UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

RUFUS B. FRANKLIN, ***Civil No.: 94-CV-75C***

Plaintiff,

vs.

FRONTIER HOT DIP GALVANIZING, ***Plaintiff's Response to Defendant's Proposed Findings of Fact and Conclusions of Law***

Defendant.

PRELIMINARY STATEMENT

The submissions of the proposed findings of fact and conclusions of law of the parties in this case make a reader wonder if the parties are talking about the same case. To the defendant, this is simply a case of a termination of an employee who got into an altercation with a fellow employee. Defendant ignores much of the testimony offered by Plaintiff including a great deal of the testimony of Rufus Franklin and all of the testimony of Darnell and Patrick Garrett concerning working conditions at the plant and the attitude of management at the plant toward black employees. The defendant also ignores the fact that employees were segregated at the door of the plant into

groups of black workers who worked in the back, where even witnesses called by defendant agreed that the conditions were harder, hotter, dirtier and less favorable. It is also a fact that workers were segregated by race and that this was apparent to anyone newly arriving at the plant and confirmed by the testimony of Peters and Staniszewski. The black workers were in back and the white workers were in front. It is also an undisputed fact that with the exception of Clemmons and Rufus Franklin (who obtained his job only because he was the son-in-law of James Knight), the workers who had the higher wages and all the fringe benefits were white and the workers who were paid close to minimum wage with no fringe benefits were black.

Thus, the workers were segregated at the door, segregated inside the plant and the effect of all this was to discriminate against the black employees and in favor of the white employees. The evidence in this case shows that Frontier Hot Dip was run like a southern plantation before Sherman made his march.

Knight, who the defendant claims was a credible witness, testified that if there were no discrimination going on at Frontier, Rufus should have had a chance to be his replacement. He was not given that chance and the inference is inescapable that it was because Frontier management wanted white supervisors. They had not given James Knight his job and they did not intend

for any black worker to succeed him. The claims of the defendant that Abel was not a successor to Knight are pure malarkey. Knight was the superintendent according to the company records and so is Abel. The claim by the defendant that James Abel was more qualified than Rufus Franklin is more of the same.

There has been evidence admitted from which the Court could find serious infractions of Title VII, the failure to promote based on race and retaliatory, discriminatory discharge. The Court can also come to the same conclusions by analyzing the case in terms of presumptions and shifting burdens of production enunciated by the United States Supreme Court. Such an analysis is set forth below.

Franklin was denied Abel's job and he was fired for complaining to May concerning the unequal treatment given to blacks. No employer would fire his best worker who had an unblemished record over such a minor incident. The rules of the company did not require discharge and there is no record of a white employee being discharged under similar conditions. The action surprised everyone at the plant except the black workers. Frontier continued to refuse to reinstate Mr. Franklin and presented misleading and downright fraudulent testimony before hearing officers concerning the makeup of the workforce and the relationship of Dobo to Franklin, claiming that Dobo was his

supervisor. Because of Frontier's refusal to reinstate Franklin and to give him an opportunity to replace Knight, the damages suffered by Franklin are substantial and he should be made whole, including reinstatement to the supervisory position held by Abel with all benefits. The fact that the damages are substantial should not deter this Court from making a complete award including reinstatement.

LEGAL BACKGROUND

Race is an undeniable fact. No one can honestly say that they have never permitted race to affect how they have treated an individual at some point in their lives. Likewise, those who suffer from the effects of racism typically learn that certain battles are not worth fighting; that not everyone is even capable of being completely fair and that the world will never be cured of ignorance.

Our legislative and judicial systems have acknowledged that the government's role in preventing such inevitable unfairness must be a limited one. They have narrowly defined the circumstances which will trigger judicial intervention. One such circumstance involves racism in the workplace.

Section 2000e-2(a)(2) of Title VII, 42 U.S.C. 2000e-2(a)(2) makes it an unlawful employment practice for an employer,

> to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a)(2). It is also an unlawful employment practice for an employer,

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

42 U.S.C. § 2000e-2(a)(1).

In some cases racial discrimination may exist even in the absence of conscious discriminatory intent.[1] Indeed, "[p]rohibited race discrimination includes not only overt discrimination, but also practices and procedures which are neutral in form but discriminatory in operation, i.e. disparate impact discrimination."[2] This case involves allegations of disparate impact discrimination, as well as disparate treatment

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[1] Nash v. Consolidated City of Jacksonville, 895 F.Supp. 1536, 1540 (M.D. Fla. 1995) (holding "good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as `built in headwinds' for minority groups and are unrelated to measuring job capability" (citing Griggs v. Duke Power Co., 401 U.S. 424 (1971)).

[2] Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 645 (1989).

discrimination. Specifically, the allegations include: discriminatory classification of applicants and employees, unequal employment conditions and compensation, discriminatory failure to promote, discriminatory discharge and retaliatory discharge. All but the wrongful termination claims can be proven by reference to both disparate impact and disparate treatment theories. Although Plaintiff believes that discriminatory intent played a role in the discrimination he has suffered, contrary to the suggestion in Defendant's proposed conclusions of law,[3] Plaintiff is not limited to such a theory of liability.[4]

This case like most Title VII discrimination cases involves allegations of intentional discrimination. It is very difficult for a plaintiff to obtain evidence of a defendant's state of mind to show racial or other improper motive for action directed at a protected group. This creates a severe problem of proof for the plaintiff. Seldom does a defendant admit directly or indirectly an improper motive. In some cases, where a defendant successfully prevents his discriminatory motive from being articulated in admissible evidence, the court is required to

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[3] Defendant's Conclusions of Law ¶ H.

[4] Box v. A&P Tea Co., 772 F.2d 1372, 1375 (7th Cir. 1985) (holding "[a] plaintiff can bring a Title VII action in Federal court only for discrimination `like or reasonably related' to the conduct identified by the plaintiff in her EEOC complaint").

dismiss the plaintiff's action based on that lack of evidence. Typically Plaintiff is required to base his case on indirect evidence of circumstances suggesting unequal treatment of the protected group. However, certain actions directly betray the motives underlying those actions and evidence of such actions in some cases provides the basis for a finding of discriminatory intent. Yet, such cases are more the exception than the rule.

In order to address this problem of proof, courts have developed a burden shifting mechanism which requires the defendant, under certain circumstances, to provide an explanation for the conduct at issue such that the explanation itself becomes the evidence of intent necessary to the finder of fact's proper determination. Under what is often referred to as the McDonnell Douglas scheme,[5] a plaintiff must establish a prima facie case of discrimination under the statute at issue. Different circumstances and different statutes require the establishment of different elements on the prima facie case.[6] The establishment of the prima facie case creates, in effect, a presumption of

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[5] McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

[6] St. Mary's Honor Center v. Hicks, 509 U.S. 502, 125 L. Ed.2d 407 (1993) (citing McDonnell Douglas, 411 U.S. at 802 n. 13).

unlawful discrimination.[7] The presumption "produces a required conclusion in the absence of explanation."[8] That is, intentional discrimination must be found if the defendant fails to produce admissible evidence which, "if believed by the finder of fact, would support a finding that unlawful discrimination was not the cause of the employment action."[9] Defendant's failure to meet the prima facie case with admissible evidence leads to a verdict for plaintiff.[10]

If the defendant produces the required evidence of legitimate motivation, even if such evidence is not believed to provide the true reason for the questioned action, the presumption falls out of the case.[11] At this point the problem of proof has been sufficiently mitigated because the defendant's explanation, if credited by the finder of fact, rebuts the presumption and if not credited by the finder of fact can serve as evidence betraying the discriminatory motive. The scheme provides the plaintiff with a measure of process in order to "sharpen the inquiry into the elusive factual question of

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[7] Id. at 416.

