

CASES IN EMPLOYMENT DISCRIMINATION

Coursebook: LR 622 Discrimination in Employment

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CASE STUDY INSTRUCTIONS

Overview

It is important that you accept the case as presented as the starting point for the assignment. This will require you first to become conscious of your own person response to the situation, articulating that response, and then setting it aside in order to deal with the facts from the perspective of what the 'actors' in the case have done or not done. In other words, you need to deal with the facts from the perspective of the actors. Don't fight the information given: if you would not have done what a given actor did, you must suspend your judgment and make the best of the situation you are in within the case. There is ample opportunity in the assignment for a disinterested analysis of the merits requiring your personal judgment and expertise.

The assignment requires you alternately to "wear different hats." This will be difficult. You will have to keep in mind at all times what you need to be doing at each given stage of the project. Before and while completing each part, it would be well for you to ask yourself:

- 1) *what is my role for this part?*
- 2) *who is my audience?*
- 3) *what are my purposes and objectives?*

Note carefully that you are being placed in a practical situation. You should think not in terms of writing long, discursive essays but rather writing direct, accurate, thorough but concise responses to each section of the project. The effectiveness of your writing necessarily will be a part of the evaluation. Although the "mechanics" of your writing will not be separately evaluated per se, they are part of any evaluation of writing effectiveness.

Because of the nature of the assignment, the persuasive power of the writing is of prime importance in the "Theories of the Case" sections. You will need to make generalizations and factual propositions with precision; tie them to the appropriate proof scheme for that category or type of discrimination; support them with examples and evidence; and demonstrate how they connect with each other and your conclusion to "prove" your Theory as best you are able. Note: do not write *about* the strongest theory; the assignment is actually to *write* the best theory, i.e., actually *make* the argument, don't just describe it.

Your Theories of the Case should be the strongest, most comprehensive and persuasive arguments you can make from the given facts in light of the legal requirements. They can only be persuasive if they effectively *deal with all* the relevant facts, both favorable and unfavorable; none of the relevant facts and none of the pertinent legal principles or proof scheme burdens may be ignored. By definition, a Theory cannot be persuasive if it fails to recognize and deal with unfavorable facts. Your Theories should attempt to get the fullest persuasive power available from favorable facts and to render irrelevant or less damaging those facts that may be unfavorable to your position.

The "Analysis" section is your opportunity to focus on the strongest Theories of the Case you have been able to put forward for the Employer and for the Complainant for the purpose of analyzing which is the more persuasive and correct argument in light of the requirements of the statute and appropriate proof scheme. **Caution:** do not "save" arguments or evidence for the Analysis. In the Analysis, you are analyzing the arguments already made in the two Theories of the Case. There should be nothing new advanced for the first time in the Analysis; get all arguments into the respective Theories.

Directions

Each case project has the following parts to which you must respond, with the point totals indicated for each part:

Points

- | | |
|----|---|
| 5 | Identify the type or category of discrimination, e.g., Disparate Treatment because of race; Disparate Impact because of sex; etc. |
| 5 | Identify the appropriate proof scheme model, if one exists (e.g. <i>McDonnell-Douglas v. Green</i> as modified by <i>Texas v. Burdine</i>) or describe, if a standard model is not available or appropriate, the appropriate burden and allocation of proof (what must be proven and by whom). |
| 25 | Present the Complainant's best Theory of the Case. |
| 25 | Present the Defendant Employer's best Theory of the Case. |
| 30 | Analyze the case on its merits (i.e. as a judge/jury would do) by working through the appropriate proof scheme you have cited, making and discussing your conclusions of fact and of law. Demonstrate why the pertinent law and/or regulations require the conclusion you reach concerning whether the Employer is guilty of illegal discrimination or not. |
| 10 | Write a concise statement of advice to the Employer outlining what steps ought to be taken to avoid or lessen liability exposure for a similar problem in the future. |

Introduction to the Models

The following model student responses to assigned Cases are reproduced with the permission of the students for your benefit. They are not offered as "perfect" responses; but they illustrate very solid, thorough efforts, certainly "A's," and you should strive to emulate them.

Don't be concerned about the length of these models. Strive to develop the persuasive arguments and analysis in your own cases as thoroughly but persuasively as you can; length then will take care of itself and be appropriate to the nature of the case on which you're working. As you do the case study, especially your Theories of the Case and Analysis, remember that your objective is to *persuade*. This requires you to show your audience why your conclusion is the best, the most reliable, the most accurate view of the facts in light of the legal requirements. You cannot just *say* that your argument is strong; you must create a strong argument by arranging the factual evidence and illustrations within an overall context that rings true as the most plausible explanation of the facts, thereby *showing* or *demonstrating* the argument's persuasive strength. You must *demonstrate* your conclusions, not *remonstrate* about them.

Latin: *monstrare*, to show.

Demonstrate: to show or point out clearly; to prove; to make evident through specimens and examples

Remonstrate: to declare one's feelings in a demand or protest; to expostulate or argue

Your task in constructing the Complainant's best Theory of the Case, for example, is to show that the Employer committed acts that are illegally discriminatory (for example, refused to promote because of sex), not simply to tell the audience that the Employer did so. Telling simply asserts your conclusions of fact and/or of law; telling demands that your audience agree simply because the conclusions have been declared. But mere *telling* does nothing to persuade the audience that your conclusions are valid or worthy of belief, not even "just for the sake of the argument." To *persuade*, you must *show why* and/or *how* you reached your conclusions. To *convince*, you must show *why* and/or *how* your argument represents the *best* — the most accurate, most plausible — explanation for the facts.

Persuade: to cause another to believe something by reasoning.

Convince: to cause another to feel that a belief is true.

Keep in mind that your objective is to make the best argument and best analysis you can in light of the law and regulations, not simply to get the "right" outcome. Outcomes are, after all, sometimes decided by 5-4 votes -- and sometimes reversed! As illustrated in the model responses to the *Corn Rigs* case, it is possible for two student responses to be excellently done and still come to different conclusions regarding the outcome.

As illustrated in the following charts, the Theory of the Case represents the most comprehensive, cohesive, convincing and compelling argument you can make for your position. Ideally, it will have both a logical framework (why your argument makes sense) and a normative theme (why your argument ought to be seen as the right outcome). The evidence will be arranged in such a way as to state factual propositions which relate, in a persuasive story, the facts of the case to the requirements of the law using the appropriate proof scheme.

THEORY OF THE CASE *

(Audience = Judge; Jury; Arbitrator; Factfinder; Conciliator; Mediator)

I. OBJECTIVE: telling an *effective story* such that you will:

- A. Make it possible for the audience to decide for you (logic)
- B. Make the audience want to decide for you (theme)

II. ELEMENTS OF THE EFFECTIVE STORY

- A. **Theory** - What happened and why it was/was not illegally discriminatory
 - 1. The logical framework of strategy and preparation relating the facts to the statute (or appropriate proof scheme)
 - 2. Example (for Employer): why the Complainant cannot make out a *prima facie* case:
 - a. The Complainant did not apply
 - b. Even if the Complainant had applied, she was not qualified
- B. **Theme** - Why or how it happened
 - 1. "Fits" the Theory and "carries" it - asserted/reasserted like a "mantra"
 - 2. Example (for Complainant): why did the Employer act as it did?
 - a. Because the Manager was racially prejudiced - or -
 - b. Because the co-worker treats women as male possessions

III. THEORY OF THE CASE AS STRATEGIC ADVANTAGE

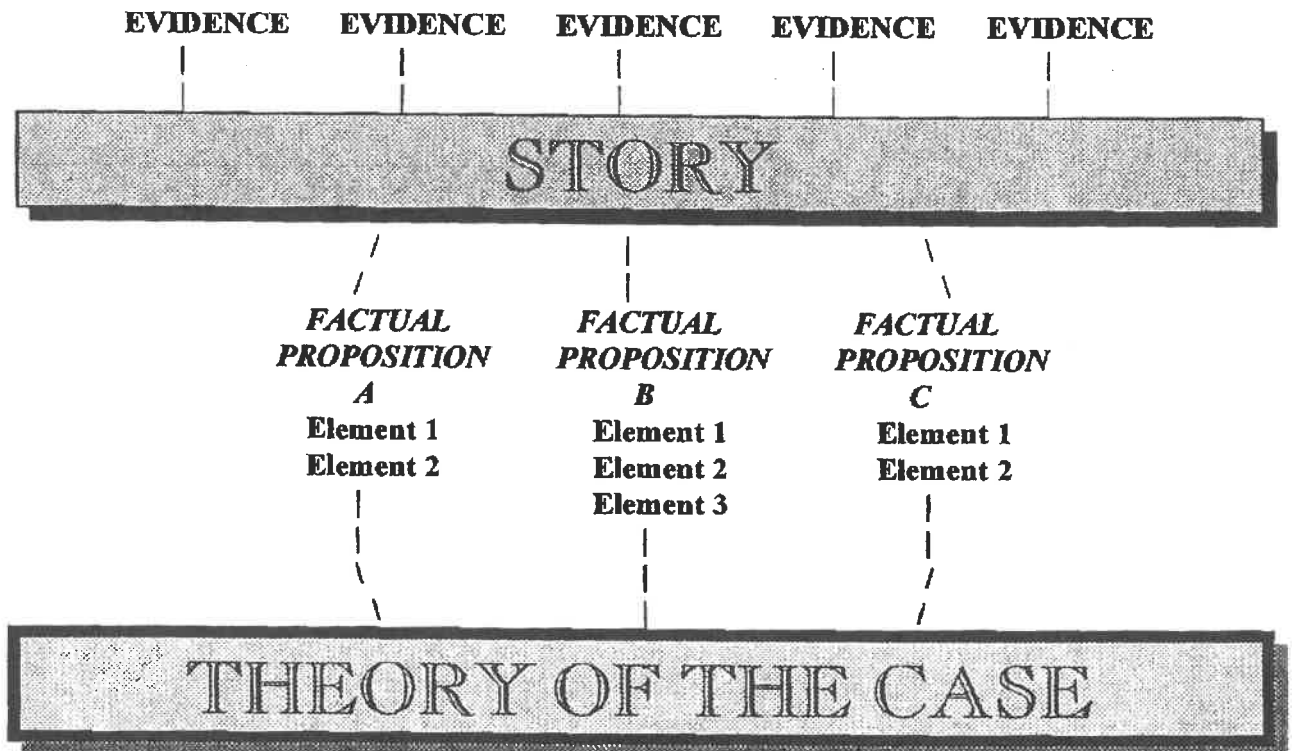
- A. The audience must adopt some Theory to explain the facts and reach a conclusion
 - 1. An argument grounded in a theory is stronger than one without a theory
 - 2. An argument without a theory is a loss waiting to happen
- B. Characteristics of a strategically effective Theory:
 - 1. **COMPREHENSIVE** accounts for all relevant facts, maximizing supportive facts; minimizing harmful facts
 - 2. **COHESIVE** internally logical; "rings true"
 - 3. **CONVINCING** persuasively relates facts to law/proof scheme
 - 4. **COMPELLING** a compatible theme with moral force

* Adapted from Paul Bergman, *Trial Advocacy* 2d ed, West: 1989.

FACTUAL PROPOSITIONS

BRIDGING THE GAP: STATUTE (PROOF SCHEME) <—> FACTS

- I. **ELEMENTS** - Conclusions that can be drawn logically from Evidence
- II. **BUNDLES OF ELEMENTS** - Logical Connections to Proof Scheme (example):
- A. The Employer has a formal application process for promotions
 - B. The process is described in the Handbook and on the Job Posting
 - C. The Complainant knew the process (had a Handbook; saw or knew about a Posting)
 - D. The Complainant knowingly chose not to use the prescribed process
 - E. An expression of interest to a supervisor does not constitute application
 - F. Without communication of such expression to those in a position to make promotion decisions, the Employer had no awareness of the Complainant's interest
 - G. An employee who fails to apply or even to make the Employer aware of his or her interest has not applied for a promotion
 - H. Therefore, the Complainant did not apply and fails to make out a prima facie case
-



A PROBLEM AT HUSTON?

Santa Rosina is a medium sized, suburban city of approximately 97,500. Early in the 20th century, a local resident made a fortune in land sales and donated a substantial sum to establish and endow the John Huston Memorial Youth Clubs. The clubs consist of two large buildings with libraries, reading rooms, swimming pools, locker rooms and recreational facilities, one for boys and one for girls, located on a campus-like setting in Huston Memorial Park near the center of the city. In the 1950s the clubs were given to the City of Santa Rosina, together with the Huston endowment, to be run in perpetuity as the John Huston Youth Centers. In the 1970s, JHYC opened small branch operations, consisting mainly of tennis and basketball courts, a softball field, and a large picnic shelter in four remote locations throughout the City.

Today JHYC is run as a public corporation of the City and has 46 full-time and part-time employees, including 13 Professional Recreation Specialists. Specialists run the various JHYC programs, serve as coaches for youth teams, schedule activities, program cultural and popular events, etc. The remaining employees are executive (Executive Director, Associate Executive Director, Finance Director and Volunteer Coordinator, who also is in charge of private fund-raising) and support staff, primarily clerical, custodial, maintenance and grounds-keeping personnel.

Since 1950 the demographics of Santa Rosina have changed dramatically. Prior to 1950 the City population was almost entirely white with several hundred Hispanics and a smaller number of African-Americans living in segregated neighborhoods clustered at the eastern and southern City lines. Today the minority population is 70%. As whites fled further to the suburbs, a substantial Hispanic population (25% of the minority population), mostly Mexican-American, and a very rapidly growing Asian population (60% of the minority population), mostly Chinese-Americans and immigrant IndoChinese (Vietnam, Laos, Cambodia) replaced them.

The "white flight" together with shopping mall construction in the region has left Santa Rosina with a run-down central business district which has experienced an increasing volume of crime and vandalism that has alarmed the community. The boys and girls club facilities have been vandalized on numerous occasions and the Board recently decided to begin closing the two downtown buildings at 7:30 p.m. and the branch locations at 9:00 p.m.

Employees of JHYC have been very loyal and very stable over many years. Except for four custodians, two part-time secretaries, and four grounds crew members, the staff of JHYC is all white. Five years ago the Board of Directors committed itself to dedicating a portion of the budget specifically for minority, especially Asian, cultural programming. Asian community leaders have begun to agitate for a greater representation in Santa Rosina public agencies. Last year the Board adopted a formal and official but general policy declaring: "Fostering Diversity will be an important value in all future JHYC personnel decisions."

