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PROVING SEX DISCRIMINATION IN UNIVERSITY EMPLOYMENT: TWO VIEWS IN THE NINTH CIRCUIT

A. INTRODUCTION

Last term, the Ninth Circuit decided two cases dealing with sex discrimination in tenure review and promotion within a university faculty. *Lynn v. Regents of the University of California*[1] provided the Ninth Circuit with its first opportunity to analyze a claim of sex discrimination in university employment arising under Title VII.[2] The court held that plaintiff Lynn had made out a prima facie case of sex discrimination and that her right to due process had been denied during the trial. The court therefore remanded the case for a new trial.[3] *Laborde v. Regents of the University of California,*[4] decided four months after *Lynn,* provided the Circuit's first application of *Lynn.* The *Laborde* court affirmed the district court's ruling in favor of the University, holding that it was not clearly erroneous.[5] Since *Lynn* and *Laborde* were nearly factually identical, their inconsistent holdings raise questions about how the Ninth Circuit will approach and analyze future cases involving disparate treatment in university employment arising under Title VII.

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1. 656 F.2d 1337 (9th Cir. 1981) (per Reinhardt, J.; the other panel members were Ferguson, J. and Alarcon, J., concurring) (as amended on denial of rehearing and rehearing en banc, Dec., 28, 1981), *cert. denied,* 103 S. Ct. 53 (1982).

2. Civil Rights Act of 1964, Title VII § 702, 42 U.S.C. §§ 2000a-2000h (1976). Section 2000e-2(a)(1) reads: "(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 to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex . . . ."

3. The court specifically ruled that Lynn had made out a prima facie case of discrimination and remanded the case to determine Lynn's right to obtain her tenure review file. 656 F.2d at 1344.

4. 686 F.2d 715 (9th Cir. 1982) (per Farris, J.; the other panel members were Choy, J. and Kennedy, J.) (petition for rehearing denied; suggestion for rehearing en banc rejected. Ferguson, J., dissented from en banc vote).

5. 686 F.2d at 719. *See infra* notes 65-72 and accompanying text.

In 1969, Lynn was hired by the University of California at Irvine as a lecturer.[6] After several extramural evaluations, she was denied tenure and finally terminated in 1977.[7] Plaintiff Laborde was hired as an assistant professor by the same University in 1965.[8] In 1970, she was granted tenure and was subsequently considered for promotion several times; each time being denied rank beyond associate professor.[9] Both women brought suit under Title VII, charging the University with sex discrimination. Lynn alleged discrimination regarding tenure evaluation; Laborde discrimination in faculty promotion.

B. BACKGROUND

Development of Title VII

Title VII prohibits employers from discriminating in employment on the basis of sex.[10] Although originally Title VII did not apply to educational facilities,[11] in 1972, Congress removed this exemption.[12] Congress passed the 1972 Act partly to draw educational facilities within the ambit of the 1964 Civil Rights Act[13] and, more importantly, to strengthen the original legisla-

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6. 656 F.2d at 1340. Lynn was promoted to the rank of untenured assistant professor in 1971, her last official promotion. *Id.*

7. *Id.* Although she was promoted in 1971, Lynn was denied a merit salary increase that year due to an extramural evaluation which had judged her scholarship to be deficient. She was again adjudged to have deficient scholarship in her 1972-73 evaluation, and again in her 1973-74 mid-career review. Because the University required that tenure be attained within eight years of employment or termination would result, Lynn was given a sabbatical during the 1974-75 academic year for the specific purpose of improving her scholarship. In 1975, tenure review commenced, resulting in the official denial of tenure in 1976. Lynn then accepted a one year terminal appointment to 1977. *Id.*

8. 686 F.2d at 716. Laborde was awarded tenure and was promoted to the rank of associate professor in 1970. *Id.*

9. *Id.* Laborde was considered for promotion to full professor annually from 1973 through 1979. Although denied promotion to full professor, Laborde was given merit increases and attained the rank of associate professor, step V, which is one step below full professor. *Id.* at 718.

10. 42 U.S.C. § 2000e-2(a)(1) (1976). *See supra* note 2 for applicable language.

11. Civil Rights Act of 1964, Pub. L. No. 88-352, Title VII, § 702, 78 Stat. 255 (1964) (prior to 1972 amendment) read: "This title shall not apply to . . . an educational institution with respect to the employment of individuals to perform work connected with the educational activities of such institution."

12. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 3, 86 Stat. 103 (1972). This act removed secular educational facilities from Title VII's original exemption. Religious facilities are still exempt from Title VII compliance.

13. H.R. REP. No. 238, 92d Cong., 2d Sess. 1, *reprinted in* 1972 U.S. CODE CONG. & AD. NEWS 2137, 2154-55 [hereinafter cited as H.R. REP. No. 238] reads in part:

> There is nothing in the legislative background of Title VII, nor

tion.[14] Seven years after the passage of the 1964 Act, Congress found that substantial discrimination in employment remained.[15] That sex discrimination persisted was especially objectionable to Congress since it was explicitly prohibited by Title VII.[16] By passing the 1972 Act, Congress emphasized that sex discrimination in employment was illegal and that educational facilities were not exempt from Title VII compliance.[17]

Courts have further refined the objectives and philosophy of Title VII.[18] In *Griggs v. Duke Power Plant*,[19] the Supreme Court expressed the congressional policies of Title VII in these terms:

> Congress did not intend by Title VII, however, to guarantee a job to every person regardless of qualifications. In short, the Act does not command that any person be hired simply because he

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> does any national policy suggest itself to support the exemption of these educational employees—primarily teachers—from Title VII coverage. Discrimination against minorities and women in the field of education is as pervasive as discrimination in any other area of employment . . . . Similarly, in the area of sex discrimination, women have long been invited to participate as students . . . but without the prospect of gaining employment as serious scholars.