[8] Id.

[9] Id. (emphasis deleted).

[10] Id. at 417.

[11] Id. at 416.

intentional discrimination."[12] The explanation required is valuable in and of itself whether true or false because of the potential insight it affords the finder of fact into the thought process of the defendant.

It is important not to overemphasize the importance of the McDonnell Douglas scheme.[13] Even before McDonnell Douglas was decided and plaintiffs were provided with a crutch on which to steady their case in the face of a defendant who refuses to acknowledge or in some cases may be unaware that its motivation is racial prejudice, violations of Title VII were proved by reference to circumstantial evidence alone. That is to say, simply because the facts of a certain case do not fit conveniently into one or another of the judicially created "prima facie" cases of race discrimination does not end the inquiry. The old fashioned method of proving discriminatory motive by a simple preponderance of the available competent circumstantial evidence, although suffering from disuse, is not only still

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[12] Id. at 415.

[13] Box v. A&P Tea Co., 772 F.3d at 1381 (holding "The statute [Title VII] prohibits in sweeping terms segregation. ... That adversely affects the individual employee. It says nothing about ... the elements of a prima facie case; such concepts are judicially created tools of analysis, not the ends of the statute. Where a peculiar set of facts renders the use of these tools inapt, the tool, not the statute, must give way.") (citations omitted).

available but is the preferred method.[14] The use of a judicially approved "prima facie" case of race discrimination under the McDonnell Douglas scheme to shift a burden of production to defendants, is unnecessary in a case such as this one where the aggregate of the competent circumstantial evidence points so convincingly to discrimination. It is important to remember the McDonnell Douglas scheme was designed to make it easier for a plaintiff to meet her burden of proof in the face of a defendant's silence, not to provide defendant with a roadmap to discrimination exempt from legal remedy under Title VII.[15]

Finally, section 2000e-3 provides the definition applicable to an allegation of retaliatory discharge:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter.

42 U.S.C. § 2000e-3(a). As there are separate theories that can provide a basis for a cause of action for discrimination, there are also separate theories that address termination. A plaintiff can be wrongfully terminated where that termination is based on discriminatory intent under section 2000e-2(a)(1) or the

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[14] St. Mary's, 509 U.S. 502 (1993).

[15] Box at 1381.

Plaintiff can be wrongfully terminated based on his opposition to an unlawful employment practice.

CLASSIFICATIONS BASED ON RACE[16]

When James Knight started working for Frontier in 1949, the company was using Substitute Personnel Services (SPS), a temporary employment service, as a source of temporary employees for hourly jobs.[17] When Mr. Franklin first applied to Frontier for a job, he filled out an application at the request of James Knight his future father-in-law at the time.[18] He was hired to work at Frontier but was hired through SPS not Frontier.[19] According to Lewis Pierce and James Knight, it was a normal employment practice of Frontier to hire employees from the ranks of the SPS temporary employees.[20] When people asked James Knight how to get a job at Frontier, he sent them down to SPS.[21] James

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[16] For the purposes of the analysis in this responding brief, we have attempted to take mucyh of defendant's testimony as true in order to show that, in spite of defendant's suggestion to the contrary, this is not simply a case of the credibility of witnesses and that defendant's testimony provides substantial grounds for a finding for plaintiff.

[17] Knight, 316, 320.

[18] Franklin, 24.

[19] Franklin, 26.

[20] Franklin, 261; Knight, 469.

[21] Knight, 544-6.

Knight sent Patrick Garrett, Darnell Garrett and Kalvin Knight, all of whom are black, to SPS and each returned to work as SPS temporary employees for Frontier.[22] No name of a white Frontier applicant who was sent by Frontier to SPS to obtain a job as an SPS temporary worker at Frontier is ever offered by defendant. Of these temporary employees only Kalvin Knight later became an employee of Frontier.[23]

James Knight could not name a single black regular hourly employee hired by Frontier, who did not first work for SPS, either for the time period during which Rufus Franklin worked at Frontier from 1982 until 1990, or for the period prior to Rufus Franklin's employment and after Mr. May and Mr. Pierce first purchased stock in Frontier.[24] Although for this earlier period he suggested there was such an employee, Mr. Knight was unable to give a name.[25] When Mr. Knight provided a name, "Rudy Davis", he explained that he did not remember if that employee first worked for SPS.[26] Gene Clemmons did not know that some white employees had not worked at SPS prior to becoming a regular hourly employee

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[22] Knight, 545-6

[23] P. Garrett, 410-12.

[24] Knight, 547-9.

[25] Knight, 547-9.

[26] Knight, 549.

at Frontier.[27] Mr. Knight named one white employee who had worked as a temporary prior to working at Frontier, Roy Niles.[28]

Rufus Franklin testified that blacks were not hired off-the-street.[29] Nowhere in the record is this statement contradicted with the name of a black employee that was hired off-the-street. The testimony of both Clemmons and Knight supports this contention.[30] Mr. Franklin also testified that white employees were hired off-the-street.[31] White employees were hired off-the-street.[32] The white employees hired off-the-street included Michael Oshirak, Gary Miller, Robert Bond, Chuck Miller, Ed Dobo, James Abel, David Peters and Anthony Staniszewski.[33] Nowhere in the record is this testimony contradicted. Indeed, the evidence on the subject indicates that the only white employee hired after working for SPS, instead of directly off-the-street, is Roy

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[27] Clemmons, 763.

[28] Knight, 547.

[29] Franklin, 47.

[30] Clemmons, 762-3; Knight, 547-9. It is useful to note that defendant has asked that the court credit the testimony of Clemmons and Knight. On this issue we would join in that request. Defendant's Findings of Fact ¶¶ 104-5, 109-11).

[31] Franklin, 48.

[32] Franklin, 47-50, 132, 137-9, 229-32.

[33] Franklin, 48-9, 137-9, 229-32.

Niles.[34] At the same time no black employees were hired by Frontier off-the-street, in spite of the fact that many black individuals were qualified and wanted to work at Frontier, including Patrick Garrett, Darnell Garrett and Kalvin Knight.[35] Rufus Franklin applied for a job with Frontier, but was sent to SPS by some Frontier employee other than James Knight.[36]

In order to establish a prima facie case of disparate impact discrimination, plaintiffs must,

> (1) identify a specific employment practice and (2) offer reliable statistical evidence of deficiencies sufficiently substantial to show that the practice has caused the exclusion of applicants because of their membership in a protected group.[37]

The clear indication from this evidence is that there was a regular business practice of sending applicants to SPS in order that they would return and work at Frontier through SPS and later hiring employees from the ranks of the SPS temporary employees.[38]

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[34] Knight, 547.