Among the Professional Recreation Specialists, employment has been exceptionally stable. Only two positions have become vacant in the last 12 years, one due to a retirement seven years ago and one a resignation five years ago because the incumbent was moving from the City. In terms of race-ethnicity, three Recreation Specialists are Hispanic, one is African American, one is Chinese-American and eight are white.

Since the Recreation Specialists are the most visible JHYC staff because of their high degree of patron/public contact, the number of minority employees has been a great concern. According to Board policy:

When a vacancy occurs the Board first chooses whether to hire from the outside or to staff the vacancy from among the incumbent employees. If it determines to staff the vacancy internally, the vacancy is assigned on the basis of seniority if all other factors are equal. If no incumbent expresses interest in the position and the Board has decided to fill it internally, the junior employee must accept an involuntary transfer.

Sulin Wang has worked as a Recreation Specialist at one of the branch locations since she was employed seven years ago. She is neither the senior nor the junior Specialist. Last month, the Coordinating Recreation Specialist in the system, who works in the main Center downtown, resigned due to ill health. The Board determined that it wished, if possible, to staff the Coordinator position internally and posted the vacancy. No incumbent employee expressed an interest.

At the direction of the Board personnel committee, Executive Director John Nicholson met with Sulin Wang to persuade her to request a transfer to the main Center and to express interest in the Coordinating Recreation Specialist position, which would be a promotion in title, responsibility and salary. Nicholson told Wang that with her superior professional skills and her Asian background and language proficiency as a "bonus," she would bring tremendous, highly valued resources to the Coordinator position. Wang is fluent in Chinese and Vietnamese and has a Master's Degree in Oriental Art and Culture and a Bachelor's Degree in Recreation Management.

After discussing the matter with her husband, Wang met again with Nicholson to explain, firmly, that she was not interested. She said she liked her position at the branch location where she worked, which is just a safe, five minute walk from her home. She further explained that the additional \$2,000 per year she would earn as Coordinator was not an incentive for her to make the move. In addition, she told Nicholson candidly that she would be concerned for her personal safety downtown, especially leaving the Centers in the dark during winter.

Nicholson reported Wang's response to the Board personnel committee. After lengthy discussion, the Board decided that Wang should be transferred to the main library. Because the vacancy was a rare opportunity for the Board to act on its commitment to diversity and because of Wang's Asian background, language fluency and cultural expertise, the Board decided she was demonstrably more qualified than any incumbent and so well qualified that it was highly unlikely the Board could secure the same level of qualifications if it hired from the outside. The Board also decided to authorize an increase in the Coordinator's differential to \$3,000 as a further incentive, if necessary, to gain Wang's voluntary acceptance.

Board President Faye Dunaway told Nicholson to gauge Wang's reaction. When Nicholson met with Wang to tell her of the decision, Wang became very angry. She said she was neither a senior employee seeking the position nor the junior employee who could be forced to accept the transfer. Wang told Nicholson she would file an official, internal complaint with the Board and that she would file a discrimination charge, if necessary, to prevent the transfer. Nicholson reported Wang's response to Dunaway. Nevertheless, at its next meeting the Board voted to direct the Executive Director to implement Wang's transfer from her branch location to the Coordinator position downtown, increasing her salary by \$3,000. Wang then filed a formal complaint with the Board and contacted the EEOC.

A Problem At Huston?

Discrimination Type: Disparate Treatment based on Race and/or National Origin

Appropriate Proof Scheme: McDonnell Douglas v. Green

Complainant's Best Theory of the Case

Ms. Sulin Yang suffered an adverse employment action, an involuntary transfer, based upon her race and/or national origin. Executive Director, John Nicholson, in concert with the Executive Board of the John Huston Memorial Youth Centers (JYHC), forced the transfer of Ms. Yang because she is of Asian race and/or national origin.

Ms. Yang is a member of a protected class. She has protection due to her race and/or her national origin as an Asian. Her race and/or national origin is apparent due to her outward physical characteristics. Mr. Nicholson directly noted Ms. Yang's "Asian background" as reason given for her forced transfer.

JYHC is a public corporation of Santa Rosina established to provide recreation and cultural facilities for the city's youth. Professional Recreation Specialists, of which JHYC employs 13 staff, run the various programs, serve as coaches for youth teams, schedule activities, program cultural events, and so forth.

Ms. Yang has been employed with JYHC as a Recreation Specialist at one of the remote branch locations for seven years until her recent, forced transfer. Her position was changed to that of a Coordinating Recreation Specialist following the resignation of the incumbent. This transfer occurred as a result of several meetings that Wang had with Nicholson.

During the first meeting, Mr. Nicholson, at the direction of the Board personnel committee, met with Wang in an attempt to persuade her to request a transfer to the main Center and for her to express interest in the vacant Coordinating Recreation Specialist position. He explained that the position, including transfer to the main center in downtown Santa Rosina, would be a promotion in title, responsibility, and salary.

The Executive Board's discriminatory decision to transfer Ms. Wang to the Coordinator position became abundantly clear when Mr. Nicholson followed his urge for her transfer with a direct connection to her Asian race and national origin. He told Wang that through her "superior professional skills and her Asian background and language proficiency as a 'bonus,' she would bring tremendous, highly valued resources to the Coordinator position." Although he mentioned other skills that Wang would bring to the position, his notation of her race and national origin "bonus" appeared to be the ultimate qualifying factor. However, he did not specifically relate how her skills and Asian background would qualify her for the position.

Accepting the Coordinator position would require Wang to transfer to the main office in Santa Rosina, which is a less than desirable work location. The area is a run-down central business district, which has experienced an increasing volume of crime, and vandalism that has alarmed the community. The Santa Rosina facilities have been vandalized on numerous occasions. In response, the board has begun closing the downtown buildings at 7:30 p.m. However, winter hours are not additionally adjusted and would require staff to leave the center after dark.

As a result of the unsafe work location, after discussing the proposal with her husband, Ms. Wang firmly told Nicholson that she was not interested in the transfer to the main center and the Coordinator position. She considered this to be an unfavorable or adverse employment action. She explained that she liked her current Recreation Specialist position at the remote branch office. Her current work location offered a safe, five-minute walk from her home. Leaving the downtown center in the dark during winter caused Ms. Wang concern for her personal safety. She candidly told Nicholson that the \$2,000 annual increase did not merit the compromise that the move would require of her personal safety.

Returning to the Board personnel committee, Nicholson told of Wang's refusal

and reasoning. Nonetheless, the Board decided that Wang should be transferred to the downtown library location in the Coordinator position. Five years ago the board declared a formal and official, but general policy declaring "Fostering Diversity will be an important value in all JHYC personnel decisions." This ambiguous policy resulted from Asian community leaders who agitated for greater representation in Santa Rosina public agencies. This "Diversity" policy is not protected under the guidelines of Title VII. It is not a written Affirmative Action Plan with time-limited hiring goals.

Guided by the general "Diversity" statement, the board concluded that Wang's Asian background, language fluency, and cultural expertise evidenced her qualification for the position. In an effort to coerce Wang into the transfer, the Board authorized Nicholson to offer the transfer to the Coordinator position at a \$3,000 per year increase.

Nicholson met with Wang to once again to order her into the Coordinator position and consequential transfer to the main library in the downtown location. Having already refused the position, Wang felt forced into the transfer and became very angry. She referenced the Board's policy on promotions and transfers stating that she was neither a senior employee seeking the position nor the junior employee who could be forced to accept the transfer. The policy states:

When a vacancy occurs the Board first chooses whether to hire from the outside or to staff the vacancy from incumbent employees. If it determines to staff the vacancy internally, the vacancy is assigned on the basis of seniority if all other factors are equal. If no incumbent expresses interest in the position and the Board has decided to fill it internally, the junior employee must accept a voluntary transfer.

As a result of the forced transfer, Wang told Nicholson that she would file an official, internal complaint with the Board and that she would file a discrimination charge, if necessary, to prevent the transfer. Disregarding Wang's statement's, the Board voted in favor of Wang's transfer to the downtown location in the coordinator position.

During the meetings that Nicholson had with Ms. Wang, he never related how her qualifications related to the specific position of Coordinator. Although the representation of minorities was a concern for JHYC, many minorities were represented in the Recreation Specialist position. Moving Ms. Wang to the downtown location seems to be a move made to appease the Asian community leaders and support the general "Diversity" policy without job qualification reasoning.

Of the other Recreation Specialists, none were forced into the Coordinator position. There is no evidence to support that any other candidates were considered. In terms of race-ethnicity, three are Hispanic, one is African American, one is Chinese-American and eight are white. It is apparent that Ms. Wang was singled out for the transfer due to the Board's "Diversity" policy in attempt to quell the Asian community leaders. However, Diversity is not a legally defensible practice under Title VII. Nicholson and the Board repeatedly singled out Wang's race and/or national origin as the extra qualifying factor for her transfer. The other Recreation Specialists might have been equally qualified for the position, however, they were not considered because they were not of Asian national origin and race.

If the Board found it necessary to employ an Asian in the position and Wang was not willing, they could have found another Asian to work in the position. A white employee would not likely be forced into a position at the downtown locations because of the general "Diversity" policy and the low (30%) white population representation in Santa Rosina.

The Board attempted to conceal its forced transfer of Wang in the "promotion" to the Coordinator position. Even when Wang refused the transfer stating a clear and reasonable explanation, the Board responded by voting Wang into the position. If \$2,000 was not enough money to merit the transfer, the Board would make it appear as if Wang had some choice in the matter of transfer by increasing the annual increase to \$3,000.

Nonetheless, Wang had no choice, and was transferred to a less desirable position. The Board concealed the adverse employment action as a promotion, based upon her Asian race and/or national origin.

Employer's Best Theory of the Case

Sulin Wang was promoted to the Coordinator position based upon her qualifications. Perhaps because of her Asian background, she is fluent in Chinese and Vietnamese and has a Master's Degree in Oriental Art and Culture. These qualifications make her the most qualified candidate for the Coordinating Recreation Specialist position.

Initially, JHYC sought applicants for the Coordinator position located in the downtown Santa Rosina location; however, no internal applications were received. Because the position entailed the Coordination of Recreation Specialists, the Board determined that an internal candidate, especially one with Recreation Specialist experience would be especially qualified.

Additional ability to communicate and plan cultural programming for the Santa Rosina community was a reasonable expectation for the position. The demographics of this location consist of a 70% minority population; 60% of the minority population is Asian, which are mostly Chinese-Americans and immigrant IndoChinese (Vietnam, Laos, and Cambodia) and a 25% Hispanic population, which is mostly Mexican-American.

The Board considered Ms. Wang's ability, resulting from her Asian background, as a qualifying factor out of business necessity. Evidence of the Board's recognition for minority, and particularly Asian minority, programming is evidenced by their "Diversity" policy. As a result of the high Asian minority population, five years ago, the Board of Directors has dedicated a portion of the budget for Asian and other cultural programming. Ms. Wang's educational background in Oriental Art and Culture and multiple language

proficiency, which is directly related to the population that she would serve, makes her abundantly qualified to work in this position.

Last year, the Board adopted a formal and official policy declaring; "Fostering Diversity will be an important value in all future JHYC personnel decisions." It is true that this policy was developed following Asian community leaders' call for minority representation in public agencies. However, the decision to place Ms. Wang in the Coordinator position was not merely a matter of diversity, it was a matter of maximizing personnel resources. Ms. Wang was well qualified to perform in the position. Ms. Wang's Asian race and national origin would satisfy the Asian community leaders if she was promoted, but this was not the reason for her promotion. It was an added benefit.

Ms. Wang has worked as a Recreation Specialist at JHYC since she was employed seven years ago. Since the Recreation Specialists are the most visible JHYC staff because of their high degree of patron/public contact, the number of minority employees has been a great concern. Specialists run the various JHYC programs, serve as coaches for youth teams, schedule activities, program cultural and popular events, etc. However, even in this area with concern for minority representation three Recreation Specialists are Hispanic, one is African American, one is Chinese American, and eight are white.

Ms. Wang's tenure as a Recreation Specialist, her superior professional skills, fluency in Chinese and Vietnamese, Master's Degree in Oriental Art and Culture and Bachelor's Degree in Recreation Management made her, by far, more qualified than any other incumbent staff. As a result, her abilities and qualifications were apparent to the Board personnel committee. Her language proficiency could be applied to the direct population at the downtown center and her degree in Oriental Art and Culture would be useful in cultural programming.

Therefore, Executive Director, John Nicholson met with Ms. Wang at the

direction of the Personnel Committee. He attempted to persuade Ms. Wang to request the transfer and consecutive promotion for the Coordinator position, with an increase in responsibility in responsibility and salary. He pointed out that "her professional skills and her Asian background and language proficiency as a 'bonus,' she would bring tremendous, highly valued resources to the Coordinator position." Nicholson and the Board were certain that Wang would then consider the opportunity for advancement that she would receive as a benefit of the position.

However, Ms. Wang was not in favor of the promotion. She related safety concerns among her reasoning to Mr. Nicholson after discussing the promotion with her husband. She said that she liked her current position at the branch location where she lived only a five-minute walking distance away. She explained that the \$2,000 per year increase for the Coordinator position was not an incentive to make the move. Additionally, she explained that she would be concerned for her personal safety downtown, especially leaving the Centers in the dark during winter.

The Board was aware of the safety concerns surrounding the downtown Center. Santa Rosina's run-down central business district, including JHYC's facilities, has experienced an increasing volume of crime and vandalism that has alarmed the community. In a safety measure, the Board has begun closing the downtown facilities at 7:30 p.m. In response, the Board determined that early closing of the downtown centers provided the safety it sought for JHYC clientele and staff alike.

Nicholson reported Ms. Wang's response to the Board's personnel committee and after lengthy discussion, the committee decided to promote Ms. Wang to the Coordinator position at the downtown location. The Board recognized that the opportunity to promote Ms. Wang was rare. She was demonstrably more qualified than any other incumbent and so well qualified that it was highly unlikely the Board could secure the same level of qualifications if it hired from the outside. Therefore, the transfer and promotion policy

was not relevant. The policy states that "if all other factors are equal" then seniority will be the basis for the decision, with junior employees accepting involuntary transfers. In this case, it was clear that Wang was exceptionally qualified and that all factors in this case were not equal.