The report observed that because students are influenced by ideas imparted in school, discrimination there would promote in them discriminatory attitudes. *Id.* at 2155.

14. *Id.* at 2139, reads in part: "Despite the commitment of Congress to the goal of equal employment opportunity for all citizens, the machinery created by the Civil Rights Act of 1964 is not adequate."

15. *Id.* "Despite the progress which has been made since the passage of the Civil Rights Act of 1964 discrimination against minorities and women continues." *Id.*

16. *Id.* at 2140. Congress found that women were subjected to economic deprivation on a class-wide basis. Numerous studies indicated that women were consistantly put in less challenging and therefore less renumerative positions solely on the basis of their sex.

17. *Id.* at 2141. "Discrimination against women is no less serious than other forms of prohibited employment practices and is to be accorded the same degree of social concern given to any type of unlawful discrimination." *Id.*

18. *See generally* International Brotherhood of Teamsters v. United States, 431 U.S. 324, 348-49 (1977) (primary purpose of Civil Rights Act of 1964 was "to assure equality of employment opportunities and to eliminate discriminatory practices which have fostered racially stratified job environments . . . . Congress proscribed not only overt discrimination, but practices that are fair in form but discriminatory in operation."); Albermarle Paper Co. v. Moody, 422 U.S. 405 (1975) (primary objective of the Equal Employment Opportunity provisions of the Civil Rights Act was to achieve equality of employment opportunity and remove barriers that had operated in the past to favor an identifiable group over another); Daniel v. Paul, 395 U.S. 298 (1969) (overriding purpose of Civil Rights Act of 1964 was to remove the daily affront and humiliation involved in discriminatory denials of access to facilities ostensibly open to the general public).

19. 401 U.S. 424 (1971).

> was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed. What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.[20]

In sum, it is the High Court's view that Congress' purpose in enacting Title VII was to eradicate discriminatory barriers to employment.

The McDonnell Douglas Test and its Adaptations

In *McDonnell Douglas Corp. v. Green*,[21] the Court outlined the procedure and allocation of proof in a Title VII suit. This test has become the prevailing approach in Title VII actions.[22] The first step requires the plaintiff to show a prima facie case of discrimination by proving four elements:

1) that he or she belongs to a racial minority,
2) that he or she applied and was qualified for the job the employer was advertising,

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20. *Id.* at 430-31. *Griggs* was a class action suit by blacks alleging that the company's requirement of having a high school education or passing a standardized test violated Title VII. The Court held that when such tests are not related to job performance, Title VII prohibits them. Although *Griggs* dealt with disparate impact under Title VII, its interpretation of Title VII's goals is cited with approval in disparate treatment cases as well. *See* Albermarle Paper Co. v. Moody, 422 U.S. 405, 417 (1975).

21. 411 U.S. 792 (1973). The plaintiff in this case, a black mechanic, alleged that he was refused employment as a re-hire because of his involvement in civil rights activities. The issue was whether he had demonstrated that he had been impermissibly discriminated against. The Court held that he had. *Id.* at 802.

22. *See generally* Mortensen v. Callaway, 672 F.2d 822 (10th Cir. 1982) (using the *McDonnell Douglas* test to determine if the Army violated Title VII provisions by passing over a female for a promotion as a supervisory chemist); Lindsey v. Mississippi Research & Dev. Center, 652 F.2d 488 (5th Cir. 1981) (using the *McDonnell Douglas* test to analyze a claim of race discrimination in employment); Loeb v. Textron Inc., 600 F.2d 1003 (1st Cir. 1979) (concluding that principles of the *McDonnell Douglas* test can be applied to age discrimination arising under A.D.E.A.); Scott v. Univ. of Delaware, 601 F.2d 76 (3d Cir. 1979) (using *McDonnell Douglas* test to determine if black professor was discriminated against when his university contract was not reviewed); Bundy v. Jackson, 641 F.2d 934 (D.C. Cir. 1981) (utilizing *McDonnell Douglas* test to determine if employer violated Title VII by sexually harassing female employee). *But see* Note, *Labor Law-Civil Rights Act of 1964-Burdens of Proof in Employment Discrimination Cases*, 15 B.C. INDUS. & COM. L. REV. 654 (1974) (Supreme Court has made it more difficult for Title VII plaintiffs to successfully prove discriminatory employment practices).

3) that he or she was refused employment despite his or her qualifications, and
4) that the employer continued to seek applicants with plaintiff's qualifications.[23]

These elements and the evidence required to satisfy them are not to be taken as a rigid formula.[24] In *International Brotherhood of Teamsters v. United States,* the Court stated that the important criteria are not the discrete elements which make up the first step of this test but whether plaintiff has shown by competent evidence that the employer's refusal to hire him or her created an inference that the decision was based on unlawful discrimination.[25]

Therefore, while plaintiff must generally show each of the four elements in step one to show prima facie discrimination, the evidence which plaintiff must present is not rigidly applied to any one element. Rather, the evidence is fluidly applied to all four elements of the prima facie showing. What the plaintiff must show is that he or she was in fact discriminated against.[26]

Once a prima facie case is shown, the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for refusing to hire plaintiff.[27] *Board of Trustees of Keene State College v. Sweeney*[28] demonstrates that this burden can be met easily. The *Sweeney* Court stated that the defendant need not prove the absence of a discriminatory motive, but only state a

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23. 411 U.S. at 802.

24. The Court in *McDonnell Douglas* cautioned that because the facts will vary with each Title VII case, the factors may not fit tightly in every respect. *Id.* at 802 n.13.