[35] Knight, 544-6.

[36] Franklin, 24-6, 121-2; Knight 546.

[37] Jones v. Pepsi-Cola Metropolitan Bottling Co., Inc., 871 F. Supp. 305, 309 (E.D. Mich. 1994).

[38] It is plaintiff's position that blacks were almost never hired from the ranks of the SPS temporary employees but the Court need not resolve this dispute because defendant's suggestion that it was a regular business practice to hire black and white regular employees from the ranks of the SPS temporary employees does not absolve them from liability in this case but

As is set out in further detail below, the use of SPS in this manner resulted in substantial deficiencies in employment opportunities and conditions for black workers at Frontier. If the practice was evenly applied the theory that would prevent the resulting deficiencies is a disparate impact theory. If the practice is unevenly applied and the disparate impact of the uneven application cannot be explained except by reference to race then the appropriate theory is a disparate treatment theory.[39] In any event the important question is whether being black is a significant disadvantage to all or any of the workers at Frontier. If all the employees at Frontier are suffering racial discrimination then Plaintiff has suffered racial discrimination. Were Plaintiff the only employee who ever suffered racial discrimination at the hands of Frontier, equal treatment of other black employees would not make up for unequal treatment of that one black employee.

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instead forms the basis therefore.

[39] Walker v. N.Y.S. Office of Mental Health, 865 F. Supp. 124, 125 (S.D.N.Y. 1994) (citing Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252, 269 (1977) for the proposition, "[w]here a policy be it formal or informal is 'not consistently applied . . . [but in a particular instance is] invoked with a strictness . . . that could only demonstrate some underlying motive,' an adverse inference can be drawn").

It is important to note that the fact that a black man, James Knight, participated in and indeed probably perpetuated the disparate treatment of black potential employees through this discriminatory classification scheme, in no way diminishes the discriminatory effect of this policy or even the discriminatory intent that underlies the policy. Mr. Knight was carrying out a policy that was orchestrated by Frontier through Lewis Pierce and James May, not necessarily by explicit directive but by subtle conduct that is not best portrayed in the direct evidence, although there is considerable direct evidence of discriminatory intent in the record, but in equally competent but uncontroverted direct circumstantial and indirect circumstantial evidence.

Take, for example, Exhibit 36 which was prepared by defendant and indicates the racial makeup of employees of Frontier from 1984-90. In spite of certain reservations, which we expressed at trial, concerning this document, we will take it on its face for the purposes of this short analysis. As the uncontradicted evidence of SPS employment detailed above indicates, of the white employees listed on exhibit 36 only Roy Niles worked as a temporary for SPS prior to being hired as an employee of Frontier. None of the black employees listed on exhibit 36 were hired off-the-street. All worked as SPS

temporaries prior to being hired as regular hourly employees at Frontier.

If we take the average number of regular or so-called permanent hourly white employees over the 1984-90 time period and the average of regular hourly black employees we get an average work force for the time period of 12.43 employees, 4.43 of whom were black.[40] That is a work force of which **36%** is black and **64%** is white. If this practice of using SPS as a conduit for Frontier's job applicants and as a pool from which to hire regular hourly employees did not have a significant disparate impact or was not applied in a discriminatory manner, one would expect that there would not be a significantly different percentage of white employees who had worked at SPS prior to working at Frontier than the percentage of black employees who worked at SPS prior to working at Frontier. However, of the black regular employees over that seven year period not **36%**, but

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[40] These numbers are offered in an effort at persuasion by counsel applying his best grammar school math to the raw evidence presented by defendants. See Carpenter v. Stephen F. Austin State University, 706 F.2d 608 (5th Cir. 1983) (holding "[i]n some cases, statistical proof of a substantial or `gross' disparity in treatment of protected and unprotected groups may make out the plaintiff's prima facie case and justify the inference of discriminatory animus. ... If the statistical disparity is deficient, the [plaintiff] may `buttress' its case with evidence of a `history of discrimination, and opportunities to discriminate that exist in the employer's decision making processes') (citations omitted).

100% worked as SPS "temporaries" prior to working at Frontier as regular employees and of the white regular employees not **64%**, but **12.5%** worked as SPS employees prior to working as regular employees at Frontier.

Having been required to work at Frontier through SPS has "deprive[d] or tend[ed] to deprive" all the black employees, including Rufus Franklin, of higher wages and benefits including pension contributions. Furthermore, a requirement that an employee work as a temporary at minimum wage prior to becoming a regular so-called permanent employee would certainly interfere with that employee's opportunities for advancement in the future, following him like a cloud throughout his entire tenure with the company. This employment practice, in effect, stunted the professional growth of each black employee of Frontier including Rufus Franklin, not just while they were SPS "temporary" employees, but throughout the entire length of their employment with the company. See note **48** infra and accompanying text.

Frontier should not be heard to complain that it would have paid these black workers minimum wage from the beginning of their employment even absent the discriminatory scheme. All but one of the white employees were paid Frontier wages, not minimum wage, from the beginning of their tenure at Frontier. It is important to remember that the use of SPS for temporary employees dates

back at least to 1949 and Frontier directed certain applicants to SPS.

This information, on its own, even if it is not sufficient to convince a Court to find by a preponderance of the evidence that Frontier's use of SPS services constitutes discriminatory classification under section 2000e-2(a)(2), which we believe it does, at the very least constitutes the necessary evidence of disparate treatment to establish a prima facie case of discrimination and require Frontier to explain why **100%** of black employees must first work at SPS for minimum wage with no benefits while of the white employees only **12.5%** must follow this route to employment with Frontier.[41]

It is not necessary to be a statistician to understand that coincidence cannot fully explain this discrepancy and that the true explanation is likely race discrimination. It is also important to note that "conduct even if time-barred as a separate

[41] Marsh v. Eaton Corp., 639 F.2d 328 (6th Cir. 1981) (reversing the trial court's dismissal of the prima facie case based on statistical evidence and holding that even statistics lacking in precision and based on a small sample size were enough to establish a prima facie case of sex-based discrimination where **100%** of females were placed in one job classification and only **52.9%** of men were placed in the same job classification over a four year period).

ground for relief, can shed light on claims which are within applicable time limits."[42]

Frontier has failed to offer, nor could it offer, a legitimate reason for the existence of this stark statistical disparity. Frontier's failure to produce any evidence constitutes a failure to meet its burden of production and such a failure can form the basis for a judgment for plaintiff.[43]

UNEQUAL OPPORTUNITY FOR ADVANCEMENT

Furthermore, as is made crystal clear in Kellam v. Snelling Personnel Services, 866 F. Supp. 812 (D. Del. 1994), the SPS temporary employees at issue in this case were employees of Frontier for purposes of Title VII.[44]

In light of this fact it is useful to examine Exhibit 44 which was prepared by defendant and lists SPS personnel as of April 3, 1990 and June 13, 1990. According to defendant, Frontier allegedly typically hired regular hourly employees from

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[42] Walker v. N.Y.S. Office of Mental Health, 865 F. Supp. 124, 125 (S.D.N.Y. 1994).

[43] St. Mary's at 417.