Because of her hesitancy and due to her exceptional qualifications, the Board agreed to an increase of \$3,000 for the Coordinator position. The Board realized that Ms. Wang would be more productive in the Coordinator position if she voluntarily promoted into the position and felt that the increase would help persuade her.

Offering the additional incentive, Nicholson met with Ms. Wang to tell her of the Board's decision. Unfortunately, the increase was not enough incentive to convince Ms. Wang to voluntarily transfer to the downtown location for the Coordinator position promotion. She became angry stating that she was neither most senior employee seeking the position nor the junior employee who could be forced into the transfer. Again, the decision to promote Ms. Wang was based upon her exceptional qualifications. Since she is more qualified, seniority is not a factor. Additionally, Ms. Wang told Nicholson that if she was forced into the promotion then she would file an official internal complaint and a discrimination charge if necessary.

At the next Board meeting, Ms. Wang was voted into the incumbent decision. The Board could not allow a discrimination threat to dissuade its vote. Its decision was not based upon its intent to disparately treat Ms. Wang based upon her race and/or national origin. Management reserves the right to transfer its employees to other positions at other locations. Moreover, Ms. Wang's qualifications present an opportunity for management to maximize its personnel resources. The JHYC Board has demonstrated its willingness to listen to Ms. Wang's concerns and has attempted to offer an additional pay incentive for the promotion/transfer. However, ultimately, the Board exercised its right as management to transfer a qualified employee into a position and in

doing so has maximized its resources.

ANALYSIS

Complainant's Prima Facie Case

Ms. Wang has presented a case of disparate treatment based upon her race and or national origin. Her first burden was to produce evidence that she was covered under Title VII of the Civil Rights Act. As established by the Supreme Court in *McDonnell Douglas v Green*, Ms. Wang must first establish that she has established a prima facie case.

Ms. Wang has readily demonstrated that she is a member of a protected class. She is both of Asian race and national origin. Her physical characteristics are clearly of each of these protected classes. The remainder of the *McDonnell Douglas* proof scheme for establishing a prima facie case must be altered from the traditional model in the case of disparate treatment as it relates to involuntary transfer, however. Rather than examining whether Ms. Wang established that she was qualified for the position, Ms. Wang must establish that she was qualified for the position in which she was working. Based upon the employer's own desire to transfer/promote Ms. Wang into the Coordinator position of higher responsibility and higher pay, it is clear that Ms. Wang must have been qualified for the position in which she was working as a Recreation Specialist.

The adverse employment action in this case is not termination or failure to hire Ms. Wang in a position; rather, it is the transfer of Ms. Wang into a less desirable position. Ms. Wang has demonstrated that she was not willing to transfer into the position, she stated that she liked her current position and the safety of the current work location. Her unwillingness to transfer to the downtown center is not in question. The employer had attempted to secure a voluntary termination, but agrees that the transfer/promotion was forced upon Ms. Wang. Ms. Wang has established that she has

suffered some adverse employment action.

The final issue in the *McDonnell Douglas* proof scheme is not at issue in this case. Additionally, whether the position remained open and a search continued is not relevant to determining a prima facie case.

Employer's Legitimate, Non-Discriminatory Reason

JHYC has offered its inherent right as management to determine Ms. Wang as qualified for the position and to transfer/promote her to other positions as its legitimate, non-discriminatory reason for her transfer/promotion. It bases her qualifications upon her seven years of experience as a Recreation Specialist, professional skills, Masters in Oriental Art and Culture and a Bachelor's Degree in Recreation Management. More importantly it bases her proficiency in Chinese and Vietnamese languages and their application in the position to the surrounding population as additional qualifications. Although her qualifications may be due to her race and/or national origin, the employer did not hire her because of her race and/or national origin. The employer would not have hired another Asian candidate without these skills in comparison to Ms. Wang. Additionally, the JHYC Board might have considered a non-Asian candidate with the same set of skills had such an internal candidate existed.

Although it states that it had a "Diversity" program and intended to increase minority representation at JHYC, this was not the intended purpose of Ms. Wang's promotion. Her promotion was based upon her qualifications for the position and that she may have been more qualified due to her race and national origin as they may have related to the skills that she had.

In addition, JHYC has illustrated that the promotion of Ms. Wang was just that, a promotion. The employer did not attempt to adversely impact Ms. Wang; instead, it gave her a position of greater responsibility at a greater pay. It first requested that she apply

for the position and then increased the annual pay incentive in an effort to gain her cooperation.

Ultimately, the employer has articulated compelling evidence that it did not intend to exercise an adverse employment action upon Ms. Wang. Its intentions were to provide a promotional opportunity for her. In addition, the employer has demonstrated a legitimate, non-discriminatory reason for the employment action. Although Ms. Wang may have been more qualified due to her Asian race and national origin, the employer did not base its decision on her race and/or national origin. Rather, the employer based its decision upon Ms. Wang's qualifications of education and language proficiency as they related to the minority population that Ms. Wang would serve in the Coordinator position. Therefore, the burden shifts to the complainant to show that the employer's reason is not legitimate.

Pre-text

Since the employer has articulated a legitimate, non-discriminatory reason for Ms. Wang's promotion/transfer, Ms. Wang must show that, in fact, the employer's reason is pretextual and that the true reason for the adverse employment action is discriminatory.

Ms. Wang has argued in her theory of the case that the employer offered her qualifications as the reason for her transfer/promotion. However, she claims that this reason is not worthy of belief. She argues that the employer was not interested in her skills due to her Asian background, but transferred her based upon her race and/or national origin itself.

She argues that the employer did not relate her qualifications to the position itself. The employer merely suggested that her professional skills qualified her for the position without listing them or how they related to the Coordinator position. However, she argues that the employer was focused upon her Asian background and language

proficiency as a "bonus" for the position. Ms. Wang argues that the true reason that the Board personnel committee felt she was qualified was due to her race and national origin not due to her skills.

She supports her argument by offering the "Diversity" policy and community pressure as the reasons that the Board transferred her to the less desirable position. Asian community leaders have begun to agitate for greater representation in public agencies and JHYC responded by developing the "Diversity" policy. Ms. Wang argues that pacifying the Asian community leaders through the Diversity policy was the true purpose for her involuntary promotion into the Coordinator position.

Decision

The employer based its promotion of Ms. Wang upon her qualifications, while Ms. Wang claims that the employer's qualification argument is a pre-text for disparate treatment based upon her race and/or national origin. In reviewing both the complainant's and the employer's best theories of the case, the decision is determined regarding the lack of strength in the employee's claim that the transfer was based directly upon her race and/or national origin.

The preponderance of the evidence suggests that the employer did, in fact, transfer Ms. Wang due to her qualifications. Her qualifications may be as a result of her choice of educational endeavors resulting in her Masters Degree in Oriental Art and Culture and her language proficiency in Vietnamese and Chinese. She may have developed this skill set as an Asian American, but not all Asian-Americans demonstrate these skills.

These skills do qualify Ms. Wang as well qualified for the position as it relates to the community in which she would serve as Coordinator. The employer's argument that Ms. Wang's Asian background was a plus, but not the final determining factor in its

employment decision is believable. The employer's offer of additional incentive pay for the transfer/promotion and the increased responsibility in the position also suggests that the employer did not intend the transfer/promotion to be an adverse employment action, but a promotional opportunity for Ms. Wang. The final decision rest upon the employer's inherent management right to determine the valid qualification of employees, which it has done here, and the consequential right to assign work even if the assignment involves a transfer.

Ruling

The employer is found not guilty of disparate treatment based upon race and/or national origin under Section 703(a) and Section 701(k) of Title VII. The case is dismissed.

Advice

In the future, if JHYC intends to relate qualifications to a specific position, it should prepare a job description with essential functions and qualifications outlined. Having a Coordinating Recreation Specialist job description with qualifications listed would have clarified exactly how Ms. Wang was qualified for the position. Listing educational preferences and language proficiencies would have strengthened the employer's claim.

In addition, if the employer intends to establish hiring goals, as may be inferred by the facts of the case, it may wish to develop a written Affirmative Action Plan. This plan can be voluntary, but must be of an established duration with hiring goals based upon population representation in specific job categories. These goals should not be based upon the clientele population, however.

Further development of the "Diversity" policy would be beneficial. Declaring

that "Fostering Diversity will be an important value in all future JHYC personnel decisions" opens the employer to claims like this one from Ms. Wang. Without a specific plan for developing Diversity, anyone can interpret this policy as a commitment to fulfilling Affirmative Action-like goals. Without the aforementioned written Affirmative Action Plan, hiring goals would be discriminatory. Stating that the Diversity Plan included educational and training endeavors and/or community outreach, for example, should be statements of Diversity.

As a matter of compromise, the employer might have restructured the Coordinator position. Although the employer retains the right to assign job responsibilities, it could have attempted a compromise with Ms. Wang. How productive would she be if forced into the Coordinator position? Wouldn't the employer benefited more from restructuring the job? Perhaps Ms. Wang could have performed some of her responsibilities from the satellite office in which she worked as a Recreation Specialist and commute to the downtown centers as necessary. Scheduling her downtown work responsibilities at such a time that would allow her to leave the downtown area before dark could have been an option.

In its push to hire Ms. Wang in the Coordinator position, regardless of her disinterest in the position may cost JHYC a Recreation Specialist and a Coordinating Recreation Specialist. Although the case doesn't state that Ms. Wang left JHYC's employment, one would expect that she would be less than productive in this position if she continues in their employment.

Comments: A Problem at Huston?

1. Read the Board's policy very closely to determine the ER's strongest position: seniority does not come into play unless all other factors are equal. Among obvious other factors are qualifications and performance - if the Board finds an internal candidate to be demonstrably more qualified than the others, the policy does not require it to assign on the basis of seniority. The policy, not to mention an ER's rights at-will employees, involuntary transfers are permissible and anticipated.

2. The Board should not admit that the Board violated its own policy. It theoretically could take the position that the policy was unilateral and the Board can change it if it wishes. (In general, that is true - it wouldn't be illegal to change the policy but it does damage the credibility of the ER's case.) The policy was followed: ER found an internal candidate who was demonstrably more qualified so it is not required involuntarily to transfer the junior employee.

3. ER's legitimate, non-discriminatory reason must be that "all other factors" were *not* equal. Complainant will have to demonstrate (i.e., prove: carry the burden of production of evidence as well as the burden of persuading, by a preponderance of the evidence) that reason to be a pretext (lie, coverup, unworthy of belief). Note: If ER states a reason which ultimately is not legitimate and non-discriminatory, ER will lose at that stage of the proof scheme - therefore such can't be its strongest possible theory. Thus, it makes a potentially big difference whether the Board describes her qualification in terms of her race/national origin or, alternatively, in terms of her "cultural knowledge," as evidence by her academic background, and her language facility. If ER names race or national origin as a "because of" reason and cannot prove a BFOQ (remember: national origin only, not available for race) then it will admit at least a mixed motive form of illegal discrimination. (See #5 below) Both parties need to consider whether this has both race (Asian/Pacific Islander) and national origin elements.

4. The Complainant cannot simply remonstrate that the Board violated its own policy -- that is in dispute. Strongest Complainant position is that when the Board chooses to fill a position among incumbents, the notion of "assigning" by seniority not a unilateral right because such right makes no sense when the policy goes on to note that a junior employee "must accept the involuntary transfer." Thus "assign" must mean from among interested incumbents -- a meaning supported by the provision that notes "if no incumbent expresses an interest." That is exactly what happened here -- the Board decided to fill it internally and no incumbent expressed an interest. Thus by its own policy, the Board must force the junior employee to transfer involuntarily (such statement makes no sense if the Board can force any employee to transfer involuntarily). But all this will require the Complainant to show that all factors were equal, i.e., that she is *not* demonstrably more qualified (e.g., what is there about the central location which makes it the sole possibility for someone of these abilities? If these abilities were so crucially important, how could the ER have posted the job for bid -- no one else has those qualifications! Language facility was not apparently a *requirement* for and it does not necessarily implicate the *Asian* qualities which the Board finds desirable in Wang. Etc.) The "absent...." form of analysis may be helpful: ("absent her Asian/Chinese race/national origin, the Board would not have transferred . . .")

5. ER might consider a BFOQ defense *but note*: it will have the burden of *proving* that being of Asian national origin is *reasonably necessary* to the *normal operation of the ER's business* (difficult, at best). And ER admits to having considered national origin as the *deciding* factor! If BFOQ proof fails, ER has admitted, at least, to a mixed motive. And Complainant has many angles to attack the credibility of ER's reason (#4 above) -- so ER's reason will appear pretextual.

6. When doing your analysis, you must APPLY THE PROOF SCHEME! Show how Complainant *proved* the Employer's reason was a pretext *and* that the real reason was illegal discrimination or show how/why Complainant's proof failed. You must *demonstrate* your conclusions in the analysis, not just state them. Attend to the "voice": it's your analysis: you should not be simply repeating the positions of the parties, you should be evaluating whether the parties met their respective, required burden:

7. Use the statute! §703(a) (1) and (2) have general categories: "or otherwise to discriminate against any individual ... and "in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee" Does the statute require the personnel action to be adverse to her? (ER: we promoted/paid her more -- and she has no guarantee to any particular position as an at-will employee). If so, she must *demonstrate* "adverse."

8. A §703(m) analysis need only show that race/national origin was a factor in the decision. A §703(a) finding of disparate treatment exposes the Employer to damages effective with the 1991 Civil Rights Act. But §703(m) does not.

9. *Outcome*: If the ER's affirmative case is that it considered her more qualified because of her race or national origin then Employer admits at least to mixed motive -- 703(m). If, on the other hand, ER states its reason only in terms of qualities and qualifications she has w/o reference to race or national origin, treating them only as "bonus," then the ER has a strong chance in the disparate treatment proof scheme to prevail. (It will still have to show that its preference for her abilities is not a pretext for race/National Origin. If Complainant can show she has the seniority right not to be transferred involuntarily i.e., that all factors were not equal, proving at least mixed motive will be easy. If Complainant can show that ER actually was motivated by the Complainant's race/national origin to take an adverse or, at any rate, covered personnel action then she can win a 703(a) violation. Note: "Diversity" has no legal status under Title VII as a defense to a 703(a) or to a 703(m) charge. "Diversity" motivation is not the equivalent of a legal "affirmative action" defense.