25. 431 U.S. 324 (1977). In *International Brotherhood,* the United States sued the Teamsters Union for alleged violations of Title VII, specifically that their seniority system effectively locked out non-whites, thereby leaving them with the local truck routes. The Court held that the United States had sustained its burden of showing discrimination. *Id.* at 358.

26. In Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981), the Court stated that the burden of establishing a prima facie case should not be onerous. *Id.* at 253. Similarly, in Furnco Constr. Corp. v. Waters, 438 U.S. 567 (1978), the Court stated that in order for plaintiff to go forward with the evidence, he or she must show that the actions of the employer make it more likely than not that such actions were discriminatory. *Id.* at 576.

27. 411 U.S. 792, 807.

28. 439 U.S. 24 (1978). In *Sweeney,* a female college professor sought to have her promotion backdated to the date of her first attempt to obtain a promotion, alleging that the first attempt and denial was based upon sex discrimination. Sweeney v. Board of Trustees of Keene State College, 569 F.2d 169, 171 (1978).

legitimate reason for refusing to hire plaintiff.[29] Once so stated, the burden shifts back to the plaintiff.[30] The final step of the test requires plaintiff to show by a preponderance of the evidence that the defendant's legitimate and nondiscriminatory reason was a pretext for unlawful discrimination.[31]

The *McDonnell Douglas* test was developed in the context of racial discrimination in employment.[32] Subsequent cases have applied the test to discrimination in academia.[33] In *Smith v. University of North Carolina,*[34] the Fourth Circuit applied the *McDonnell Douglas* test and adapted it specifically to sex discrimination in a university setting. The *Smith* approach requires a plaintiff to establish prima facie discrimination by showing that:

1) he or she was a member of a class protected by Title

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29. 439 U.S. at 25. The Court in *Burdine* made it clear that the defendant must present some evidence to rebut the plaintiff's prima facie showing. "It is sufficient that defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff." 450 U.S. 248, 254-55.

30. *McDonnell Douglas*, 411 U.S. 792, 802. It should be pointed out that throughout the Title VII suit, the plaintiff bears the ultimate burden to show that he or she was discriminated against. *See* Texas Dept. of Community Affairs v. Burdine, 450 U.S. 428 (1981); Board of Trustees of Keene State College v. Sweeney, 439 U.S. 24, 25 n.2 (1979); *See generally* 9 J. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 2489 (3d ed. 1940) (burden of persuasion never shifts).

31. 411 U.S. at 804. *McDonnell Douglas* listed various factors which could show by competent evidence that the employer's stated reason was a pretext for discrimination. *Id.* at 804 n.18. Because of the relatively easy burden a plaintiff has in step one—the prima facie showing—and the extremely light burden an employer has in articulating a legitimate reason, the major issue in Title VII disparate treatment cases revolves around plaintiff being able to show pretext on the part of the employer.

32. H.R. REP. No. 238, *supra* note 13.

33. *See* Kunda v. Muhlenberg College, 621 F.2d 532 (3d Cir. 1980) (female college physical education teacher sued under Title VII. Court required school to grant her tenure and promotion); Whiting v. Jackson St. Univ., 616 F.2d 116 (5th Cir. 1980) (white teacher at predominantly black school made out prima facie showing using civil rights laws); Jepsen v. Florida Bd. of Regents, 610 F.2d 1379 (5th Cir. 1980) (female teacher not required to prove abuse of discretion by university in Title VII suit); Sweeney v. Board of Trustees of Keene State College, 604 F.2d 106 (1st Cir. 1979), *cert. denied,* 444 U.S. 1045 (1980) (female teacher proved that reasons advanced by University for not promoting her were a pretext for discrimination); Davis v. Weiner, 596 F.2d 726 (7th Cir. 1979) (model established by *McDonnell Douglas* was applicable where a female professor alleged termination of her position was based on sex).

34. 632 F.2d 316 (4th Cir. 1980). In *Smith,* a female teacher was denied promotion and reappointment at the University. She brought suit alleging sex discrimination in violation of Title VII and charged that the University's articulated reason was a pretext for discrimination. The court of appeals held that the reasons offered by the University were not pretextual. *Id.* at 344.

VII.

2) he or she was qualified for the promotion or rank sought,
3) he or she was denied promotion or reappointment,
4) in cases of reappointment or tenure, members of the opposite sex with similar qualifications achieved the rank or position sought.[35]

Smith left intact the second and third steps of the *McDonnell Douglas* test.[36]

C. THE *Lynn* DECISION

In *Lynn,* the Ninth Circuit expressly adopted the *McDonnell Douglas* test as applied by *Smith* to sex discrimination in an educational facility.[37] The *Lynn* court concluded that the district court erred in holding that Lynn failed to make out a prima facie case of discrimination.[38] The court found that Lynn established a prima facie showing of discrimination by demonstrating that: (1) she belonged to a class protected by Title VII, (2) she was denied tenure,[39] (3) she met the objective criteria for tenure, and (4) males with qualifications similar to her own were granted tenure.[40] The court found Lynn's presentation of specific statistical data helpful in establishing her prima facie case.[41]

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35. 632 F.2d at 340.

36. *Id.* In effect therefore, *Smith* modified only the first step of the *McDonnell Douglas* test, the prima facie showing. But in doing so, *Smith* made the test slightly stricter by requiring plaintiff to show that a nonprotected class member (male) got a similar position.

37. 656 F.2d 1337, 1341. The court noted that this adapted test could also be used to attack racial discrimination in university employment decisions and in areas other than tenure review or promotion such as the initial hiring determination. *Id.* at 1341 n.2.