[44] Kellam at 816 (applying the common law tests and holding that the temporary employees at issue in that case were not employees of the employment service who sent them to work as temporaries at other businesses but employees of the businesses to whom they were sent within the meaning of Title VII).

the ranks of the SPS temporary hourly employees.[45] Under normal circumstances, one would expect this procedure to result in a workforce where the ratio or percentage of white SPS hourly workers to black SPS hourly workers would be similar to the ratio of white regular hourly workers to black regular hourly workers and that those ratios would be similar to the ratio of the total number of white hourly workers to the total number of black hourly workers.

Looking first at the April 3, 1990 list on the first page of Exhibit 44, there are 16 black SPS workers, five white SPS workers and one Hispanic SPS worker.[46] Putting this information together with the information provided in Exhibit 36 concerning regular hourly employees there were 10 white regular hourly employees and 6 black regular hourly employees in 1990, the sum of which is 15 white hourly employees and 22 black hourly employees out of 38 total employees.

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[45] Pierce, 261; May, 386-7; Knight, 467-70, 483-4, 493-4 544-9, 551-4; May, 600-02, 626, 641-2; Plummer, 787-8. Plaintiff disputes this; the only black persons hired from SPS employees were Franklin, Clemons and Lamont Candy before 1990. Frontier made it its business not to hire SPS employees in general (see page 12 *supra*). Instead, its practice was to hire whites off-the-street even though black SPS workers had worked there for years.

[46] Again, we take the exhibit on its face for the purposes of this analysis.

These numbers would lead one to expect that since 15 of 38 or **39.5%** of the hourly workers are white that about **39.5%** of the hourly workers in the better jobs as permanent employees with benefits and higher pay would be white. Instead, not **39.5%** but 10 of 16 or **62.5%** of the better jobs are filled with white workers. Inversely, one would expect that since 22 of the hourly workers are black, 22 of 38 or **58%** of the hourly employees with the better higher paying jobs would be black. Instead, not **58%** but 6 of 16 or **37.5%** of those jobs are filled with black workers.[47]

Turning to the June 13, 1990 list, there were 19 black SPS workers, 8 white SPS workers and one Hispanic SPS worker.[48] Together with the workers listed on Exhibit 36, there were 28 SPS workers and 16 regular hourly employees or 44 total employees at that time. Of the total employees, 18 of 44 or **41%** are white. Of the white employees one would expect that in the absence of racial discrimination a similar percentage would be reflected in

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[47] Of course, three of the black regular employees were hired June 11, 1990, half way through the year and plaintiff was terminated the next day and therefore was not employed by Frontier for half the year. Taking these factors into account would change the percentage from 6 of 16 to 4 of 16 black employees (i.e. 4 black employees, each of whom worked for six months results in the equivalent of 2 employees for the full year) or 25% black employees instead of 58%.

[48] Exhibit 44 at 2.

the better jobs as regular hourly employees than in the lower paying temporary jobs. Instead, not **41%**, but 10 of 16 or **62.5%**, of the better jobs are filled by whites, only one of whom was required to work for SPS services prior to being employed as a regular hourly employee,[49] while only 8 our of 28 or **29%** of the temps were white.

Of the black hourly employees 24 of 44 total employees or **54%** are black. Therefore, one would expect that such a proportion would be reflected in the distribution of the better permanent hourly jobs as well as the lower paying temporary jobs. Instead, the number of blacks working as regular employees is not **54%** but 6 of 16 or **37.5%**[50] and the number of blacks in the temporary jobs is not **54%** but 19 of 28 or **68%**.

These numbers together with the numbers concerning SPS service show that, in spite of the suggestion that hourly employees are hired from the ranks of the SPS temporary workers, for some reason white people have considerably better access to the good hourly unskilled jobs at Frontier. This information, on its own, is sufficient to convince a Court to find by a

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[49] This is further circumstantial evidence that having worked for SPS tends to contaminate even a white worker's future opportunities with the company.

[50] Again, based on time of service, the percentage would not be 37.5% but 4 of 16 or 25% instead of the expected 54%.

preponderance of the evidence that Frontier's use of SPS services constitutes discriminatory classification under section 2000e-2(a)(2), and, at the very least constitutes the necessary evidence of disparate impact or disparate treatment to establish a prima facie case of discrimination. Frontier should therefore be required to explain why black employees tend to be classified and segregated, in that they tend to be hired only through SPS and, once they begin working for Frontier as SPS hourly workers, they tend to remain SPS hourly workers making minimum wage and are seldom given jobs as regular hourly employees, where they would make better wages and receive benefits, not to mention upper level supervisory positions.[51]

Frontier has not offered, and could not offer any legitimate business reason or other innocent motive for the discriminatory scheme of placing and promoting black and white workers in such a disproportionate manner. Defendant fails to offer evidence that, if credited by the Court, would rebut the presumption raised by the prima facie proof of race discrimination, at their own peril. Indeed, they have failed to produce any proof that would tend to explain this striking statistical disparity, much less proof which, if credited by a finder of fact would be sufficient to

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[51] Marsh v. Eaton Corp., 639 F.2d 328 (6th Cir. 1981).

rebut the presumption. Their failure to put forward such proof is a failure to carry their burden of production, a very minimal burden, but a real one, the failure to comply with which should result in judgment for plaintiff.[52]

The classification encountered by Rufus Franklin and the other black employees as applicants to Frontier was only the beginning. After those employees were hired by SPS to work at Frontier as temporaries they were further classified at the door of the Frontier facility. Generally, blacks worked in the back of the plant[53] where the working conditions were harsh[54] and whites worked in the front where conditions were much better. The locker room in the back was run down[55] where the one in front was clean.[56] After the black superintendent, James Knight who worked in the back, retired from frontier with no symbolic acknowledgement from the company whatsoever of his more than forty years of 16 hour per day service (no watch, no party), new

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[52] St. Mary's at 417.

[53] Knight, 537-8; Plummer, 787; Staniszewski, 771; Peters, 778; May, 665)

[54] Knight, 498; Clemmons, 761; D. Garnett, 289-90; P. Garrett, 413-5).

[55] Franklin, 57-8; D. Garrett, 286-7; P. Garrett, 402-3, 416, 420-1).

[56] Franklin, 60.

offices were constructed for the white employees who replaced him.[57]

EQUAL PAY

The evidence also clearly indicates that the temporary employees performed the same job duties as many of the regular hourly employees for considerably lower wages. In combination with the disparity between black regular hourly employees and black temporary employees this fact forms the basis of an equal pay claim. Although there may exist a certain right to hire temporary workers and pay them less than workers doing the same jobs for the same supervisors,[58] when that technique is used in such a way as to prevent qualified black workers from earning the regular wage with benefits while white workers are not similarly disadvantaged, such evidence can form the basis of either a disparate impact claim or a disparate treatment claim.[59]

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[57] Plummer, 788; Franklin, 37; D. Garrett, 282, 304; P. Garrett, 40.

[58] This is currently a hotly contested issue which is being re-examined by the Ninth Circuit in an en banc rehearing of a case concerning benefits refused temporary workers by Microsoft Corp. Vizcaino v. Microsoft Corp., 97 F.3d 1187 (9th Cir. 1996) (reh'g en banc ordered).