CORN RIGS

Notwithstanding his actual age of 45, Hamish Ivor MacKinnon, Ph.D., Professor of English, has long been considered something of a "dirty old man" by the students who took his courses at Evergreen State University and by other faculty. He delighted in sharing biographical stories about lascivious activities of various writers and poets, using puns and double entendre of a sexual nature, and assigning poems or short stories having sexual themes. Among colleagues, he was a dependable source of sexual jokes and innuendoes and would readily produce and circulate satires or cartoons with sexual overtones. These were always circulated anonymously, but "everyone knew" where they came from -- and plenty of people encouraged him. If any faculty were offended, they never confronted him.

Although he had never been accused of sexual harassment of students and, so far as anyone knew, never became involved in relationships with students, MacKinnon was a not infrequent target of student complaints to the department chairperson or dean. These typically arose either as the result of the assignment of rakish 17th and 18th century poems in his various poetry classes for department majors. Somehow, MacKinnon always seemed to stop just short of behavior for which he could be disciplined. He received "words to the wise" every once in awhile from colleagues, the chairperson, and the dean, but all could tell he enjoyed this game of nearly, but not quite, getting caught.

Last spring, the Department hired a new faculty member, Anna-Margaret Begbie, to begin in September as a tenure-track Assistant Professor. Begbie, a specialist in American poetry, was in the process of completing her dissertation. Soon after the start of the fall semester, MacKinnon asked her to lunch at the faculty dining room. The conversation turned to British poets and, in particular, to Robert Burns, a favorite of MacKinnon's.

MacKinnon asked Begbie if she were doing anything with the British influence on American poets. She said she wasn't. MacKinnon said that was unfortunate, both because he thought she could find substantial influence from the poetry of Robert Burns, for example, and also because he wrote some of his love poems to, of all people her "namesake" -- a girl by the name of Allison Begbie.

Begbie was fascinated and asked if MacKinnon could give her copies. MacKinnon replied that he could, but warned that some were from a collection of Burns's bawdy songs and poems, "The Merry Muses of Caledonia," and tended to be a bit "racy." "Oh....that sounds very interesting!" Begbie replied with a coquettish smile, "all the more fun!" "Right," said MacKinnon, "I'll send them along to you as I come across them."

Over the course of the fall semester, MacKinnon put poems and excerpts from poems of Burns in Begbie's department mail box. At the beginning, he would send well-known Burns poems and intersperse them only occasionally with some of the "Merry Muses" pieces. Then he'd call or see Begbie in the hall and ask how she liked the last one or several he'd sent. She grew deliberately cooler in her responses as he began to send more of the bawdy variety and also to ask her to lunch more often. He would often write in the margins, "What do you think of this one?" or "Here's one that really turns me on, what do you think of it?" Begbie got more and more uncomfortable as the semester went on and the poems and songs sent by MacKinnon became increasingly sexually oriented. She was especially uncomfortable because MacKinnon served on the Tenure and Evaluation Committee.

In mid-January, MacKinnon sent her a note explaining that January 25th was Robert Burns's birthday, celebrated all over the world with Burns night dinners. He concluded by inviting her to his apartment for a "real Burns night." "We'll have all the traditional foods," his note continued, "and, of course, generous drams of Scotch." He concluded, "When we've had our fill of Scotch, we'll be ready further to discuss the "Merry Muses" collection -- the first verses of the enclosed will give you the flavor." He enclosed an excerpt from "O Saw Ye My Maggie:"

O Saw Ye My Maggie?

I

Saw ye my Maggie?
Saw ye my Maggie?
Saw ye my Maggie?
Comin oer the lea?

II

What mark has your Maggie,
What mark has your Maggie,
What mark has your Maggie,
that ane may ken her be? [know]

III

My Maggie has a mark,
Ye'll find it in the dark,
It's in below her sark, [shirt, shift]
A little aboon her knee. [above]

Begbie talked with two other untenured women colleagues. They decided she should ask MacKinnon to see her in her office and they would be there as witnesses. When MacKinnon arrived, she asked him to sit down. She then returned the invitation and poem to him and said, "I find this lewd and disgusting. I am not interested in seeing or talking to you. Stop sending me these." MacKinnon told her he was sorry she felt that way and that she was misinterpreting and over-reacting. He also said he felt he was being "set up - witnesses and everything. How would you rate this in the 'relationship with colleagues' category?" he asked all of them. "You asked for the poems," he said, "you've been leading me on."

On the recommendation of her colleagues, Begbie agreed that they would write up an account of the confrontation they witnessed and both of them -- and Begbie -- would sign it. She then scheduled an appointment with the chairperson, Dr. John Smith, and recounted the events. Smith seemed quite sensitive to her concerns but then observed: "MacKinnon's really pretty harmless. He does this sort of thing to get a rise out of people. You're probably best off just to ignore him and not make an issue of it." "I have no intention of not making an issue of it," Begbie replied, "I want it stopped and you can consider this an official complaint. Do what you want with it, but I don't want to have to put up with this again." The chairperson sent a copy of the memo to the Dean and then called to explain what had happened. The Dean's response was, "Here we go again. I wish he'd stop this game-playing. Keep me advised." Neither did anything further, nor was there any further contact between MacKinnon and Begbie.

On a Tuesday in late February, Begbie called in sick and told Smith she would not be able to meet her 11 a.m. English II class. Standard practice was to have a colleague cover the class, if someone was available. "We're studying the theme of 'Harvest' in American poetry," Begbie explained. "The class has been given several poems and are supposed to be prepared to discuss them." She told him what poems were assigned and said extra copies were in her mailbox. "OK," Smith responded, "if I can get some one to fill in, I will."

The chairperson went to the faculty lounge to see if anyone was available. MacKinnon readily volunteered. "OK, Ham, thanks, but can I have a word with you privately," Smith said as they walked toward the department office to pick up the assigned poems. "Please Ham," Smith told him, "don't do anything funny." "What do you mean by that?" MacKinnon replied. "You know very well what I mean," Smith said. "Don't worry, 'Boss,'" MacKinnon responded, "I'll just be my old charming self." "That's what I'm afraid of," Smith replied. "I want you to write up a report of the class for the instructor and show a carbon copy to me. Just put it in my mailbox."

When the chairperson arrived the next morning, a copy of MacKinnon's memo to Begbie was in his box:

SUBJECT: CLASS REPORT
TO: Prof. Begbie
FROM: Dr. MacKinnon

We had an excellent discussion of the American harvest poems you had assigned. They told me you require them to write weekly journals, and I suggested they write up their reactions to the class for you as an entry.

Since there was about 15 minutes remaining, I read them an example of British harvest poetry, explaining that British poetry was my specialty, and suggested they might want to include a brief comparison and contrast with the American examples in their journals.

We looked at one of the most famous and critically-acclaimed of Robert Burns's songs, "Corn Rigs." It's in the anthology we use as a required book for all students in English III, so, if nothing else, your students have a head start on next term. Hope you're feeling better.
cc: Dr. John Smith

Corn Rigs

It was upon a Lammas night, [Trad'l Harvest Festival]
When corn rigs are bonie, [beautiful]
Beneath the moon's unclouded light,
I held awa to Annie;
The time flew by, wi' tentless heed;
Till, 'tween the late and early,
Wi' sma' persuasion she agreed
To see me thro' the barley.
Corn rigs, an' barley rigs,
An' corn rigs are bonie:
I'll ne'er forget that happy night,
Amang the rigs wi' Annie.

The sky was blue, the wind was still,
The moon was shining clearly;
I set her down, wi' right good will,
Amang the rigs o' barley:
I ken't her heart was a' my ain; [knew, own]
I lov'd her most sincerely;
I kiss'd her owre and owre again,
Amang the rigs o' barley.

I lock'd her in my fond embrace;
Her heart was beating rarely:
My blessings on that happy place,
Amang the rigs o' barley!
But by the moon and stars so bright,
That shone that hour so clearly
She ay shall bless that happy night [always]
Amang the rigs o' barley.

I hae been blythe wi' comrades dear;
I hae been merry drinking;
I hae been joyfu' gath'rin gear;
I hae been happy thinking;
But a' the pleasure e'er I saw,
Tho' three time doubl'd fairly --
That happy night was worth them a',
Amang the rigs o' barley.
Corn rigs, an' barley rigs,
An' corn rigs are bonie:
I'll ne'er forget that happy night,
Amang the rigs wi' Annie.

No sooner had Smith finished reading the memo than Begbie flew into his office in a rage. "What are you going to do about this?" she demanded. "I don't think I can do anything," Smith said, "what's wrong with the poem?" "You know damn well what's wrong with it...and what's going on," Begbie said. "I don't have to put up with this anymore. I told you I wanted this stopped. You're not only tolerating it, you're encouraging him. I'm charging MacKinnon -- and you -- and this University -- with sexual harassment."

Kate Golding
LR 622
December 6, 1994

Corn Rigs

A. Type of Discrimination: Disparate Treatment based on sex

B. Appropriate Proof Scheme: McDonnell Douglas v. Green (as modified by Henson v. City of Dundee)

Complainant's Best Theory of the Case:

Professor Anna-Margaret Begbie has been subjected to a campaign of sexual harassment by one of her colleagues, Dr. Hamish Ivor MacKinnon, therefore, she has suffered discrimination based on her sex. But for the fact that she is a woman, Ms Begbie would not have suffered harassment by Dr. MacKinnon.

MacKinnon's actions have created an abusive and hostile working environment for Ms Begbie. In addition, Dr. MacKinnon sits on the tenure committee. The future of Ms. Begbie, recently hired as a tenure track Assistant Professor, is in the hands of that committee. Therefore, not only is she a victim of hostile environment sexual harassment, there is an element of quid pro quo harassment in her case as well.

Shortly after Ms Begbie was hired by Evergreen State University, Dr. MacKinnon invited her to lunch in the faculty dining room. Ms Begbie was not yet aware of Dr. MacKinnon's proclivity for sexually explicit poetry, therefore, when he suggested that she may be interested in some poetry written by Robert Burns to what he called "her namesake", a girl named Allison Begbie, Ms Begbie expressed some interest and asked Dr. MacKinnon to give her some copies. Dr. MacKinnon told her that some of the poems were a bit "racy", however, as stated before, Ms Begbie was not yet familiar with Dr. MacKinnon's fascination with sexually explicit poetry nor his reputation as a "dirty old man", so she did not give it a second thought.

Over the course of the fall semester, MacKinnon put poems and excerpts from Burns

poetry in Begbie's department mail box and called her to see how she liked them. As the poems began to get more sexually explicit, Ms Begbie's attitude toward MacKinnon became increasingly cool. Begbie continued to become more and more uncomfortable as the poems became more sexually oriented. She was particularly uncomfortable because MacKinnon was not just a colleague, he also sat on the Tenure and Evaluation Committee.

Finally, Begbie decided to confront MacKinnon after he sent her a note explaining that January 25th was Robert Burns birthday and invited to what he called a "real Burns night" to celebrate. The note invited her to dinner at his home, during which he proposed that they drink "generous drams of Scotch...[after which] we'll be ready to further discuss the 'Merry Muses' collection" and enclosed a sexually explicit poem to "give you the flavor". Begbie found the invitation very disturbing and spoke with two other untenured female colleagues in an effort to decide how to handle the situation. They decided that Begbie should confront MacKinnon in her office and that they would be there as witnesses. During the meeting with MacKinnon, Begbie returned the invitation and poem to him, told him she found them "lewd and disgusting" and that she was not interested in seeing or talking to him. She also asked him to stop sending her poems. MacKinnon responded that he was sorry she felt that way and went on to say that he felt he was being "set up - witnesses and everything" and alluded to the Tenure and Evaluation committee by saying "[h]ow would you rate this in the 'relationship' with colleagues' category". He then said, "you asked for the poems, you've been leading me on."

Begbie's colleagues recommended that they should write up an account of the confrontation and that all three of them would sign it. Begbie scheduled an appointment with the chairperson, Dr. John Smith, to inform him of what had occurred. Smith listened to her accounts, but told her that "MacKinnon's really pretty harmless...[h]e does this sort of thing to get a rise out of people...you're probably best off to ignore him and not make an issue of it". Shocked by his response, Begbie replied that she wanted it stopped, that he could consider their meeting as a official compliant, and that she did not want to have to put up with MacKinnon's behavior again. The chairperson then sent a copy of the memo to the Dean and called the Dean

to explain. However, neither Dr. Smith or the Dean did anything further! They did not discuss the matter with MacKinnon, warn him, or take any action against him at all!

In late February, Begbie called in sick and told Smith she would not be able to teach her 11:00 a.m. English II class. They had been studying the theme of "Harvest" in American poetry and Begbie told Smith that the class had been assigned several poems and were supposed to be prepared to discuss them. Smith then went to the faculty lounge to see if anyone was available to teach Begbie's 11 o'clock class. MacKinnon readily volunteered. Smith took MacKinnon aside and asked him not to do anything "funny" and asked him to write up a report of the class for the instructor and to show Smith a copy as well.

At the end of the class, MacKinnon decided to read a sexually explicit Robert Burns poem to the class which described conduct of a sexual nature between the author and a woman named ANNIE to the class, asking them to write about the poem in their journals! The class was studying the "Harvest" theme in American poetry, the Burns poem was British poetry, therefore, it had nothing to do with the established theme of the class. MacKinnon knew full well that Begbie found Burns poetry offensive and would object to its inclusion in her class. Even worse, the woman in the poem was named Annie. It is no coincidence that Begbie's first name is Anna. Not only did he read the poem to the class and discuss it with them, he also told them to write about the poem in their journals, which he knew Begbie would have to read! Begbie had clearly asked MacKinnon to stop harassing her with sexually explicit poetry. Yet MacKinnon took the harassment a step further, read the poetry to her class and asked them to write about it in their journals! Ms Begbie was understandably very upset! As soon as she found out what MacKinnon had done she went straight to Smith and demanded that he do something about it. To her astonishment, Smith said he did not plan to do anything. Not only was Smith doing nothing to stop MacKinnon's behavior, by allowing MacKinnon to teach her class he was encouraging it! Begbie could no longer put up with such a hostile and abusive working environment. She had communicated her wish that MacKinnon stop sending her such poetry to both MacKinnon and Smith. But MacKinnon found another way to harass her with the poetry. Now, not only was she

being subjected to more of Burns poetry, but a poem which described sexual conduct between the author and a woman named Annie had been given to her class. She was being forced to read about it in her students journals! Begbie was understandably upset and humiliated. She could only imagine what her students had thought of the innuendo that both MacKinnon and the poem had implied! She had sought help with the chairperson in vain. It was clear that he was not willing to help her. Therefore, she was left with no other choice but to bring charges of sexual harassment.