38. *Id.* at 1342. The court pointed out that the district court had "held, without discussing the four elements that establish a prima facie case under *McDonnell Douglas* and *Smith,* that Lynn had failed to make the required showing." *Id.*

39. *Id.* The court did not describe why she met elements one and three. It merely stated that "[L]ynn obviously satisfied elements (1) and (3) of the *McDonnell Douglas* test as applied by *Smith* in the academic context." *Id.*

40. *Id.* Lynn presented specific statistical data which showed that she had the same education, experience, and number of published works as others who had been granted tenure. This data, the court found, was evidence that she met the objective criteria for tenure—the second element of the prima facie showing.

41. *Id.* The court found that the reliance on this type of data during the prima facie showing was both practical and sound. The court noted that the ultimate issue in cases like this is whether the tenure decision was based on merit or sex. Even though statistical data only provides indirect evidence of discrimination, it nonetheless is an effective

In addition, Lynn showed by using general statistical data, that the University engaged in an overall pattern of sex discrimination.[42] This data was useful because of the highly subjective nature of the tenure review process.[43] The court found that statistics could be used to show it more likely than not that the University's decision to deny Lynn tenure was based on sex.

The court found that the University's attitude toward Lynn's scholarship was due, in part, to her choice of subject matter—women's issues in French literature. The University considered this to be an insubstantial topic for scholarly work.[44] The court found such disdain evidence of a discriminatory attitude toward women.[45] This evidence helped Lynn establish her prima facie case independent of the four elements required by *McDonnell Douglas*.[46]

Turning to the issue of whether the University articulated a legitimate, nondiscriminatory reason to rebut Lynn's prima facie case, the court acknowledged that all the University need do was present a genuine issue of fact that it did not discriminate on the basis of sex.[47] The University gave as its reason that Lynn had been warned repeatedly of her deficient scholarship. Given

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tool due to the scant evidence available in a sex discrimination suit. This then allowed the court to effectively discharge its duty under Title VII. *Id.* at 1342 n.3.

42. The court reprinted an excerpt from the district court's opinion which pointed out that even with an on-campus affirmative action program, U.C. Irvine still was not effectively utilizing these groups. In fact, the district court noted that since the University was founded, it had only granted tenure to two women as compared to twenty-six men. 21 Fair Empl. Prac. Cas. (BNA) 313, 314-15 (1979).

43. "Statistical evidence does not deal with the merits of the University's tenure decision, which necessarily involves academic judgments." 656 F.2d at 1342 n.3.

44. Lynn's research of French literature concentrated primarily on the influence women had on its development. *Id.* at 1343 n.4.

45. The court expressly rejected the district court's rationale that since the University would have objected if a man had pursued Lynn's study of women in French literature, there was no sex discrimination. "A disdain for women's issues, and a diminished opinion of those who concentrate on those issues, is evidence of a discriminatory attitude towards women." *Id.* at 1343. *See also* 656 F.2d at 1343 n.5, *infra* text accompanying note 77.

46. The court noted that "the existence of a discriminatory attitude, like general statistical data, tends to establish . . . that the University's decision was based on an impermissible criterion, and therefore tends to establish Lynn's *prima facie* case." *Id.* at 1343.

47. *Id.* at 1344. In a footnote, the court concluded that to require the University to prove more in the second step of the test would make the third step superfluous. *Id.* at 1344 n.6. *See also* Board of Trustees of Keene State College v. Sweeney, 439 U.S. 24, 24 n.1 (1978).

the ease with which this step of the *McDonnell Douglas* test can be met, the court concluded that this reason met the burden required to rebut Lynn's prima facie case.[48]

The court found that this type of subjective criteria—the University's opinion that Lynn's scholarship was deficient—should not be considered during the prima facie showing. Rather, at the initial stage, it is best to consider only objective data.[49] To include both objective and subjective data in the prima facie showing would reduce the three step test of *McDonnell Douglas* to one step in which all issues of the Title VII suit would be resolved.[50] This would require the court to substitute its own evaluation of faculty performance, a task the court is not suited to perform.[51] Regardless of when the data is introduced, the court found that Lynn's burden remained the same: to show by a preponderance of the evidence that the University unlawfully discriminated against her.[52]

The *Lynn* court did not rule on the merits of the third step of the *McDonnell Douglas* test.[53] Instead, the court turned to the trial proceedings and concluded that the district court violated Lynn's due process rights by denying her request to see her tenure review file (the majority report).[54] The University had submitted the majority report to the trial judge for an *in*

48. 656 F.2d at 1344. The court stated that this burden is very easy to meet in the academic context. *See* Smith v. University of N.C., 632 F.2d 316 (4th Cir. 1980).

49. 656 F.2d at 1344. The court found that objective job criteria should be presented at step one, the prima facie showing. Subjective criteria, along with any supporting evidence indicating discrimination, is best dealt with later in the proceedings. *Id.*

50. *Id.* at 1344. The court found that this would defeat the purpose of the *McDonnell Douglas* test. *Id.*

51. *Id.* The court found that the three step approach of *McDonnell Douglas* enabled it to discern whether the objective criteria was applied to the plaintiff in a discriminatory manner. *Id.* at 1345 n.8.

52. 656 F.2d at 1345. The court noted that on the practical level, at what point subjective evidence is introduced should not make any difference in the final outcome of the suit. If plaintiff offered the evidence when showing prima facie discrimination, the criteria would have to be inherently discriminatory; if plaintiff offered it during the second step, she would have to show the criteria was a pretext for discrimination in the third step. *Id.*

53. 656 F.2d at 1345.