[59] Jones v. Pepsi-Cola Metropolitan Bottling Co., Inc., 871 F. Supp. 305, 309 (E.D. Mich. 1994).

Again, once plaintiffs have produced proof forming a basis for a finding that they have established a prima facie case under the standard articulated above, the defendants must produce proof which, if believed by the finder of fact, would rebut the presumption of discrimination.[60] This they have not and cannot do. The suggestion is that the use of the temporary service is necessary to save money and to provide a source of temporary workers. However, when you take this explanation as true it does not explain the racial disparity. The further explanation that the sole source of the racial disparity is the temporary service

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[60] The Court can determine for itself the reliability of the statistics we have developed from the numbers submitted to the Court by the defendants. This is clearly not an instance where an expert would be necessary to account for statistical makeup of the population at large or the population of available applicants. Our statistics are based on the workforce as a whole as compared with subsets of that workforce. See Nash v. Consolidated City of Jacksonville, 895 F.Supp. 1536 (M.D. Fla. 1995) (holding [W]hen an organization, such as a Fire Department, promotes from within, the relevant labor pool is the actual group of employees eligible for promotion and those actually promoted.) There are no variables to account for as in some of the reported cases. See Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989). We are comparing the numbers of workers who were actually hired to numbers of workers who were actually hired (apples to apples or total apples to green apples total apples to red apples). Frontier cannot suggest that these apparently separate hiring avenues, through SPS and off-the-street, account for any imbalance. Black workers come in off the street and are sent to SPS. White workers are hired off-the-street. If only white workers applied at Frontier that might present a different situation. Here, black workers tried to apply and were sent to SPS. White workers tried to apply and certain of them were hired.

itself. This explanation is internally inconsistent in that defendant's proof is that they routinely directed applicants to the temporary service thus affecting through their own conduct the makeup of the temporary employees ultimately sent to Frontier. White applicants were not always sent to SPS and black applicants were. This is reinforced by the testimony concerning the arrangement that Frontier had with the owner of the temporary service.[61] They would send applicants with the understanding that those applicants would be sent to Frontier.[62] This analysis does not go to the credibility of defendant's proof, which would be improper under the very lax burden of production standard, but to whether the proof, if believed, would rebut the prima facie case. This proof is insufficient on its face.

CONTINUING VIOLATION

To establish that a claim falls within the continuing violation theory, a Title VII plaintiff must do two things:

> (1) he must demonstrate that at least one act occurred within the filing period for the crucial question is whether any present violation exists and (2) plaintiff must establish ... more than the occurrence of isolated or sporadic acts ... of discrimination for the relevant distinction is between the occurrence of isolated,

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[61] Knight, 482-3.

[62] Knight, 483.

> intermittent acts of discrimination and a persistent, ongoing pattern.[63]

The above analysis provides insight into the discriminatory practice of using SPS in a way that classified, segregated and limited Frontier employees in violation of Section 2000e-2(a)(2). The evidence suggests that this practice began sometime prior to 1949 and continues to this day.

FAILURE TO PROMOTE

With this background it is possible to begin to understand the conditions under which black employees worked at Frontier. The subtle oppression was unspoken and tolerated to varying degrees. Eugene Clemmons, typically the only black employee working up front, was quite satisfied with his place in the company. Mr. Clemmons did not appreciate the existence of a racially segregated work environment.[64] However, it is important to acknowledge that simply because every black employee did not feel the same sting of the racism that pervaded the work environment, does not mean that such racism did not exist. Just because Mr. May and Mr. Lewis were nice to, maybe even counted Mr. Clemmons as a friend, in no way changes the real

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[63] West v. Philadelphia Elec. Co., 45 F.3d 744 (3d Cir. 1995).

[64] Clemmons, 751-2.

discrimination encountered by the remaining work force. Bigotry is no more consistent than other emotions.

Mr. James Knight preferred to work his double shift. He enjoyed his authority over the back of the plant.[65] He was enterprising, sold refreshments to the workers in the back[66] and was able to obtain regular hourly positions for members of his family such as Rufus Franklin.[67] He complained that black workers were being unfairly treated only once in connection with the unequal distribution of holiday turkeys and hams.[68] Such overt discrimination he would not tolerate. He did not complain about working conditions.[69] He did his job, worked 16 hours a day and received a $90,000 buyout at retirement.[70] One might suggest that in a way he lived his own version of the America dream at Frontier. He worked hard, almost never complaining or playing the victim and made a good living in the face of adversity in the form of ignorance and bigotry. He appears to

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[65] May, 359-60.

[66] Knight, 515.

[67] Knight, 322.

[68] Knight, 477, 531. We do not expect this Court to decide this case on the basis of turkeys and hams.

[69] May, 360.

[70] Knight, 464,5, 566.

have known his place in the Frontier operation and he was satisfied with that position.

Rufus Franklin, like James Knight, worked hard, was a good employee[71] and never complained about the unfairness that he encountered in his position at Frontier.[72] He always arrived to work on time[73] and worked 70 hour weeks. His only desire was to follow in his father-in-law's footsteps, to be promoted to the job of superintendendent, a job for which he was uniquely qualified. He is not a crusader for racial equality, but rather a man more than willing to endure the ignorance and bigotry that he encounters every day. It was only upon being passed over for the one managerial position that he dared to hope for at Frontier, that he began to actually confront Frontier management.

JAMES KNIGHT'S DEPARTURE

Rufus Franklin was the best qualified hourly employee in the few years before James Knight's retirement.[74] He acted as supervisor in James Knight's absence[75] and worked 70 hour weeks.[76]

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[71] Clemmons, 759; Pierce, 255-6; May, 362; Knight, 494.

[72] Franklin, 182-3.

[73] Knight, 494, 332.

[74] Knight, 343, 346.

[75] Knight, 327-8.

[76] Knight, 494.

The most remarkable aspect of Mr. Knight's position was the hours he worked and the conditions under which he worked those hours. He worked 16 hours a day as the foreman of two shifts in the foundry which was extremely cold in the winter (requiring a fire in a 55 gal. drum to help warm the employees as they worked)[77] and extremely hot in the summer. Similarly Rufus Franklin worked 70-hour weeks under these same conditions acting as a welder after his regular shift.[78] Although Knight was frequently involved in hiring decisions, Mr. May and Mr. Pierce set about finding a replacement for Mr. Knight without consulting Mr. Knight or posting the position so that Frontier employees could apply.[79] They hired Mr. Abel who they knew because he had worked for another company but had been "pushed out" of that job.[80] Mr. Abel was given the title formerly held by Mr. Knight and set about learning about the Frontier Facility.[81] At this point, several months prior to Mr. Knight's retirement, it was not common knowledge throughout the plant that Mr. Abel would be

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[77] Knight, 572-4.

[78] Knight, 494.

[79] May, 375, 608, 668; Knight, 523-4; 329-30, 342.

[80] May, 606, 670-2.