The appropriate proof scheme in this case was established by the Eleventh Circuit Court in Henson v. the City of Dundee. First, we must establish that the employee belongs to a protected class. It is undisputed that Begbie is a woman. Therefore, she does in fact belong to a protected class. Secondly, we must establish that the employee was subjected to unwelcome sexual harassment. As we stated above, MacKinnon sent Begbie a series of sexually explicit poetry, culminating with an invitation to a "real Burns night" that contained sexual innuendo. In the presence of two witnesses, Begbie declined the invitation, told MacKinnon that she did not want to see or talk to him and asked that the poetry be stopped. However, MacKinnon, knowing that she had found the poetry to be offensive and had asked that it be stopped, read a sexually explicit poem, which described sexual conduct with a woman named Annie to her class and asked them to write about it in their journals! When one considers the fact that she confronted him with witnesses present, wrote and signed an account of what had happened and complained about it to the chairperson, it is clear that the conduct was unwelcome.

Thirdly, the harassment complained of must be based on sex. As stated above, the poetry was sexually explicit, MacKinnon had invited Begbie to dinner and had implied conduct of a sexual nature would follow. There is no evidence that he extended similar invitations to male colleagues or that he makes it a habit to place sexually explicit poetry in their department mailboxes. Therefore, it is obvious that if Begbie were not a woman, MacKinnon would not have harassed her.

Fourth, we must show that the harassment complained of affected a "term, condition, or

privilege of employment". As such, the conduct must be sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment. Clearly, MacKinnon's conduct had a negative impact on Begbie's working conditions. The poetry he sent her made her increasingly more uncomfortable, especially because he was a member of the Tenure and Evaluation Committee. She was also very uncomfortable with his "Burns Night" invitation. In an effort to stop the conduct she was forced to turn to two other female colleagues for assistance. She also was put in the embarrassing position of having to complain to the chairperson about MacKinnon's behavior. Then, she was forced to suffer the humiliation of having a sexually explicit poem involving a woman named Annie read to her class. Adding insult to injury, she was forced to read about the poem in each one of her students' journals. When one considers the totality of the conduct it is easy to see that it created a hostile and abusive working environment.

Fifth, we must establish that the employer knew or should have known of the conduct and failed to take prompt remedial action. Begbie met with the chairperson to complain of the behavior and gave him a written account of what had happened during her confrontation with MacKinnon. The chairperson sent a copy of the memo to the Dean and called the Dean to discuss the matter. However, neither the Chairperson nor the Dean took any action or did anything about Begbie's complaint. Therefore, we contend that the employer knew of the conduct and failed to take prompt remedial action.

PRETEXT

The employer claims that MacKinnon's conduct was not sexual harassment and that MacKinnon did nothing wrong when he placed sexually explicit poetry in Begbie's mailbox, sent her an invitation to "Burns night" that contained sexual innuendo, read a sexually explicit poem that he knew she would object to in her classroom and asked her students to write about it in their journals after she clearly told him not to send her anymore poetry or have anymore contact with her. The employer claims that she requested that the poems be placed in her mailbox, therefore by implication that she asked for the invitation to "Burns night". The employer also claims that there was nothing more that needed to be done after Begbie confronted MacKinnon and

complained about his behavior to Smith. The employer also claims that there was nothing wrong with them allowing MacKinnon to fill in for Begbie while she was ill, reading a Burns poem to her class and asking them to write about it in their journals. Finally, the employer also claims that since there was nothing wrong with what MacKinnon did in her classroom, there was nothing that they could be expected to do about it. All of those claims are not worthy of belief.

First, Begbie may have asked for a few examples of Burns poetry, however, she did not ask to be subjected to a campaign of offensive, sexually explicit poetry and an invitation that contained sexual innuendo. Just because she showed an interest in Burn's poetry she did not invited MacKinnon to behave in such an offensive and harassing manner.

In addition, after Begbie confronted MacKinnon and complained of his behavior to Smith the University should have taken some sort of action to prevent the behavior from continuing. They could have met with MacKinnon to make sure that he understood the gravity and seriousness of Begbie's complaint or at least counseled him about the inappropriateness of his behavior.

Furthermore, Smith should never have allowed MacKinnon to fill in for Begbie in her absence. He knew that MacKinnon had harassed Begbie in the past and that MacKinnon had a habit of including sexually explicit poetry in his lectures. The fact that he pulled MacKinnon aside and asked him not to do anything "funny" and that he wanted a copy of a written class report is evidence of that. Smith knew that MacKinnon would probably use the opportunity to subject Begbie to more of his poetry and harassment, therefore, he never should have allowed MacKinnon to teach Begbie's class. By giving MacKinnon the opportunity to harass Begbie again, Smith encouraged MacKinnon's behavior.

The University's claim that MacKinnon's behavior in the classroom is acceptable is also not worthy of belief. Both MacKinnon and Smith knew that Begbie found Burn's poetry offensive. MacKinnon was asked to discuss the material provided by Begbie. There was absolutely no reason for him to include the Burns poem in the discussion, much less to suggest that Begbie's students write about it in their journals. The established topic of the class was the

harvest theme in American poetry. There was no reason or need for MacKinnon to include a British poem, written by an author he knew offended Begbie, in the discussion. He did it because he thought he had found a new, safe way to continue to harass Begbie. As we stated before, there was no need for MacKinnon to include that poem in the discussion, especially after Smith warned him not to do anything "funny".

The employer claim that there was nothing they needed to do about MacKinnon's behavior in Begbie's classroom is also not worthy of belief. Clearly, Smith warned MacKinnon not to do anything "funny" while teaching the class. MacKinnon did in fact do something "funny" - he read a poem he knew that Begbie would find offensive to her class and suggested that they write about it in their journals. Therefore, Smith should have taken action against MacKinnon. The fact that he did not and indicated his unwillingness to do so to Begbie illustrates his encouragement of the behavior. Smith should have taken action against MacKinnon for his behavior in Begbie's classroom. Therefore, as we have shown, their claim that they did not need to take any action is clearly not worthy of belief. Furthermore, MacKinnon sits on the Tenure and Evaluation Committee. Therefore, it is possible that he could influence whether or not Begbie gets tenure in the future.

As we have stated above, the employer's reasons for excusing MacKinnon's behavior and not taking any action against him are clearly not worthy of belief. As we have shown in the facts stated above, a preponderance of the evidence supports the claim of sexual harassment. Therefore, MacKinnon, Smith, and the University should be found in violation of the law and found guilty of sexual harassment.

D. Employer's Best Theory of the Case

It is the employer's position that Ms Begbie was not sexually harassed by Dr. MacKinnon. Shortly after Ms Begbie was hired Dr MacKinnon invited her to lunch in the faculty dining room. She accepted and during the course of their conversation during lunch Dr. MacKinnon asked Ms Begbie if she were doing anything with the British influence on American poets. She responded that she was not. MacKinnon suggested that she may find the love poems by Robert Burns (a

British poet) influential and interesting because they were written to a woman named Allison Begbie. She asked him to give her copies and when he told her they "were a bit racy" she responded with a smile and said "Oh...that sounds very interesting...all the more fun!" MacKinnon then promised that as he came across them he would send them to her.

As promised, MacKinnon sent Begbie several Burns poems over the course of the semester. Each time he put some poetry in her mailbox he called to see how she liked them. At no time did she tell him to stop putting them in her mailbox or indicate that she was offended by them. In mid-January MacKinnon sent Begbie an invitation to dinner in his home in honor of Robert Burns birthday. With the invitation he included one of Burns more racy poems, however, since Begbie had not indicated that she did not enjoy the ones he had sent previously, he had no reason to think that she would be offended. Therefore, it is understandable that MacKinnon was shocked when Begbie called him to her office and in the presence of two other faculty members returned the invitation and the poem to him saying that she found them "lewd and disgusting", that she did not want to see or talk to him anymore and that she wanted him to stop sending her poetry. MacKinnon was both shocked and embarrassed! He was being blindsided! Begbie had asked for the poems, he had given her numerous ones over the course of the fall semester and she had never indicated that she found them offensive. If he had known that she was offended he would never have continued to send them to her. All she had to do was tell him that she found the racy ones offensive and he would not have sent anymore to her. Confronting him in front of witnesses was truly embarrassing. He never meant to offend her or harass her in any way. She had asked for the poems and had never indicated that she did not enjoy them. This confrontation came out of nowhere and MacKinnon felt that he was being set up. He apologized to Ms Begbie and said that she had misinterpreted the poems and his invitation. Begbie was clearly overreacting. If she did not like the poems all she had to do was tell him. She did not need witnesses to tell him that and to decline his invitation. As we stated before, Begbie had never indicated that she did not like the poems until the confrontation in her office. Since Begbie asked MacKinnon to send her the poems and had never indicated that she did not like them,

MacKinnon felt that she had been leading him on. If she had indicated in any way that she did not like the poems MacKinnon would have stopped sending them and would never have invited her to his home for "Burns night". He was truly astonished and embarrassed by the confrontation in front of two of their colleagues. Witnesses were not necessary and only served to embarrass him. Therefore he was on the defensive and said to both Begbie and the two witnesses, "how would you rate this in the relationship with colleagues category"? It was not a threat and was not intended as one. MacKinnon was simply pointing out that the whole thing could have been handled in a less formal and embarrassing way.

After Begbie confronted MacKinnon in her office she wrote up an account of what had happened and both she and the two witnesses signed it. She then had a meeting with Dr. Smith, the chairperson, to discuss the matter with him. He listened to her concerns and assured her that MacKinnon was harmless and did not mean to harass or offend her. She said that she intended to take the matter very seriously, that she considered their meeting an official complaint and that she wanted the behavior stopped. After the meeting Smith sent a copy of the memo to the Dean and later called the Dean to discuss the matter. There was nothing more that Smith needed to do at that point. Begbie had confronted MacKinnon, had told him that the poetry and invitation were unwelcome, and had asked him not to talk to her or send her anymore poetry. There was nothing that Smith could say to MacKinnon that Begbie had not already said. Therefore, there was no more "prompt remedial action" that Smith could take.

After the confrontation, MacKinnon did not send Begbie anymore poetry and they had no further contact with each other. Begbie called in sick in late February and the chairperson, Dr. Smith, went to the faculty lounge to see if someone could fill in for her 11 o'clock class. MacKinnon readily volunteered. Smith took MacKinnon aside, explained the topic of the class, and asked him not to do anything funny and to write up an account of the class for Begbie and to give a copy of it to him. MacKinnon assured him that he would be his "old charming self" and agreed to write up a report of the class.

MacKinnon discussed the theme of "Harvest" in American poetry with the class and since

there were 15 minutes remaining MacKinnon read the class an example of British harvest poetry, explaining that British poetry was his specialty. The poem titled "Corn Rigs" by Robert Burns is contained in the anthology that is used as a required book in the university's English III course. MacKinnon discussed the poem with the class and suggested that they write a brief comparison and contrast between the Burns poem and the American examples in their journals. MacKinnon explained this to Begbie in the class report and told her that since the poem was part of the English III curriculum the class had a head start on next term. MacKinnon gave copies of the report to both Begbie and Smith.

The next day, Begbie flew into Smith's office in a rage and demanded that he do something about MacKinnon. After reading the memo Smith responded that he did not think he could do anything. MacKinnon had written the report as instructed, had followed the class theme established by Begbie and had simply utilized the 15 minutes remaining in the class period to give the class an example of British harvest poetry that is part of the English III curriculum. Smith asked her what was wrong with the poem. Begbie responded "you know damn well what's wrong with it...and what's going on...I don't have to put up with it anymore. I told you I wanted this stopped. You're not only tolerating it, you're encouraging him. I'm charging MacKinnon -- and you -- and this University -- with sexual harassment." Smith was astonished. MacKinnon had not done anything harassing or wrong by including an example of a famous and critically - acclaimed British harvest poem that is part of the English III curriculum in the class period that he had covered for Begbie. Furthermore, there was no reason why Begbie would charge that Smith or the University with sexual harassment. MacKinnon had stopped sending her poems and had not had any contact with her since she had confronted him in her office. As we stated before, there was no action that Smith or the University could take because Begbie had taken all of the appropriate actions when she confronted MacKinnon in her office. There was absolutely no reason for Smith not to allow MacKinnon to fill in for Begbie when she called in sick. The behavior that Begbie had found unwelcome and harassing had stopped. The very idea that Begbie would charge MacKinnon, Smith, and the University with sexual harassment simply

because MacKinnon read a famous British harvest poem that is part of the curriculum in English III to her class is absurd! This University and its faculty should not be prohibited from including poetry of a sexual nature in their coursework simply because Begbie finds it offensive. She cannot dictate what will and will not be included in the curriculum of the English department. Robert Burns is a famous and well respected British poet and his work is included in English classes across the nation. Simply because Begbie changed her mind after she asked MacKinnon to place examples of Burns poetry in her mailbox and asked him to stop sending it to her does not mean that the University must prohibit MacKinnon from discussing Burns poetry in the classroom. Begbie asked MacKinnon to stop sending Burns poetry to her. He agreed to her request and had no further contact with her. Essentially, Begbie is demanding that MacKinnon not be permitted to discuss Burns poetry in any setting in which she may have exposure to it. That demand is ridiculous! It is easy to see that in a department that teaches English literature such a demand is unreasonable. We cannot censor what we teach our students simply because Begbie found a few poems that were placed in her mailbox to be offensive.

There was nothing the University or Smith could have been expected to do about Begbie's complaint - she had already taken the appropriate steps to stop MacKinnon's behavior. The claim that the poem that MacKinnon read to the class was a form of sexual harassment is ridiculous. As we stated above, he simply included an example of British harvest poetry in the class discussion. There was nothing wrong with his conduct, therefore there is nothing that Smith or the University could be expected to do about it.