54. *Id.* at 1346. Lynn's primary contention throughout the appellate proceeding was that she was entitled to view the tenure review file and that her inability to see it prevented her from adequately proving Title VII discrimination. *Id.* at 1345 n.10. The tenure review file was the report of the majority of the evaluators. The minority report consisted of those evaluators who disagreed with the majority.

camera inspection to determine whether its contents should remain privileged.[55] The file was introduced to counterbalance the effect of Lynn's introduction into evidence of the minority report.[56] The court concluded that the district court's use of the majority report required that Lynn be able to see the report as well since it was relevant to all the parties.[57] Therefore, the district court committed reversible error by viewing the majority report while denying Lynn the opportunity to review it.[58]

The appellate court then offered guidelines to the district court in resolving the issue of privilege of tenure review files, specifically peer evaluations in Title VII suits.[59] The court stated that the University's interest in confidentiality—the need to maintain the effectiveness of the tenure review process—should be balanced against plaintiff's need to obtain evidence to aid in establishing prima facie discrimination.[60] The importance of enabling plaintiffs to prove discrimination, the difficulty of obtaining direct evidence of discrimination, and the strong national policy against discrimination in educational facilities are factors which should be considered in balancing these two interests.[61] The court then adopted the view expressed by the Fourth and Fifth Circuits in resolving this question—that when peer evaluations serve as the alleged basis for the tenure decision, plaintiff's need to see the evaluations outweighs the University's

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55. *Id.* at 1346. The University's position was that the file was never submitted, accepted, or used as evidence by the trial judge and therefore Lynn had no right to view its contents. *Id.* at 1346 n.11.

56. Counsel for the University had stated that "we feel for purposes of your [the judge's] making a complete review that you ought to be provided with the [majority report] . . . ." *Id.* at 1346.

57. *Id.*

58. *Id.* The court stressed that the judicial process was based upon the need for informed and vigorous argument by all concerned parties during litigation. The district court's refusal to let Lynn see the majority report violated this principle. *Id.*

59. *Id.* The court explicitly stated that it would not decide this issue at the present time. These guidelines were intended to help the district court resolve the issue of Lynn's right to obtain the majority report since they would be required to consider the issue upon remand. *Id.*

60. *Id.* at 1347. The court also mentioned that the evidence used by plaintiff to show prima facie discrimination may be relevant to steps two and three of the *McDonnell Douglas* test and vice versa. For example, statistical data may be helpful in establishing discriminatory application of objective job criteria at step three of the test as well as helping plaintiff establish her prima facie case at step one. *Id.* at 1346 n.13; *See also* McDonnell Douglas Corp. v. Green, 411 U.S. at 805.

61. 656 F.2d at 1347.

need for confidentiality.[62]

The court noted that because the University had allowed Lynn to see other information in her file, the University had far less interest in maintaining the confidentiality of Lynn's tenure review file than it normally would.[63] The court concluded that on remand, the district court should reach its decision regarding her file in light of the strong interest she continued to have in proving Title VII discrimination.[64]

D. THE *Laborde* DECISION

In *Laborde,* the Ninth Circuit applied the approach adopted by *Lynn* in a Title VII case. The court found that Laborde, a tenured associate professor, had made out a prima facie showing of discrimination.[65] However, the trial court further ruled that Laborde had failed to establish by a preponderance of the evidence that the University's reason for denying her promotion to full professor was a pretext for discrimination.[66] The Ninth Circuit concluded that this ruling was not clearly erroneous, and therefore affirmed the district court's ruling in favor of the University.[67]

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62. *Id. See* Jepsen v. Florida Bd. of Regents, 610 F.2d at 1379 (5th Cir. 1980) (when University defends sex discrimination claim on unbiased faculty evaluations, plaintiff is entitled to see them); Keyes v. Lenoir Rhyne College, 552 F.2d 579 (4th Cir.), *cert. denied,* 434 U.S. 904 (1977) (court denied plaintiff's request to see entire faculty's review file to establish prima facie case, noting that had the University sought to justify any male-female disparity based on these files, the plaintiff should be allowed to see them).

63. 656 F.2d at 1348. Pursuant to University regulations, Lynn had a summary of the evaluator's comments. Furthermore, she had obtained the names of her evaluators through a fellow faculty member. In addition, Lynn had letters written by members of the review committee as well as testimony of the chair. As a result, the confidentiality of the majority report had been severely eroded even though Lynn did not know which evaluator made which specific comment. *Id.*

64. *Id.* at 1348. The court also cautioned that the district court should decide the issue of Lynn's right to see the majority report without considering the report's contents via an *in camera* inspection. *Id.* at n.20. While agreeing with the result, Judge Alarcon would not have ruled specifically on the question of when a plaintiff in a Title VII action should be allowed to breach the confidentiality of the evaluations. *Id.* at 1348-49.

65. 686 F.2d 715, 717. This showing was met using the *McDonnell Douglas* test as modified by *Smith* and adopted by *Lynn.* The court merely restated the four elements required to show prima facie discrimination, and without discussion, held that Laborde had met them.

66. Laborde v. Regents of the Univ. of California, 495 F. Supp. 1067, 1073 (C.D. Cal. 1980).

67. 686 F.2d at 719.

The opinion outlined the *Lynn* approach[68] and affirmed the use of statistical data when a plaintiff seeks to establish discrimination under Title VII.[69] The court found that this evidence raised an inference that the University was engaged in a pattern of sex discrimination. But the court cautioned that although relevant to the showing of prima facie discrimination, such data may not by itself be sufficient to raise the requisite inference.[70] The court stated that the University's articulated reason for not promoting Laborde was legitimate and nondiscriminatory.[71] The opinion stressed that by affirming the lower court's ruling, it was not adopting the University's position regarding Laborde's scholarship. Rather, the court applied the clearly erroneous standard to the lower court's ruling and found no error.[72]

E. SIGNIFICANCE

The *Lynn* court, while adapting the *McDonnell Douglas* test

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68. *See supra* text accompanying notes 35-38.

69. 686 F.2d at 718.