[81] Plaintiff's Exhibits 45, 46.

replacing Mr. Knight upon his retirement.[82] Mr. Franklin did not know that Mr. Abel had been hired to replace Mr. Knight.[83]

One of Mr. Abel's duties as the new Superintendent, assigned by Mr. May and Mr. Pierce, was to hire two new A level supervisors who would take on some of Mr. Knight's responsibilities.[84] A sign-up sheet was posted for these positions on or about March 8, 1990.[85] Mr. Oshirak, Mr. Franklin and Mr. Clemmons were allegedly offered these positions but Mr. Clemmons explained that he signed up for the job as a joke because moving from a position in the front of the plant to one requiring considerably more work in the rear of the plant was worth much more than the additional $2 per hour.[86]Mr. Franklin testified that he never accepted or declined the position, nor was he interviewed for it.[87]

According to the defendant, Mr. Abel had a ten minute meeting with Mr. Franklin in the galvanizing area where he told

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[82] Franklin, 152.

[83] Franklin, 152.

[84] May, 364-5.

[85] Franklin, 233.

[86] Clemmons, 764-5.

[87] Franklin, 233-5.

him that the pay increase would only be $2.00/hour[88] which would only be a dollar more than he was making. Mr. Franklin then declined the offer.[89] Mr. Franklin then requested that he be permitted to meet directly with Mr. May[90] (**Confrontation Number One with Abel**). He did meet with Mr. May (**Confrontation Number One with Mr. May**).[91] Mr. Franklin was again offered the position, but declined because he felt the position should include a $3.00/hour raise above the previous rate, not $2.00/hour.[92] Mr. May explained that the $3.00/hour raise was "outside the guidelines for the A-level supervisors."[93]

HIRING OF STANISZEWSKI AND PETERS AS A-LEVEL SUPERVISORS

Mr. Staniszewski and Mr. Peters, who are both white, were hired off-the-street in April and May of 1990 respectively as A-level supervisors.[94] They were allegedly going to be making $8.50/hour or $30,000/year for a 40 hour work week.[95] Mr. Abel

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[88] Abel, 705-6.

[89] Abel, 686.

[90] Abel, 686-7.

[91] Franklin, 373-4.

[92] May, 612.

[93] May, 612.

[94] Abel, 769.

[95] Franklin, 371, 376, 769.

testified that on an occasion in May of 1990 he asked Mr. Franklin to explain his job duties to Mr. Staniszewski and Mr. Franklin became upset because he did not want to train Staniszewski[96] (**Confrontation Number Two with Mr. Abel**).

RETIREMENT OF JAMES KNIGHT, JR.

James Knight retired on May 30, 1990.[97] There was no party at Frontier to celebrate Mr. Knight's retirement. Instead, that day his office was cleaned out and construction of a new office began.[98] The roof and ceiling were rebuilt and the office was enlarged, refurbished and updated to accommodate Mr. Abel, Mr. Peters and Mr. Staniszewski, the new white supervisors.[99]

FINAL CONFRONTATION WITH ABEL AND MAY

The next day Mr. Abel asked Mr. Franklin to explain how to complete the production sheets (**Confrontation Number Three with Mr. Abel**).[100] Mr. Franklin became very upset, went directly to Mr. May's office and complained that he should not have to instruct Abel and that he, Mr. Franklin, should have been

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[96] Abel, 269.

[97] Knight, 465.

[98] Franklin, 68-72.

[99] Franklin, 68-72.

[100] Franklin, 86-8, 233.

promoted to Mr. Knight's former position.[101] May stated that Mr. Franklin was no longer a member of the Frontier family at that meeting (**Confrontation Number Two with Mr. May**).[102]

HIRING OF THREE BLACK WORKERS IN PREPARATION FOR DISCRIMINATION CHARGES FROM MR. FRANKLIN

After this final confrontation, it is plaintiff's position that defendant set out to prepare themselves for anticipated trouble from Mr. Franklin in the form of some kind of complaint of civil rights violations. Mr. Abel testifies that he gave three black individuals applications and set up physicals for them.[103] He testified first "I believe it was the last week of May" and then "[o]r first week of June."[104] It is plaintiff's position that the timing of these events cannot be explained by simple coincidence. Mr. Franklin challenged the failure to promote him on numerous occasions before Mr. Abel and Mr. May and after the most serious of these confrontations, Mr. Abel took the step of hiring three black temporaries as regular hourly Frontier employees. These individuals became regular hourly employees of

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[101] Franklin, 87-90.

[102] Franklin, 88-9.

[103] Abel, 691.

[104] Abel, 691.

Frontier on June 11, 1990 according to Mr. Abel one day before Mr. Franklin was fired.[105]

CONFRONTATION WITH MR. DOBO

This further background prepares us to understand the confrontation between Mr. Franklin and Mr. Dobo. Mr. Franklin was feeling the pressure. First, Mr. Franklin realized that Mr. Abel was hired to take on certain tasks formally performed by Mr. Knight without any notice to Mr. Franklin that would permit him to make an application for the position. Mr. Franklin next realized that the A-level supervisory positions would pay a marginally higher hourly rate than he was currently being paid, and in the final analysis, considerably less because he would have to give up his overtime welding position. Staniszewski and Peters would be taking up the remaining tasks formally performed by Mr. Knight.[106] Mr. Abel was asking Mr. Franklin to instruct him as well as Mr. Peters and Mr. Staniszewski on his job. Complaints about Mr. Franklin's work began surfacing for the first time in his six years at Frontier.[107] Mr. Franklin knew that Frontier was looking for an excuse to fire him. When Mr.

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[105] Abel, 691.

[106] Franklin, 69.

[107] Franklin, 89-90.

Dobo made a comment about Mr. Franklin's work performance,[108] Mr. Franklin responded.[109] The exact character of his response is in dispute.

One thing is clear, however, Mr. Franklin would not have been fired if he had not confronted Mr. May and Mr. Lewis Pierce[110] about the failure to promote him to the position which Mr. Knight left on May 30, 1990. Mr. Dobo had a work history replete with disciplinary notices.[111] On several occasions he arrived at work and yet was unable to function on the job.[112] He was disciplined on these occasions.[113] One important question becomes whether an employer who puts up with on the job drunkenness would have fired its undisputed best employee, who had never been disciplined, for an argument with another employee, which left the other participant Mr. Dobo, "snickering" at Mr. Franklin.[114] And would the other participant, Mr. Dobo, who is described as a `hot head,' in the altercation, be

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[108] Franklin, 90-2.

[109] Franklin, 94.

[110] See Exhibit 23 at 3.

[111] Plaintiff's Exhibit 13.

[112] Franklin, 100-1.

[113] Plaintiff's Exhibit 13.

[114] Dobo, 729.

disciplined as well.[115] Does it still "take two to tango?" This altercation was not the result of a simple misunderstanding.