Begbie was not a victim of sexual harassment by MacKinnon, Smith, or the University. She asked for the poems to be placed in her mailbox and until she confronted MacKinnon in her office she never indicated that the poems were unwelcome or that she found them to be offensive. After she confronted MacKinnon the behavior stopped and he had no further contact with her. There was nothing more the University could have or should have done. In addition, as we have shown above, there was absolutely nothing wrong with MacKinnon's behavior when he covered for her during her illness. MacKinnon would have read the poem to the class for

discussion no matter who the regular instructor had been. British poetry was his specialty and the poem he read is part of the curriculum of English III. He was simply discussing an example of a poem from his area of expertise, which fit into the established theme of the class, with the students during the 15 minutes remaining in the class period. Therefore, it is our contention that Ms Begbie was not sexually harassed by Dr. MacKinnon.

ANALYSIS

The complainant charges that she has been sexually harassed by a colleague, her supervisor, and the University in violation of Title VII. Therefore, before we can consider the merits of this case using the appropriate proof scheme, we must be sure that the practice is covered under Title VII. To this end we will use Gutman's six questions.

Q 1 Is Ann-Margaret Begbie a member of a protected class?

Yes, all people are considered to be members of a protected class under Title VII. In this case Ms Begbie is female.

Q 2 Is Evergreen State University covered as a business entity?

Yes. State employers are covered if they employ at least 15 people for each day, 20 or more weeks in the current or prior year. Evergreen State meets that definition, therefore they are covered.

Q 3 Is the alleged discriminatory practice covered?

Yes, disparate treatment based on sex, which included sexual harassment is covered under Title VII.

Q 4 Is the law administered? and Q 5 What are the penalties?

Both are irrelevant to our discussion.

Q 6 What are the attacks and the defenses used?

The appropriate proof scheme that must be followed in disparate treatment cases such as this is that established in McDonnell Douglas v. Green (as modified by Henson v. City of Dundee). When using this proof scheme the complainant must first establish a prima facie case by establishing that:

1. The employee belongs to a protected class.
2. The employee was subject to unwelcome sexual harassment
3. The harassment complained of was based upon sex
4. The harassment complained of affected a term, condition, or privilege of employment
5. The employer knew or should have known of the harassment and failed to take prompt remedial action.

The defendant is then burdened with providing a legitimate, non-discriminatory reason for the conduct of the alleged harasser. Then, the complainant must persuasively argue that the discrimination (in this case sexual harassment) did in fact occur. Thus, the complainant must prove that the defendant's non-discriminatory reason is not worthy of belief. We will now analyze the case at hand.

I. Complainant's Prima Facie Case:

There is no question that Begbie is a member of a protected class - she is a woman. There is also no question that she found MacKinnon's behavior unwelcome. She confronted him about it in the presence of two witnesses, wrote an account of the confrontation which she and the two witnesses signed and gave it to the chairperson of the department in a meeting in which she complained of MacKinnon's behavior. Thus, that part of her case is easy to establish. It is also not difficult to establish that the alleged harassment was based on sex. The employer argues that MacKinnon would have conducted himself in the same way no matter whose class he was teaching and that may be true, however there is no evidence that he has placed sexually explicit poetry in the department mailboxes of male colleague and invites them over for "Burns night" dinners. In addition, while it is difficult to prove the complainant did establish that MacKinnon's behavior affected a term, condition, or privilege of employment. The behavior occurred at work and it had a negative impact on Begbie's working environment. Therefore, it did affect a term, condition, or privilege of her employment. Finally, the complainant has also established that her employer knew of the conduct and did not take action against it. She complained about the behavior to the chairperson and regardless of the reason, no action was taken. Therefore, Ms

Begbie has established her Prima Facie case.

II. Employer's Legitimate, Nondiscriminatory Reason:

Evergreen State University claims that Ms Begbie was not sexually harassed for a variety of reasons. First, Begbie asked MacKinnon to give her copies of Burns poetry. MacKinnon warned her that some of them were a bit "racy" and she responded with a smile and responded that would make them more interesting and fun. MacKinnon put a series of Burns poetry in her mailbox throughout the fall term and called Begbie each time to see how she liked them. At no time during the fall term did she indicate that she found them offensive and that she wanted MacKinnon to stop giving them to her. In January, MacKinnon invited Begbie to his home to dinner in honor of Burns birthday and included another poem of s sexual nature in the invitation. The employer contends that at that time Begbie decided that she did not want anymore poems or contact with MacKinnon and confronted him in the presence of two other colleagues. During the course of that confrontation Begbie made it clear that she did not want anymore poems or contact with MacKinnon. She wrote an account of the confrontation with MacKinnon and gave a copy of it to the chairperson during a meeting that she scheduled with him. The chairperson read the memo, forwarded a copy of it to the Dean and in the course of a conversation that they had over it both the chairperson and the Dean decided that there was nothing more that they needed to do at that time. Begbie had made it clear that she wanted no more contact or poems from MacKinnon and he abided by her wishes. Therefore, the employer contends that there was nothing more that they could do.

They employer also claims that since the behavior had stopped there was no reason that Smith should not have permitted MacKinnon to fill in for Begbie during her illness. In addition, the employer claims that the poem that MacKinnon read to Begbie's class was not a form of sexual harassment. The poem fit the harvest theme established by Begbie, it is a well-known and critically acclaimed poem that is part of the English III curriculum and it was in MacKinnon's area of expertise. Thus, the employer claims that there was no reason that he should not have discussed the poem with the students during the 15 minutes remaining in the class or suggested

that they discuss it in their journals. According to the employer, Begbie requested that MacKinnon stop having contact with her and putting Burns poetry in her mailbox. MacKinnon abided by her wishes. According to the employer simply because Begbie found MacKinnon's poetry offensive, they employer should not have to order MacKinnon not to discuss it in the classroom or include in their curriculum. The employer argues that because MacKinnon did nothing wrong in Begbie's classroom there were no actions that they should have taken against him.

Finally, while MacKinnon does sit on the Tenure and Evaluation Committee, he did not threaten to hold the situation against Begbie, nor does he have the power to prevent her from getting tenure.

Based on the fact that Begbie asked for the poems to be placed in her mailbox; that MacKinnon stopped putting them in her mailbox and ceased having any contact with her after she confronted him about it; that because the behavior stopped after Begbie let it be known that it was unwelcome, there was nothing more the University needed to do; and that the poem MacKinnon read to Begbie's class was within the theme she herself established for the class, that it was part of the University's English curriculum, and that since it was in his area of expertise, it was natural for MacKinnon to want to discuss it with the class; we find that the employer has met the burden of stating a legitimate non-discriminatory reason for the allegedly discriminatory behavior.

III. Pretext:

Begbie claims that the employer's nondiscriminatory reasons are not worthy of belief. She claims that MacKinnon should not have interpreted a request for Burns poetry as a license to subject her to sexually explicit poetry and an invitation to dinner fraught with sexual innuendo. In addition, she claims that after she confronted MacKinnon and met with Smith, the University should have taken some sort of action to prevent it from happening again. She also claims that the employer should not have allowed MacKinnon to teach her class in her absence and that Smith request that MacKinnon not do anything "funny" and request for a copy of the class report

are evidence that they knew what he would do and by putting him a position to do that they encouraged his behavior. Finally, she argues that the poem that MacKinnon read to her class had nothing to do with the harvest theme in American poetry and that it was obvious what MacKinnon was doing. She argues that Smith should have done something about the behavior when he read the class report.

Begbie makes a valiant effort to prove that the reasons that the employer stated were not worthy of belief, however, upon analysis her reasoning falls apart. Begbie is not able to prove through a preponderance of the evidence that the employer is either lying or their stated reasons are not worthy of belief. The fact remains that Begbie asked for MacKinnon to give her copies of Burns poetry, that until the confrontation in her office she never indicated that she found the poems offensive and that MacKinnon's behavior was unwelcome. Until she indicated otherwise, MacKinnon had no way of knowing that the poems or his invitation to dinner were unwelcome. After she confronted MacKinnon the behavior did stop. There was nothing else the University could have accomplished by getting involved. Because the behavior had stopped and there was no more contact between MacKinnon and Begbie, there was absolutely no reason for Smith not to allow MacKinnon to teach her class. The poem MacKinnon read to the class fit in with the harvest theme of the class, was part of the University's English curriculum and was in MacKinnon's area of expertise. Since MacKinnon knew that Begbie was not fond of Burns poetry, MacKinnon may not have exercised the best of judgement in including a Burns poem in her classroom. However, lack of good judgement in the selection of course material hardly constitutes sexual harassment, especially since the poem is part of the English curriculum.

There was nothing the University should have done to MacKinnon after Smith read the class report because he was correct in determining that MacKinnon did nothing wrong. In addition, MacKinnon may have a seat on the Tenure and Evaluation Board, but he has never threatened to hold the current situation against her, nor does he have the power to prevent her from getting tenure. Therefore, Begbie has not been able to prove that the employer's stated, nondiscriminatory reasons are not worthy of belief.

Decision

Ms Begbie has charged MacKinnon, Smith and the University with sexual harassment. However, she has not been able to convincingly argue that a preponderance of the evident supports that claim. While Ms Begbie makes a valiant effort to prove her case, she is not able to do so. As stated above, she asked for poems; when she let MacKinnon know the behavior was unwelcome he stopped having any contact with her; because the behavior stopped, there was nothing more the University needed to do; there was no reason why MacKinnon should have been prevented from teaching her class or should have been disciplined for including a poem in the class discussion that fit the theme and was in his area of expertise. We grant that MacKinnon did not exercise the best of judgement with her class, however, there is nothing in Title VII that requires colleagues to exercise good judgement in the selection of course content.

Ruling;

We find that neither MacKinnon, Smith, nor the University are guilty of violating Title VII of the Civil Rights Act of 1964 as amended.

F. Advice

The employer may want to counsel MacKinnon about his behavior. For example they could suggest that MacKinnon stick to the course material chosen by the instructor. In addition, they may want to avoid letting MacKinnon fill in for Begbie in the future. The employer may also want to establish a policy that University employees are not permitted to date on another. This will prevent any future misunderstandings or invitations from one faculty to another that may cause problems.

Finally, there is no mention of an established sexual harassment policy at the University. The University should establish one and provide training sessions for all of its employees about the subject of sexual harassment.

Lisa O'Hara
LR 622
December 6, 1994

CORN RIGS

- A. Discrimination Type: Disparate Treatment (Hostile Environment Harassment) based on sex.
- B. Appropriate Proof Scheme: Henson v. City of Dundee (affirmed by the Supreme Court in Meritor Savings Bank v. Vinson)
- C. Complainant's Best Theory of the Case:

Anna-Margaret Begbie was subjected to harassment that made her work environment offensive and abusive; in fact, the harassment made it difficult for Begbie to perform her responsibilities as Assistant Professor at Evergreen State University with dignity. The harassment that Ms. Begbie endured was directed at her as a female, contained sexual innuendos directed at Ms. Begbie specifically, and was not welcomed in any way by her.

Ms. Begbie, a member of a protected class, has been serving as a tenure-track Assistant Professor at Evergreen State University since the beginning of the school year in September. Begbie, a specialist in American poetry, was eager to develop professional relationships with her colleagues and so, when Professor Hamish MacKinnon, a member of the faculty in the Department of English, invited her to join him for lunch in the faculty dining room, she accepted his invitation.

During this conversation, Professor MacKinnon, a specialist in British poetry, mentioned his favorite poet, Robert Burns, indicating that he felt Begbie could find considerable influence from Burns's work on American poets. Professor MacKinnon also disclosed to Begbie that Burns wrote some of his "love poems" to a girl named Allison Begbie, whom MacKinnon then described as Ms. Begbie's "namesake."

Ms. Begbie, interested at this point in Burns's work, asked Professor MacKinnon if he could provide her with copies of the poetry. He agreed, indicating that some of the poems were from a specific collection of Burns's work, "The Merry Muses of Caledonia," and indicated to Begbie that some of the works might be considered a bit "racy."

At that time, Professor MacKinnon did not qualify how it was that the poems might be considered "racy." What Professor MacKinnon considered to be merely risqué, might, in fact, have been considered ribald, explicit or even pornographic by another. Ms. Begbie was such a person who found the poetry to go beyond racy or risqué, particularly in light of the fact that the work was written, as Professor MacKinnon had explained, "to her namesake."

Early in the semester, Professor MacKinnon sent Ms. Begbie well-known poems of Robert Burns, and only occasionally interspersed them with some of the works from the "Merry Muses." As time went on; however, MacKinnon sent more of the "Merry Muses" pieces, often calling Begbie or stopping her in the hall, to ask her how she liked the poetry.

MacKinnon also began to write comments in the margins of the poetry including remarks such as "What do you think of this one?", or "Here's one that really *turns me on*, what do you think of it?". If MacKinnon himself did not believe that the poetry went beyond "racy," why then would he clearly indicate to Begbie that the words and meaning expressed in the poetry "turned him on." It is apparent that MacKinnon intended to send a sexual message to Begbie each time he sent her a poem from the "Merry Muses."

The EEOC, in its 1980 guidelines, described several acts that are prohibited in its description of sexual harassment. In this description, sexually-oriented cartoons, sexually-oriented discussions and the presence of lewd, offensive or pornographic material are included. Whether considered as "love poems" or satire of human weakness, the poems were sexually-oriented and Begbie found them lewd and offensive. And because he considered the poetry to have been written to her "namesake," Ms. Begbie could only infer that the poetry was being sent as a message to her personally.

As the semester continued, MacKinnon became more vigilant in his pursuit of Ms. Begbie, asking her to join him for lunch more frequently. The poetry MacKinnon sent to Begbie increasingly became more sexually explicit as well; the communications were a far cry from the "love poems" that MacKinnon had described at the beginning of the semester. His continued pursuit only served to make it more difficult for Ms. Begbie to perform her job as Assistant Professor, particularly in light of the fact that the individual sending her these messages and pursuing her could have considerable influence over her future with the University.

In response to these actions, Begbie began to withdraw from MacKinnon, deliberately becoming cooler in her responses to him. As MacKinnon served on the tenure committee, Ms. Begbie feared a confrontation with him, believing that confrontation with MacKinnon would have had a detrimental effect on her career. Begbie's

withdrawal and cooling off were, at that time, her method of showing the unwelcomeness of MacKinnon's actions and discouraging any further poetry or communication from him.