70. *Id.* In addition, the plaintiff must show that she met the minimum objective qualifications for the position. The court reasoned that Laborde met this by virtue of her having been considered for promotion. The court added that statistical data may also help meet this requirement. *Id.*

71. *Id.* Although Laborde had published several books and articles, along with other scholarly works, the University chose to promote her to the next level within the rank of associate professor, stating that she did not possess the scholarship required for promotion to full professor. This decision occurred despite the fact that a majority of her evaluators supported her promotion to full professor. Notwithstanding this evidence and the University's pattern of sex discrimination, the trial court found that Laborde had not rebutted the University's reason for denying her promotion to full professor. 495 F. Supp. 1067, 1073.

72. 686 F.2d at 718. In addition, the court found that the trial judge had not abused his discretion when he denied Laborde's request to inspect the University's peer review file. The motion was made shortly before trial and should have been made during the discovery proceedings. *Id.* at 719.

Judge Ferguson, a member of the *Lynn* panel, dissented from the vote to deny rehearing en banc, asserting that Laborde presented the "the strongest possible case" that she was the victim of sex discrimination:

> The opinion states in clear language that men with qualifications similar to her's have been promoted to full professor positions.
>
> Yet the opinion concludes that she is not entitled to promotion because she failed to meet the University's standards for scholarship and research.
>
> The logical conclusion of that analysis is that men who do not meet the standards of scholarship and research will be promoted but women will not unless they meet the standards. Title VII prohibits that type of discrimination.

Id. at 720.

to sex discrimination in universities, applied only the first two steps. However, while not directly ruling on the issue of pretext, the court did develop an approach which may prove useful in resolving this issue in future cases. The court noted that some of the evidence which plaintiff Lynn presented for purposes of establishing prima facie discrimination could be used in showing that the University's reasons were pretextual or discriminatory in their application.[73]

The court also stated that the University's disdain for women's studies was evidence of a discriminatory attitude toward women.[74] It therefore follows that the court, had it reached the issue of pretext, would probably have found that the University's reason for denying Lynn tenure—her deficient scholarship—was a pretext for discrimination. However, because the court did not specifically rule on this issue—the key issue in a Title VII action—*Lynn* provided no precedent upon which future courts could base their resolution of the pretext issue.

Not being bound by *Lynn* on the issue of pretext, the *Laborde* court approached this issue cautiously. The court chose not to rule on or even discuss the merits of the University's decision not to promote Laborde.[75] Instead, the court deferred to the findings of the trial court.

Both cases were reluctant to apply the final step of the *McDonnell Douglas* test, concluding that it would be prudent to allow the trier of fact to decide the issue of pretext. This approach is consistant with the nature and objectives of appellate review to exercise deference to the trial court's findings of fact. However, the opinions differed as to the appropriate degree of judicial restraint in Title VII sex discrimination actions.

The court in *Laborde* did not review the merits of the University's decision, restricting itself to considering whether the trial court's findings were clearly erroneous.[76] In *Lynn*, however, while realizing the need for restraint, the court nonetheless admonished trial courts not to ignore the mandate of Title VII

73. 656 F.2d at 1346 n.13.
74. *Id.* at 1343 n.5.
75. 686 F.2d at 719.
76. *Id.*

when dealing with employment decisions of academic institutions:

> We are sensitive to the problems related to judicial examination of issues like the importance of women's studies, and to the need for courts to refrain from substituting their judgment for that of educators in areas affecting the content of curricula. Accordingly, the view we express is a narrow one. We are saying only what Title VII commands: when plaintiffs establish that decisions regarding academic employment are motivated by discriminatory attitudes relating to race or sex, or are rooted in concepts which reflect such discriminatory attitudes, *however subtly,* courts are obligated to afford the relief provided by Title VII.[77]

Thus, the *Lynn* court recognized that sex discrimination is often deeply rooted in our traditional values and therefore is subtle and difficult to detect. However, this very reason serves to make the court's job of determining the true reason for employment decisions all the more exacting.[78]

Lynn's approach is more appropriate for determining whether University employment practices violate Title VII than the deferential approach of *Laborde*. *Lynn* recognized that Universities have a dual role—that of educator and that of employer. Decisions concerning academic employment may therefore reflect valid academic concerns but may also be the product of discrimination. However, district court findings which give deference to the University's asserted academic reason will not reveal whether or not such decisions were based on a permissible reason. *Lynn* therefore recognized that even though a University may have a legitimate reason for its employment decisions, a more exacting inquiry is needed to separate discriminatory employment decisions from those resting on valid academic criteria.

F. Conclusion

The courts in both *Lynn* and *Laborde* correctly asserted that as a general matter, it is unwise to involve the judiciary in decisions of curricula. However, when a man or a woman is de-

77. 656 F.2d at 1343 n.5 (emphasis added).
78. *Id.*

nied tenure or promotion solely on the basis of his or her sex, this is not a curriculum decision. It is an employment decision and should be scrutinized as thoroughly as Congress intended all employment decisions to be scrutinized.[79] By recognizing this, the *Lynn* court more faithfully upheld the spirit of Title VII's goal—the removal of any and all barriers which serve to classify employees on impermissible grounds. *Laborde*'s reticence to look beneath the surface of university employment decisions reduces Title VII's impact in academia to a level approaching impotence. In order that Title VII be effective in eliminating sex discrimination in Universities, the Ninth Circuit should undertake the exacting inquiry of employment decisions as contemplated by *Lynn* to review trial court findings of the reasons behind such decisions.