DEFENDANT'S MISAPPLICATION OF THE LAW
FAILURE TO PROMOTE

Defendant in their proposed conclusions of law misstates the allegations at issue in this lawsuit. Defendant first attempts to limit the lawsuit to the allegations in the EEOC complaint, ignoring the properly filed amended complaint. They suggest that the conduct complained of is the failure to promote Mr. Franklin to positions filled by Abel, Staniszewski and Peters. Plaintiff's main allegation is that he was not promoted to Mr. James Knight's position. Mr. Abel was promoted to Mr. Knight's position, or, to the extent Mr. Abel's position is different from Mr. Knight's position, Mr. Abel's position most closely resembles the compensation which Mr. Franklin would have earned in the absence of a discriminatory scheme. In the face of defendant's suggestion that Frontier eliminated Mr. Knight's position, it is plaintiff's position that in order to eliminate the existence of the only upper level black supervisory employee, Mr. James Knight, Jr., Frontier eliminated Mr. Knight's position upon his retirement and hired three white employees off-the-street in his

[115] Plaintiff's Exhibit 23 at 3.

place and paid them considerably more than $120,000/year in all.[116]

Plaintiff would direct the Court to Liberman v. Brady, 926 F.Supp. 1197 (E.D.N.Y. 1996) for the appropriate elements on plaintiff's prima facie case:

> (1) That the plaintiff is a member of the protected class; (2) that the plaintiff was qualified for the position he held at the time he was not promoted and was terminated; (3) that the plaintiff was not promoted and was terminated from his position; and (4) that the failure to promote him and his termination occurred in circumstances giving rise to an inference that it was based on the plaintiff's national origin or religion.[117]

The simple analysis on these elements is that (1) plaintiff is black; (2) he was qualified for the position at the time of the failure to hire and the termination; (3) he was not promoted and was terminated; (4) the failure to promote him and his termination occurred under circumstances giving rise to an inference of discrimination because, *inter alia*, (i) a white employee, indeed, several white employees, were placed in that

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[116] Plaintiff's Amended Complaint ¶ 39 (Plaintiff's Trial Exhibit 9).

[117] Liberman v. Brady, 926 F.Supp. 1197 (E.D.N.Y. 1996) cf. Defendant's Conclusions of Law ¶ N (citing Amirmokri v. Baltimore Gas & Electric Co., 60 F.3d 1126 (4th Cir. 1995)); see Emanuel v. Marsh, 897 F.2d 1435, 1440 (8th Cir. 1990) holding on the "application element" "The plaintiff must have made or attempted to make or have been deterred from making application for the job or promotion").

position; (ii) he was denied even the opportunity to apply for the position by defendant in violation of section 2000e-2(a)(2); and (iii) his termination came in retaliation for his complaints concerning defendant's unlawful employment practices in violation of section 2000e-3.

Plaintiff has offered enough evidence both to establish this prima facie case and to establish discriminatory intent by a preponderance of the evidence even without the assistance of a burden shifting scheme. Plaintiff is black and was qualified for the promotion.[118] Mr. Knight worked a double shift every day supervising employees in the foundry. Mr. Franklin worked approximately 70 hours per week supervising employees as Lead Man in the foundry and taking over Mr. Knight's duties in his absence. He was therefore uniquely qualified. Plaintiff was qualified to take Mr. Knight's position according to Mr. Knight, who was in the best position to know.[119] Mr. Abel had one year of college.[120] Plaintiff had one year of college.[121]

This case provides a perfect example of a failure to promote "under circumstances giving rise to an inference of

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[118] Knight, 346.

[119] Knight, 524.

[120] Abel, 702.

[121] Franklin, 104.

discrimination." Instead of promoting Mr. Franklin to Mr. Knight's position, in effect replacing one black supervisor with another, and receiving the benefit of paying only one employee's benefits and receiving the equivalent services of two regular employees, Frontier replaced one black man with three white men. This was done regardless of the fact that Frontier would be paying considerably more wages and benefits, and that none of the new supervisors had experience in the plant. Certainly the fact that Frontier replaced one black man with three white men instead of one white man in no way prevents plaintiff's establishment of its prima facie case.

Furthermore, defendant sought to eliminate the legal effect of their discriminatory scheme by hiring three black regular hourly employees at the same time as they were preventing plaintiff from rising to an upper level supervisory position. Their suggestion that they cannot be accused of racial motivation because they balanced the off-the-street hiring of three white supervisory employees with the so-called "hiring" of three black "employees" from the ranks of the SPS workers is naive. The reality as acknowledged by the law in this area is that these black employees were "employees" prior to being "hired" as regular hourly employees and that under their old designation as temporary employees they were paid a discriminatorily lower wage

for equal work in violation of Title VII. The allegedly coincidental "hiring" of these "employees" is not evidence of Frontier's equal opportunity hiring policy but a predicate act in furtherance of a conspiracy, the goal of which was to prevent Rufus Franklin, a black model employee, from rising to an upper level management position at Frontier.

DEFENDANT'S MISAPPLICATION OF THE LAW
TERMINATION, RETALIATORY DISCHARGE

Defendant cites St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993) as requiring the satisfaction of four elements to establish a prima facie case of discriminatory termination: (1) that he is black, (ii) that he was qualified for the position (iii) that he was discharged, and (iv) that the position remained open and was ultimately filled by a white person.[122] This naive attempt to classify this complex case as a simple case of discriminatory termination, calls for a wooden application of the law. Certainly a Title VII plaintiff is not denied a remedy where the employer replaces him because he asserts his civil rights and demands to be treated as similarly situated white employees, simply because the employer replaces him with another black employee more willing to turn the other cheek.

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[122] St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993).

The suggestion in defendant's conclusions of law that where a plaintiff is replaced by a worker of the same minority he has failed to establish a prima facie case should not be extended to mean that defendant is automatically entitled to summary judgment. It simply means, at most, that the reduced "prima facie" showing under the McDonnell Douglas scheme of merely establishing these simple elements, i.e. black worker fired replaced by white worker, is not available because where a black worker is replaced by a black worker that situation without more does not properly form the basis of an inference of discrimination. It does not mean that plaintiff does not have a case but at most means that plaintiff cannot use the specifically identified prima facie case as a burden shifting tool. In this case, plaintiff has set out a prima facie case under Liberman and has proved considerably more than what is described by defendant as necessary to establish the traditional judicially approved prima facie case. Plaintiff's case provides the necessary evidence to trigger the burden shifting scheme, and this is an example of the unique situation where plaintiff is not required to resort to judicially created burden shifting tools to make his case. The Plaintiff here would prevail even before McDonnell Douglas, on its own direct circumstantial evidence of discrimination. That is to say, our proof overwhelms any

proffered evidence from defendant suggesting any legitimate motivation or busines spurpose for the failure to promote Mr. Franklin or for his discharge. Plaintiff has carried his burden by showing through direct circumstantial evidence that defendant discriminated against him, not simply by attacking the proof offered by defendant but by presenting overwhelming circumstantial evidence that discrimination took place.

In this case, (1) where an upper level supervisory position, for which the black Plaintiff is uniquely qualified and which was held by a black employee, is allegedly eliminated upon the retirement of that black employee, (2) where three white employees are hired to assume the tasks formerly performed by that one black upper-level, supervisory employee, (3) where Plaintiff protests the failure to promote him to that position, (4) where soon after the most vigorous of these protests by Plaintiff, three black employees are hired as regular hourly employees in a naive effort to balance the discriminatory, off-the-street, hiring of the three white employees to upper level supervisory positions and (5) where plaintiff is fired two weeks after he makes his most vigorous protest of these violations of his civil rights, plaintiff has established not only a prima facie case of discriminatory motive, but has met his burden of proof by establishing the discrimination by a preponderance of

the evidence separate and apart from any judicially approved prima facie case or burden shifting scheme.