Begbie received an invitation from MacKinnon in mid-January, inviting her for dinner and what MacKinnon termed a "real Burns night." In the letter Begbie received, MacKinnon insinuated that he and Begbie would eat traditional foods, drink large amounts of Scotch whisky and "further discuss the Merry Muses". MacKinnon also enclosed the first verses of a Burns song with the invitation, indicating to Begbie that the song would give her "the flavor" of the evening; the song hinted at a sexual encounter with a woman named Maggie.

This particular invitation and work of poetry caused Begbie considerable distress. In this particular Burns piece, the subject shared a given name with Anna-Margaret Begbie. Begbie confided in two untenured colleagues about the poetry and attention she was receiving from MacKinnon; her colleagues, also female, felt that the communication Begbie received was sexually explicit and threatening, she was advised to schedule a meeting with MacKinnon.

Begbie met with MacKinnon in her office. At that time, she returned the invitation and verbally instructed MacKinnon to cease sending her poetry or letters. Begbie indicated, quite clearly, that she found the materials lewd and disgusting and that she was not interested in seeing or talking with MacKinnon. Two of Begbie's untenured colleagues attended this meeting also. MacKinnon responded to the confrontation by insinuating that participation in the meeting would not rest well in the tenure evaluations of any of the three women.

Following the meeting, Begbie, along with her colleagues, drafted a letter to the department chairperson, Dr. John Smith, informing him of the confrontation with Professor MacKinnon. Begbie personally delivered this letter to Dr. Smith and informed him, at that time, that she was making a formal complaint. The chairperson's response was that MacKinnon was "harmless" and simply did these types of activities to "get a rise out of people." Ms. Begbie was not notified of any additional reporting or grievance procedures in place at the university, she was not instructed to seek any additional advice concerning the harassment she endured. In this case, her written communication to the chairperson signaled her formal complaint to her employer.

A copy of Begbie's memo was forwarded to the Dean; Smith followed up on the memo with a phone call. The Dean instructed Smith to keep him advised of the situation; however, *neither took any further action regarding Begbie's claim.* No investigation was undertaken of the incidents, no meeting was held to discuss the incident with Professor MacKinnon, nor was Ms. Begbie contacted in anyway further regarding this incident by either Dr. Smith or the

Dean. There is no indication that a report was made of this incident to the Human Resources Department or any other university official. In short, nothing was done regarding Begbie's claim.

The EEOC guidelines on sexual harassment (29 CFR, §1604.11(d)) indicates the following regarding sexual harassment by a co-worker:

With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action.

Dr. Smith, the Department Chairperson, and the Dean both qualify as supervisory employees. Both of these gentlemen were informed of the sexual harassment that Ms. Begbie endured. Neither performed "immediate and appropriate corrective action".

The following month, February, Begbie called in sick and requested that Smith find someone to cover her 11:00 a.m. class. Begbie informed Smith that the class was studying American poetry and that the theme was "Harvest." When Smith checked the availability of department staff to cover the class, MacKinnon readily volunteered. Fully aware of the incidents between Begbie and MacKinnon, Smith still permitted MacKinnon to take over the class. Smith warned MacKinnon not to do anything "funny", but did not specify any actions or elaborate on that statement any further.

Smith had the opportunity to find a different instructor, surely some other individual who specialized in American literature or poetry would have been preferred, but did not do so. He also had the opportunity to cancel the class, given that they were no instructors qualified in American poetry to cover it. Instead, Smith permitted MacKinnon, who, as a specialist in British poetry had no particular proficiency in the course content, to cover the class.

At the 11:00 class, MacKinnon provided the students with a copy of a song, "Corn Rigs," by Robert Burns. This particular song, which MacKinnon described as a "Harvest" poem, tells of a night spent with a woman named "Annie." MacKinnon included a copy of the poem with a memo he wrote to Begbie reporting on the events of the class.

In his memo, he informed Begbie of the class activities, noting that he finished 15 minutes early and, rather than dismissing the class, shared the Corn Rigs poem with them. He also indicated that he suggested the students include a comparison of this poem in their journals (which Begbie would ultimately be forced to read).

Clearly, Professor MacKinnon intended to continue his harassment and pursuit of Ms. Begbie after being informed, both verbally and physically, that his poetry and attention was unwanted. And despite Begbie's plea to the department chairperson, Dr. Smith, nothing was done regarding her claim of harassment. Evergreen State University permitted Professor MacKinnon to resume his harassment of Ms. Begbie, causing her undue difficulty in performing her job and altering her work environment considerably.

The Supreme Court has indicated that to be actionable as hostile environment harassment, conduct does not have to seriously affect the psychological well being of an employee or cause the employee to suffer injury. In Harris vs. Forklift Systems (1993), the Supreme Court reaffirmed the standard it set in Meritor vs. Vinson (1987), indicating that Title VII bars conduct so severe that it creates an objectively hostile work environment *and one that the victim subjectively perceives as abusive* (emphasis added). Further, the Court indicated that Title VII comes into play before harassing behavior leads to a nervous breakdown. In short, an abusive work environment, including those situations where an employee's psychological well-being is not seriously affected, can and often do diminish an employee's job performance, ultimately leading to lack of advancement or separation from the employer.

Ms. Begbie, a female, was subjected to unwanted sexual advances by a male co-worker. The harassment was based on her sex as the object of his perverse desire for her, the "namesake" of a poetry subject. The harassment was pervasive, humiliating and threatening, effectively altering Begbie's work environment. And finally, Ms. Begbie informed her immediate supervisor, Dr. John Smith, who then notified the Dean of their college, of the harassment but no further action was taken by either of these agents of Evergreen State University.

PRETEXT

Evergreen State University contends that, given Ms. Begbie's oversensitivity to the situation, they took appropriate and corrective action. They believe that Ms. Begbie was oversensitive of the poetry, given that she was new to her position and feeling overwhelmed by all of the new experiences involved.

If Ms. Begbie was overwhelmed, it was not because of her teaching responsibilities or the work on her dissertation. It was because she was relentlessly pursued with offensive poetry and communications by Hamish MacKinnon.

The university maintains that a "reasonable woman" would not find the poetry sent by MacKinnon to be offensive, lewd, or pornographic in anyway. According to the university, because it does not reference any particular sexual act, it would not be considered humiliating or threatening by a reasonable woman. A

further question may be to ask if Ms. Begbie can be considered a reasonable woman by the same standard, that is, does she share the same qualities as the reasonable woman that the University has described?

Is the reasonable woman described by the University nearing completion of a terminal degree in the field of English? Has that same reasonable woman been trained extensively in the interpretation of poetry? Does that same reasonable woman share the same names as the subjects in the poetry? The University tends to lump all women together in the reasonable woman standard, but is this effective with Ms. Begbie? In light of the fact that Ms. Begbie possesses characteristics that other women may not or do not, Ms. Begbie's occupation also presents hurdles for the simple "reasonable woman" standard.

In applying the "reasonable" standard in Ellison vs. Brady (1991), the court applied the rule "The focus should be on the perspective of the victim and not on a reasonable person." Would a reasonable woman who was not trained in the interpretation and analysis of poetry find the "Merry Muses" objectionable? No, probably not. Would a reasonable woman who was trained in the interpretation and analysis of poetry find those same poems objectionable. We believe so. In fact, aside from Ms. Begbie, the two colleagues with whom she shared the poetry found the communication so objectionable and threatening, that they advised her to schedule a meeting with MacKinnon. Professor MacKinnon, who is actually a very clever fellow, knew that to send Ms. Begbie pornographic pictures or stories from a current publication would be unseemly, so he instead sent more discreet messages, knowing that she would understand his intentions.

The university also sets forth that Professor MacKinnon *would have stopped the communication earlier, if only he had known that Ms. Begbie was not enjoying it.* Because, they claim, Ms. Begbie did not verbally state that she no longer wanted the poetry and communications, MacKinnon continued to send them. Regardless of the fact that Begbie had withdrawn from MacKinnon and was avoiding him, he still was not aware that she did not want further contact.

The EEOC, in its policy guidelines, provides insight on determining the welcomeness of conduct in hostile environment cases. Specifically, the EEOC advises to investigate the conduct of the victim to determine whether the victim's conduct is consistent with the claim that the harasser's conduct was not welcome. Is avoidance and withdrawal consistent with a finding of welcomeness? Obviously not. If a woman walked away from a man, or avoided his attention, after being asked for a date, would that same man think the woman was interested in him? Easily, the answer to that question is "No." But Professor MacKinnon still claims he was unaware that Ms. Begbie was not enjoying his poetry and attention. Nowhere can the University show that Ms. Begbie

encouraged the communications throughout the semester. Clearly, avoiding and withdrawing from another individual does not indicate welcomeness.

Unwelcomeness does not have to be expressed verbally. The conduct of an employee, such as walking away, can communicate welcomeness (Chamberlin v. 101 Realty (1990)). Ms. Begbie communicated both verbally and physically to MacKinnon that his poetry and communications were unwelcome. The physical communication occurred throughout the semester, the verbal communication occurred in January.

The University makes light of the fact that the poetry was addressed to Allison Begbie, Annie and Maggie. If it was not for the surname of "Begbie," Anna-Margaret Begbie would not have become the object of MacKinnon's fascination. This is what makes the communication that much more threatening. Further, the University lumps together all the communication that occurred during the Fall semester as one incident. In fact, individual, specific pieces of poetry and communications were sent to Ms. Begbie throughout the semester, communication that increased in its explicitness as the semester wore on. She was not forced to endure three specific encounters over a six month period; Anna-Margaret Begbie was forced to survive five months of nearly constant harassment.

The fact that the comments began to appear along with the poetry, for example "this really turns me on," has been ignored by the university. If a man was calling a woman on the telephone, reading her poetry selections, and then telling her it "turned him on," the woman would have cause for fear. Ms. Begbie, too, had cause for fear. Aside from the physical threat, Ms. Begbie also feared for her career because of MacKinnon's influence in the tenure committee. To attempt to brush aside MacKinnon's actions as friendly poetry shared by two individuals is irresponsible.

The University has also attempted to smooth over the humiliation caused by sharing this poetry, written to "Annie," with Ms. Begbie's English II class. If the roles had been reversed, and Ms. Begbie had shared a poem about an impotent man named "Ham" with MacKinnon's English III class, would that not be equally humiliating? Instead, the poetry is portrayed as a sweet, romantic encounter with a woman named Annie who, coincidentally, shares the same given name as Anna-Margaret Begbie because of her nationality. Exactly. As stated before, if not for the fact that she is a woman, of some British descent, who is named Anna-Margaret Begbie, she would not be forced to be the receiver of Hamish Ivor MacKinnon's lurid pursuit.

Finally, Evergreen State University believes that they took appropriate and corrective action to Ms. Begbie's notification by monitoring the situation and asking MacKinnon "not to do anything funny" when he volunteered to monitor Begbie's class.

If an employer receives a complaint of sexual harassment, that employer has an affirmative duty to investigate the claim promptly and thoroughly and to take whatever steps necessary to remedy the situation and prevent further misconduct. Further, the remedy must be effective in stopping the harassment; indicating that follow-up is often indicated to determine if the harassment has ended. Evergreen State University, after being told of the harassment by Ms. Begbie, did none of these things.

The University indicated only that they decided to monitor the situation in response to Begbie's claim. No investigation was undertaken of her claim. No agent of the University discussed the incidents with MacKinnon. No follow-up was made with Begbie following her report. No steps were taken to prevent further misconduct; instead the University encouraged it by allowing MacKinnon to cover Ms. Begbie's class.

When MacKinnon was permitted to cover Begbie's class, the only warning he received was "not to do anything funny." No clarification of what "funny" might be, no specific mention of the poetry, only a vague, generalized warning about some foggy, unspecified behavior. And yet the University considered this to be "immediate and appropriate." The University was negligent in their reaction to the complaint of harassment by Ms. Begbie, their response was not immediate, no action was taken to prevent further incidents.

Lipsett v. University of Puerto Rico (1988) echoed the principle of respondeat superior when it claimed:

We hold therefore, following Meritor, that...an educational institution is liable upon a finding of hostile environment perpetrated by its supervisors upon employees if an official representing that institution knew, or in the exercise of reasonable care, should have known, of the harassment's occurrence, unless that official can show that he or she took appropriate steps to halt it. (emphasis added)

Evergreen State University, through the actions of Dr. John Smith and the Dean, cannot show that either took appropriate steps to halt the harassment.

Section 703(a) of Title VII states:

(a) It shall be an unlawful employment practice for an employer -

(1) to fail or refuse to hire or to discharge any individual *or otherwise discriminate against any individual* with respect to his compensation, terms, conditions, or privileges of employment, because such individual's race, color, religion, sex, or national origin. (emphasis added)

Based on the facts of this case, Ms. Begbie was not afforded that protection under Title VII by Evergreen State University.

D. Employer's Best Theory of the Case

To determine whether alleged harassment occurred, and whether it created a hostile working environment, the alleged harassment must be viewed in its totality. In particular, the severity and pervasiveness of the conduct must be examined. Our examination of the alleged incidents will follow those guidelines.

Hamish MacKinnon is an entertaining, well-liked and well-respected faculty member of the Department of English at Evergreen State University. Professor MacKinnon specializes in British poetry and is an avid fan of poet Robert Burns, a fact well-known by students, other faculty, and administration alike.

Professor MacKinnon teaches English III and often uses the poetry of Robert Burns in that class. That has been his teaching practice and thus far, it has been successful.

Professor MacKinnon was anxious to share his enjoyment of poetry with a new colleague, Anna-Margaret Begbie, who also enjoyed and appreciated poetry. Ms. Begbie herself requested that MacKinnon share some of the Burns poetry with her after he indicated that the poetry was written to a girl named Allison Begbie.

Before any poems were shared between the two, MacKinnon informed Ms. Begbie that the poetry was from a specific collection of bawdy songs and poems and as such, might be considered "racy". Ms. Begbie indicated that she was "interested," and also indicated to MacKinnon that the racy poetry would be "all the more fun."

It is the case that "racy" may have different connotations for different individuals. If the content of the poetry was of concern to Begbie, she had ample opportunity to ask for clarification. If, after receiving a sample of some of Burns's poetry, Begbie did not approve of the poetry and did not wish to continue receiving it, she should have informed MacKinnon personally. Because she did not do so, Professor MacKinnon was unable to determine that the poetry was offensive to her in any way. Indeed, because he had shared this poetry with others over the years, and had not received a direct complaint about its content, Professor MacKinnon was unaware that his poetry was offending Ms. Begbie.