*Robert Lowney**

OTHER DEVELOPMENTS IN CONSTITUTIONAL LAW

A. Belief in "Mark of the Beast" Protected by Free Exercise Clause

In *Callahan v. Woods*,[1] the Ninth Circuit held that a belief that social security numbers are the "mark of the beast" was plainly religious within the meaning of the free exercise clause of the Constitution, and therefore the government must show a compelling interest in making social security numbers a prerequisite for Aid to Families with Dependent Children (AFDC) benefits.

While plaintiff was in prison, he developed a strong interest in religion and since then, had read the Bible daily and become a member of the Baptist Church.[2] Following his release from prison, plaintiff was unemployed and his family became eligible

79. H.R. Rep. No. 238, *supra* note 13.

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1. 658 F.2d 679 (9th Cir. 1981) (per Adams, C. J., sitting by designation; the other panel members were Goodwin, and Farris, JJ.) (rehearing denied, Jan. 19, 1982).

2. *Id.* at 682.

to receive AFDC benefits. Later, the county notified him that his younger daughter was no longer eligible for benefits because plaintiff would not obtain a social security number for her.[3] He refused to do so because he believed social security numbers to be the "mark of the beast and the sign of the Antichrist who threatens to control the world."[4] He believed that to accept a number was to "serve the beast."[5] Plaintiff acknowledged that his aversion to social security and other personal identification numbers predated his interest in religion.[6] Nonetheless, he asserted that his objection was religious in nature and that the *Revelation* text of the Bible articulates a concept that he felt in a more inchoate form before his religious study.[7]

The sole issue which the Ninth Circuit addressed was whether plaintiff's belief was protected by the free exercise clause of the first amendment.[8] To merit protection under the free exercise clause, a religious claim must satisfy two basic criteria. First, the claimant's proffered belief must be sincerely held; second, the claim must be rooted in religious belief, not in "purely secular" philosophical concerns.[9] The Ninth Circuit noted that the district court's application of that test was am-

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3. *Id.* at 681. In requiring a social security number for AFDC eligibility, the State of California acted pursuant to the mandate of section 602(a)(25) of the Social Security Act, 42 U.S.C. § 602(a)(25) (1976).

4. 658 F.2d at 682.

5. *Id.* Plaintiff cited the New Testament *Book of Revelation* 13, which reads in part:

> 16. [H]e causeth all, both small and great, rich and poor, free and bond, to receive a mark in their right hand, or in their foreheads;
> 17. And that no man might buy or sell, save that he had the mark, or the name of the beast, or the number of his name;
> 18. Here is wisdom. Let him that hath understanding count the number of the beast: for it is the number of a man; and his number *is* Six hundred three-score *and* six.

658 F.2d at 682.

6. 658 F.2d at 682. Plaintiff first developed his aversion to social security and other personal identification numbers during his 13-year prison term at San Quentin. In the last few years of his term, he began studying the Bible and thereafter developed his strong interest in religion. *Id.*

7. *Id.* Plaintiff, his wife and older child all had social security numbers. However, plaintiff believed than on behalf of his younger daughter, he must observe his religious objection to assigning numbers and preserve her freedom to avoid serving the beast, even though she may decide later to obtain a number voluntarily.

8. The free exercise clause states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . . " U.S. CONST. amend. I.

9. 658 F.2d at 683.

biguous since the lower court found that while plaintiff was sincere in his objection to identification numbers, his objection was not "rooted in religious belief."[10] The appellate panel explained, however, that "[a] First Amendment inquiry into sincerity generally has a different focus, addressing the sincerity with which the claimant holds the allegedly religious belief itself."[11] Thus, the court concluded that "construed properly the trial court's blanket finding of sincerity must mean that the plaintiff, when he says that he opposes personal identification numbers because they are the 'mark of the beast' . . . sincerely believes in the diabolical nature of those numbers."[12]

Next, the panel addressed the question of whether plaintiff's objections were "rooted in" a religious belief. First, it explained that the religious belief must be relevant to the claim.[13] The court found that the relevance of plaintiff's beliefs to his claim was apparent; it was difficult to imagine how a sincere belief that numbers are the "mark of the beast" could be considered irrelevant to his stand against the assignment of a number to his daughter.[14] The panel noted the trial court had found that plaintiff's objection to identification numbers, although sincere, was actually "rooted in secular and philosophical concerns" and had emphasized that since plaintiff's aversion to identification numbers significantly predated his religious beliefs, his long prison experience was "the major impetus to his belief."[15] The Ninth Circuit found that this reasoning suggested a fallacious premise that a long-held secular belief invalidates first amendment protection for a related but newly alleged religious belief. The court also made clear that a claimant's belief need not be of

10. Callahan v. Woods, 479 F. Supp. 621, 624 (N.D. Cal. 1979).

11. 658 F.2d at 683.

12. *Id.*

13. *See* Wisconsin v. Yoder, 406 U.S. 205 (1972). *Yoder* involved claims by Amish parents who refused to send their children to school beyond the eighth grade despite a state law requiring attendance until age 16. Claimants argued that further education would violate their religious beliefs because the values taught in public high schools clashed with the Amish values and way of life. The Supreme Court found that the Amish way of life is an essential part of their religious beliefs and practices, and that secondary education would tend to severely infringe upon claimants' religious beliefs. *Id.* at 215-16.

14. 658 F.2d at 683.