FAILURE TO NOTICE MR. KNIGHT'S FORMER POSITION ULTIMATELY FILLED BY MR. ABEL

The Court need look no further than the testimony of James Knight, Jr., who defendant describes as credible:

> If there were no discrimination, Franklin would have been given a chance . . . Franklin was the best qualified.[123]

When Mr. Abel was hired to take on duties which were being performed by Mr. Knight notice was not even posted so that hourly employees could apply for the position.[124] Thus not only was Plaintiff denied the position but was denied even the opportunity to apply and interview for the position. Like the legal requirement of an explanation in the face of prima facie proof, the opportunity to apply and interview for the position of plant Superintendent would have been valuable in and of itself, to Mr. Franklin, who would have had an opportunity to make an argument on his own behalf, but also to Frontier. An interview with Mr. Franklin very well could have made Frontier re-examine its future plans for Mr. Franklin thus avoiding this lawsuit.

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[123] Knight, 346.

[124] May, 375-6.

Although Courts are reluctant to look too deeply into business judgments, in this age of downsizing the Court might ask itself if this decision to replace the black superintendent with three whites at considerably more than twice the pay, was in the interest of the company and would result in a benefit to the shareholders, leaving aside the fact that Mr. May and Mr. Pierce own the company. Or was this action taken because Mr. May and Mr. Pierce prefer to work with and manage the company surrounded by white managers instead of black managers. The interest of the company was to retain their best employee. Clearly the failure to provide notice of the opening for what had formerly been Mr. Knight's job would tend to limit the opportunities of the hourly employees as they sought to break into the supervisory ranks.

It is also useful to look to section 2000e-3 and the cases decided thereunder for a further analysis of the particular circumstances of this case. To make out a prima facie case of retaliation under Title VII,

> [plaintiff] must demonstrate (1) that she was engaging in a protected activity, (2) that she suffered an adverse employment decision, and (3) that there was a causal link between her activity and the employment decision.[125]

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[125] Trent v. Valley Elec. Ass'n, Inc., 41 F.3d 524, 526 (9th Cir. 1994).

On the first element it is necessary for plaintiff to prove only that "she had a 'reasonable belief' that the employment practice she protested was prohibited under Title VII."[126] An employee's informal complaint to management qualifies as "protected activity" for purposes of a Title VII claim of retaliation.[127] In this case Plaintiff must prove simply that he believed that the failure to promote him violated his rights under Title VII, it is not even necessary to show that he was correct. Mr. Franklin believed that Frontier's failure to promote him was a violation of his civil rights. He was correct in that belief. On the second element Plaintiff must show an adverse employment action. He was fired.

On the third element, Plaintiff must show a causal connection between his termination and the protected conduct. The necessary causal link between adverse action and protected activity can be inferred when adverse action closely follows protected activity, for purposes of establishing a prima facie case of retaliation under Title VII.[128] In one recent case a plaintiff established a prima facie case of retaliatory discharge

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[126] Id.

[127] Arzate v. City of Topeka, 884 F. Supp. 1494 (D. Kan. 1995).

[128] Klein v. Derwinski, 869 F. Supp. 4 (D.D.C. 1994).

where she complained to her supervisor of sexual harassment by coemployee and was terminated two weeks after coemployee replaced supervisor.[129] In another case an employee was fired one week after complaining of company vice president's discriminatory and abusive conduct.[130] In this case, plaintiff was fired two weeks after the final confrontation with management over their failure to promote him. Part of the third element requires that the defendant be aware of the protected activity.[131] Both Abel and May knew of Plaintiff's complaints concerning Frontier's failure to promote him to Mr. Knight's position.[132]

With all the background provided in the trial testimony, some of which is detailed above, Mr. Franklin's complaints to Mr. May and to Mr. Lewis Pierce cannot be understood except in the context of a potential that Mr. Franklin might take some action to enforce his civil rights. In response to that threat Frontier set out to protect themselves from any future litigation by hiring several black "employees" and then fired Mr. Franklin as

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[129] Stoeckel v. Environmental Management Systems, Inc., 882 F. Supp. 1106 (D.D.C. 1995).

[130] E.E.O.C. v. A. Sam & Sons Produce Co., Inc., 872 F. Supp. 29, 38 (W.D.N.Y. 1994).

[131] Meadows v. State University of New York at Oswego, 160 F.R.D. 8 (N.D.N.Y. 1995).

[132] Franklin, 183-4.

soon as a convenient excuse was available. Mr. Dobo's complaint concerning the alleged altercation with Mr. Franklin provided just the type of excuse Frontier needed to rid themselves of this black employee who did not know his place in the "family".

Contrary to the statement in defendant's brief, it is not necessary for plaintiff to prove that "Defendants knew Mr. Dobo had not been attacked and fabricated the story as a pretext to discharge the plaintiff."[133] Nor is it true that in the absence of such a showing that "the termination must be found to be non-discriminatory."[134] The evidence in this case is that even if the alleged physical altercation between Mr. Dobo and Mr. Franklin did in fact take place, that absent improper discrimination Mr. Franklin would not have been terminated.[135]

Furthermore, the retaliatory discharge theory simply provides further support for the allegation that Mr. Franklin was terminated on the basis of his race in violation of section 2000e-2(a)(1). Mr. Franklin was fired not simply because he protested these unlawful employment practices but because he was black and expected to be treated fairly. A white person

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[133] Defendant's Proposed Conclusions of Law ¶ H.

[134] Defendant's Proposed Conclusions of Law ¶ H.

[135] Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

complaining about these violations to Mr. May would not have represented such a significant threat as to result in termination. Plaintiff was ultimately fired because of his race.

CONCLUSION

All of the evidence in this case points to discrimination. It is difficult to avoid getting caught up in prima facie cases of one type or another, in shifting burdens of production under various specific provisions of Title VII, in disparate impact or disparate treatment causes of action and in pretextual explanations for questioned employment practices. We have attempted to fit this case into each of the traditional molds. It invariably fits with minor alterations. The inescapable conclusion is that Frontier has been discriminating against its black employees for decades and without this Court's intervention Frontier will continue to do so into the next century. At a minimum Frontier should be required to reinstate Rufus Franklin, formerly their best employee. He has been and will be in the future an asset to the company. His presence will be a constant reminder to Frontier that it must treat black employees equally and to the other black employees that their civil rights cannot be violated with impunity.

This Court should not tolerate a plant operating in the Western District of New York, that discriminates and classifies

its workers by race, a practice which existed throughout the 1980s and for all that appears in the record continues to this very day. The failure to promote Rufus Franklin to the job opening created by Knight's retirement was a violation of Title VII and Rufus Franklin should be made whole for the damages he has suffered in the past by reason of the company's refusal to reinstate him to that position when they received his complaint the next day. Nothing short of a full award of lost past compensation and full reinstatement will signal to Frontier management that its pre-1860 manner of plant administration must cease and cannot be tolerated under the Civil Rights Act of 1964. Thirty-two years later, Frontier Hot Dip Galvanizing has still not received the message. It is up to the Court to sound the alarm that "the times they are a-changing."

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