The poetry itself, which might possibly be considered suggestive by some, does not specifically reference any particular sexual act, nor does it specifically describe any particular sexual act. Poetry is interpreted; each individual derives their own unique meaning from the words.

In particular, "O Saw Ye My Maggie" references a "mark." The mark referenced lies somewhere below Maggie's shirt and a little above her knee. This particular "mark" could be interpreted as as

existing in several ways, but no where in the poetry is there any direct sexual reference. The mark could simply be a birthmark; in the 17th and 18th centuries, when Burns's work was written, seeing a birthmark on a woman's knee, particularly one who was not an individual's wife, was unheard of. Consider Shakespeare's "Romeo and Juliet," it is understood that the two young, star-crossed lovers spent the night together. But common and reasonable interpretation of the work does not imply any particular, explicit sexual acts.

Similarly, the "Corn Rigs" poem that was shared with Ms. Begbie's class contains no direct sexual references. The most racy reference contained in the poem refers to having kissed a woman named "Annie" several times during an evening, while hidden in a field of barley. Again, the interpretation is dependent upon the individual. What would a "reasonable woman" think of these poems? Would a reasonable woman find them sexually explicit? It is not likely.

With no direct reference to a specific sexual act or description of a sexual act, it is unlikely that a reasonable woman would find the poetry explicit, pornographic, or threatening. Certainly it might be considered "racy," particularly by 17th or 18th century standards, and while a very small percentage of individuals might still consider the "Merry Muses" indecent, a reasonable woman would not.

Ms. Begbie contends that the poetry was humiliating and threatening because much of it was written to her "namesake," Allison Begbie. She is particularly humiliated and threatened by the two poems written naming the women "Maggie" and "Annie" because these works directly referenced women who shared her given name, Anna-Margaret. Is it not likely that poetry written to a woman by a German poet would addressed to Gretel or Ursula?

By the same token, it is also then likely that poetry written by Robert Burns would be addressed to women sharing names of British descent. Of the sum of poetry sent to Ms. Begbie, she has not indicated that each and every poem was addressed to a woman sharing her name. Ms. Begbie has simply been overly-sensitive of the content and subjects of the poetry that she received from Professor MacKinnon.

Begbie received an invitation from Professor MacKinnon in January to attend a dinner in honor of Robert Burns. With no reason to believe that Begbie did not enjoy the poetry, he was merely offering a traditional Burns night dinner -- a practice celebrated all over the world. His invitation, like the poem included, "O Saw Ye My Maggie," did not contain any direct sexual references. It did; however, indicate that *discussion* of the Merry Muses would take place. Again, would a reasonable woman interpret this invitation, which actually sounds much like the traditional

New Year's Eve festivities held around the world, feel intimidated, threatened, or humiliated by this invitation? It is not likely that she would.

When Ms. Begbie reported the alleged discrimination to the Department Chairperson, Dr. John Smith, it was reported immediately to the Dean. Dr. Smith both sent a copy of the letter from Ms. Begbie and followed-up with a telephone call to the Dean. Based on the incidents, it was decided to be the best course of action to monitor the situation carefully. Professor MacKinnon had not made any direct threats, nor had any complaints of sexual harassment been made against him in the past. In short, Ms. Begbie simply overreacted.

The corrective action seemed to have worked well. There were no further incidents between Begbie and MacKinnon. When MacKinnon volunteered to cover Begbie's class in February, Dr. Smith verbally warned MacKinnon not to do anything to jeopardize the situation; to be certain no questionable actions would occur, Smith asked MacKinnon to write a report of the class for Begbie and provide a carbon copy of that same report for himself.

MacKinnon presented "Corn Rigs," one of the most famous and critically-acclaimed songs of Robert Burns to the class. This poem combined easily into the harvest theme and is also included in the anthology used as a required book for all English III students. The poem was not purposely selected to humiliate or intimidate Ms. Begbie, it was simply a poem that the students would have been exposed to the following semester. Begbie simply overreacted to the poem that was shared with the class.

In Zabkowicz v. West Bend Co. (1984), the Court ruled that Title VII "does not serve as a vehicle for vindicating the petty slights suffered by the hypersensitive." Ms. Begbie, being new to the University and the field of collegiate teaching, was sensitive to responsibilities of her new position. Clearly, she was experiencing ambiguity in her role to begin with; she then overreacted and misinterpreted MacKinnon's intentions with the poetry of Robert Burns. The EEOC in its policy statement indicates that if the challenged conduct would not "substantially affect the work environment of a reasonable person," no violation should be found.

Further, the Court has ruled repeatedly that a single incident, or a few isolated incidents of offensive remarks generally will not be enough to create an abusive environment.

In Drinkwater v. Union Carbide Corp. (1990), the court indicated that a claim must demonstrate a continuous period of harassment and that "two comments do not create an atmosphere."

In Scott v. Sears, Roebuck & Co. (1986), the court found the conduct complained of "lacked repetitive and debilitating effect necessary to maintain a hostile environment claim."

In Chamberlin v. 101 Realty (1990), the court indicated that five mild advances, without further contact, was insufficient for a finding of hostile environment.

Given these findings, the actions described by Ms. Begbie clearly do not seem pervasive.

Aside from the misunderstanding of the Burns Night invitation and the "Corn Rigs" poem, no other specific conduct has been identified by Ms. Begbie of continued harassment. There has been general comment regarding additional poetry, however no specific examples have been provided. When MacKinnon was informed by Begbie that she did not want any further contact, he ceased contact. The "Corn Rigs" poem was not sent specifically to Ms. Begbie, it was shared with a class of English II students in a learning situation.

Ms. Begbie has provided no evidence that her work has suffered during the period she was receiving the poetry from MacKinnon. She is still employed, has not indicated that she received any reprimands or poor evaluations, and she has also managed to continue work on her dissertation.

Hamish MacKinnon's conduct was clearly misunderstood by Ms. Begbie; the nature of the poetry received from Professor MacKinnon would not have affected the work environment of a reasonable woman. MacKinnon's conduct was certainly not severe, nor was it extensive; when MacKinnon was asked to stop sending poetry, he did so.

By the same token, given Ms. Begbie's oversensitivity to the situation, Evergreen State University took immediate and appropriate action. Monitoring the situation permitted university officials to keep a firm hand on the situation; in fact, they took steps to prevent any further misunderstandings from occurring between the two faculty members.

Teaching at a university such as Evergreen State University comes with its inherent stresses. Adding a dissertation to that situation clearly adds more stress, making an individual sensitive to his or her surroundings. Evergreen State University maintains a degree of caring for each individual faculty member. That same degree of caring and protection was shown for Ms. Begbie.

E. Analysis

The suit has been brought under Title VII. To analyze whether the practice is covered under Title VII, we will apply Gutman's six dimensions:

Q1 Is Anna-Margaret Begbie part of a protected class?

Ms. Begbie has a sex (female) and as such is part of a protected class under Title VII.

Q2 Is the university a covered entity?

The university would likely employ more than 15 individuals. There is no indication that it is a religiously-affiliated school, and even though it is a state university, it would still be considered a covered entity.

Q3 Is the alleged discriminatory practice covered?

Yes. Hostile work environment is a form of sex discrimination which is covered by Title VII. Hostile work environment is considered "nondiscrimination" which affects the terms, conditions or privileges of employment.

Q4 Is the law administered?

This dimension has no bearing on the decision in this case.

Q5 What are the penalties?

This dimension has no bearing on the decision in this case.

Q6 What are the attacks and defenses used?

In this case of disparate treatment, the attack and defense proof scheme will follow that established by Henson v. City of Dundee (affirmed by the Supreme Court in Meritor Savings Bank v. Vinson.) Using this proof scheme, the plaintiff must follow a five step procedure for prima facie evidence of a hostile environment in Phase 1: (a) the employee must belong to a protected class, (b) the employee must be subject to "unwelcome" advances, (c) harassment must be based on sex, (d) the harassment must be sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment, (e) the plaintiff must show that the employer knew or should have known of the harassment in question and failed to take prompt action. In Phase 2, the employer must answer the charge with a preponderance of the evidence that the complaint is unwarranted, and that it did, in fact, take immediate and corrective action. Phase 3, Pretext, the Complainant must prove that the evidence presented by the employer is untrue.

I. Complainant's Prima Facie Case:

Anna-Margaret Begbie can easily prove that she is a member of a protected class. With effort, she can also prove that she was subject to unwelcome advances. She received the communications from MacKinnon, she withdrew from him and avoided contact with him; ultimately she informed him verbally that she did not want any additional contact with him.

Proving that the harassment was based on her sex is also easily done. If she were not a female, MacKinnon would not have sent the communications and poetry to her.

Proving that the conduct was pervasive enough to alter her working environment is somewhat more difficult. She does not offer any specific evidence of poor performance evaluations, difficulty in meeting deadlines; however, she does indicate that the poetry and letters provided her undue stress and anxiety, without indicating any specific psychological damage. It is sufficient to say that the stress of the situation would have made her working environment abusive and uncomfortable.

Begbie is also able to prove that the employer knew, or should have known, of the harassment in question and failed to take action. Given her written letter and personal meeting with Dr. Smith, Begbie can easily demonstrate that Evergreen State University knew about the alleged harassment.

Anna-Margaret Begbie has proven her Prima Facie case. She belongs to a protected class, she was subject to unwelcome advances, the harassment was based on her sex, was sufficiently pervasive to alter her working environment, and her employer, Evergreen State University, knew of the conduct and failed to take immediate and responsive action.

II. Employer's Legitimate, Nondiscriminatory Reason:

Evergreen State University claims to have taken immediate and appropriate corrective action to Ms. Begbie's claim. Given their knowledge of Hamish MacKinnon and the facts of Ms. Begbie's complaint, Dr. John Smith, Department Chairperson, and the Dean concluded that monitoring the situation was the appropriate action to take.

The University contends that Ms. Begbie has been overly sensitive and that a reasonable woman would not find the poetry and communications either threatening or humiliating. The reasonable woman standard is a correct application for hostile work environment cases of sexual harassment.

A finding that the University did perform immediate and appropriate corrective action to remedy the situation is weak.

Clearly, the Chairperson did forward a copy of Begbie's letter to the Dean, and followed up the letter with the phone call, but nothing was done after that. There is no indication that MacKinnon was counseled regarding the situation until approximately six weeks after Begbie's claim. Further, the counseling was vague, did not specifically mention the harassment, and was undertaken only after the Department Chairperson gave MacKinnon permission to cover Begbie's class in her absence.

However weak, the employer defendant has met its burden of stating a legitimate, nondiscriminatory explanation of its action.

III. Pretext:

Anna-Margaret Begbie's argument that the reasonable woman standard does not adequately address the situation has certain merits, but does not adequately cover the situation. Certainly, she has specific qualities that other women do not have, but the same can be said of women in general. In reality, no two are exactly alike.

She refutes the University's claim that MacKinnon did not know his actions were unwelcome quite effectively. She provides evidence of physical and verbal actions intended to notify MacKinnon of the unwelcomeness of his actions.

Ms. Begbie also provides a convincing argument that the University failed to take immediate and responsive corrective action to her claim of harassment. She effectively points out their lack of response to her initial claim, indicating that nothing was discussed with Hamish MacKinnon regarding the situation, no investigation was undertaken, and that effectively, the University invited the final incident by their lack of response.

The University's assertion that monitoring the situation was their immediate and appropriate corrective action is a mockery of the entire incident. That Hamish MacKinnon was not counseled, nor the situation investigated, clearly indicates a lack of response, and corrective action, by an informed employer. Anna-Margaret Begbie has proven pretext.

DECISION

Evergreen State University claims that they took appropriate corrective action by simply monitoring a potentially explosive situation. Given their knowledge of the subject and his teaching skills, and the fact that the complainant was a new teacher, under a great deal of stress and overly sensitive to her surroundings, their most appropriate action was to wait and watch. The situation exploded.

Ms. Begbie has provided examples of how her behavior indicated that the conduct was unwelcome. She has also provided proof that, after notifying her supervisor, Dr. John Smith, of the harassment, the University's actions in response to her complaint were not immediate, responsive, or corrective. Clearly, if the University's response was corrective, the final incident regarding her class would not have occurred.

Merely watching an explosive situation is not an acceptable method of investigation or remediation. With no formal counseling or discipline after the complaint, MacKinnon was free to harass again. The University has shown discrimination in its treatment of Begbie.

Ruling:

The employer is found guilty of violating Section 703(m) of Title VII for discriminating against the Complainant on the basis of her sex.

F. Advice

A policy and procedure against sexual harassment is a must for every employer, including Evergreen State University. An effective sexual harassment policy must specifically address sexual harassment and alert employees to your interest in preventing and correcting this particular type of discrimination. The policy should provide for a receiver of complaints that is not the employee's supervisor.

All complaints received should be taken seriously and thoroughly investigated. Each claim of sexual harassment should be viewed as potentially valid until proven otherwise. The complaint, its investigation and results should also be held confidentially. The findings of the investigation and any action taken against the harasser, should be documented.

Having an effective policy statement and complaint system are vital in helping to insulate you from liability. It is also very important; however, that prompt and appropriate actions are taken if a problem exists. As you have witnessed, immediate and appropriate corrective action can be an employer's best defense.

In your policy statement, it should be emphasized that, as an employer, you do not condone and will not tolerate any acts of sexual harassment in the workplace. Your policy statement should be distributed to all employees, not just supervisory employees. Make clear the procedure for reporting incidents of sexual harassment and encourage employees to use the procedure if they feel they have been victims of harassment.

Training is also an important part of preventing sexual harassment. All employees should be trained on the issue of sexual harassment: your company's policy statement regarding sexual harassment, what types of behaviors are potentially harassing, the procedure for reporting sexual harassment, what the company will do with a sexual harassment claim once it is received.

When harassment is found, the harassing employee must be disciplined. Recognize that when an employee is guilty of harassing another employee on the basis of sex, that employee has actually violated a law, not just a company policy. Appropriate discipline should be evaluated by that standard.

Had you taken more immediate and appropriate corrective action, you would likely have prevented the situation from evolving to this point. Learn from this experience; become more proactive and develop policies and procedures regarding sexual harassment, train all of your employees on sexual harassment, and finally, thoroughly investigate every claim of sexual harassment received, making sure that immediate, appropriate and responsive disciplinary action is taken.