15. *Id.* at 684. The district court stated: "Plaintiff's beliefs arose in a purely secular context, uninformed by religious training or inspiration. Under such circumstances, the First Amendment does not shield plaintiff from the legitimate commands of the government." 479 F. Supp. at 625 n.6.

religious *origin* in order to warrant first amendment protection. The correct standard is not whether plaintiff's beliefs have *always* been religious, but only whether they are religious in the context of his life as he now lives it.[16]

The court also noted that a coincidence of secular and religious claims in no way extinguishes the weight to be accorded the religious one. It distinguished between beliefs based on "purely secular considerations," which merit no first amendment protection, and those based on "purely religious" claims, which merit the full scope of first amendment protection. According to the court, the "area of overlap is presumably protected."[17]

Finally, the Ninth Circuit found that widespread acceptance of a claimant's views on his or her religion is not required in order to merit first amendment protection. "In applying the free exercise clause . . . courts may not inquire into the truth, validity, or reasonableness of a claimant's religious beliefs."[18] While plaintiff's interpretation of the scripture may differ from the meaning most members of his church find in that text, the court reasoned that such disagreement cannot invalidate his free exercise right.[19] The court explained that it is not within the judicial function and competence to inquire whether a claimant or his fellow church members more correctly perceives the commands of their faith.[20] Unless the "claim is so bizarre or so unrelated to the religious nature of the text that it is 'clearly nonreligious in motivation'," a claimant's interpretation cannot be disregarded

16. 658 F.2d at 684. *See* United States v. Seeger, 380 U.S. 163, 185 (1965).

17. 658 F.2d at 684.

18. *Id.* at 685.

19. Other individuals have also interpreted the *Revelation* text to mean that social security numbers are the "mark of the beast". In Stevens v. Berger, 428 F. Supp. 896 (E.D.N.Y. 1977), plaintiffs, while seeking AFDC benefits for their children, objected to the issuance of social security numbers as a prerequisite to eligibility. They believed that these numbers were becoming the universal identification number predicted in the *Book of Revelation* as the tool used by the Antichrist to control individuals. In noting that neither widespread adherence nor scriptural support is a prerequisite to constitutionally protected status for a purportedly religious claim, the court nevertheless traced the history of the Jewish and Christian concepts of the Antichrist and found that "[t]he meaning of the mark to theologians—whatever they believe the mark to have been—is strikingly similar to the meaning for the Stevenses, who see a potential for abuse of the spiritual side of humanity in a number which could act as a universal identifier." *Id.* at 905.

20. 658 F.2d at 686. *See* Thomas v. Review Board of the Indiana Employment Security Division, 450 U.S. 707, 714 (1981).

as non-religious.[21]

The Ninth Circuit concluded that plaintiff had met both requirements of the threshold test for his free exercise claim. The court remanded the case to the district court to determine the extent to which plaintiff's protected belief is burdened by the government's requirement, and whether the government is following the "least restrictive means of achieving some compelling . . . interest."[22]

Under the Ninth Circuit's analysis, a religious belief which is partly secular and partly religious is presumed protected by the first amendment. This presumption can be overcome by a showing of "non-religious motivation."[23] This decision indicates that the Ninth Circuit will continue to deal with first amendment religion claims on a case-by-case basis and will inquire into the often difficult matters of a claimant's motive and honesty-in-fact. The court expressed its commitment to lending the full scope of first amendment protection to claims based on religious beliefs, but warned that under suspicious circumstances, it will consider all of the attendant circumstances underlying the claimant's motive for asserting such claims.[24]

B. Attorney's Fees in Civil Rights Cases: Who is a "Prevailing Party"?

In *Manhart v. City of Los Angeles, Dept. of Water*,[25] the Ninth Circuit held that plaintiffs, alleging gender discrimination under Title VII of the 1964 Civil Rights Act,[26] were entitled to

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21. 658 F.2d at 686.

22. *Id.* at 687, quoting *Thomas, supra* note 20, at 718. For those cases which have ruled on this issue, see Stevens v. Berger, 428 F. Supp. 896 (E.D.N.Y. 1977) (government must devise alternative to social security numbers for those who object to such numbers as the "mark of the beast"); Mullaney v. Woods, 97 Cal. App. 3d 710, 158 Cal. Rptr. 902 (1979) (government's interest in comprehensive numbering system for AFDC benefits is compelling and unachievable by less restrictive means, and thus overcomes "incidental infringement" of plaintiff's belief).

23. *See* text accompanying note 21, *supra*.

24. The court stated that "[t]he existence of a longstanding philosophical belief which has only recently, and to the claimant's advantage, taken on theological overtones could certainly give rise to reasonable suspicion of dissimulation." 658 F.2d at 684.

25. 652 F.2d 904 (9th Cir. 1981) (per Canby, J.; the other panel members were Fletcher, J., and Kilkenny, J., dissenting) (rehearing and rehearing en banc denied, Nov. 16, 1981).

26. Section 703(a)(1) of Title VII provides: "It shall be unlawful employment prac-

an attorney's fees award as the "prevailing party", even though their request for damages had been denied by the Supreme Court.[27]

The class action suit alleged unlawful gender discrimination in the Department's requirement that female employees make larger contributions to its pension fund than male employees.[28] The plaintiffs were awarded injunctive relief and, upon remand, attorney's fees[29] pursuant to section 706(k) of Title VII.[30]

Defendants contended that the award was improper because plaintiff's claim for damages was dismissed. Their argument was based on the premise that section 706(k) authorizes attorney's fees for the prevailing party, and since plaintiffs were denied damages, they could not be the prevailing party.[31] The Ninth Circuit rejected this claim and held that the plaintiffs were the prevailing party as long as they succeeded in establishing a "significant issue in litigation which achieved . . . the benefit which the [plaintiff] sought in bringing the suit."[32] The court found that by proving discrimination and securing an injunction, the plaintiff had satisfied this two part test.[33]

In determining the amount of the award, the court found

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tice for an employer . . . 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 . . . . " 78 Stat. 225, 253 (1964) (codified at 42 U.S.C. § 2000e-2(a)(1) (1976)).

27. City of Los Angeles Dept. of Water & Power v. Manhart, 435 U.S. 702 (1978). The Court upheld plaintiffs claim for injunctive relief, but denied the claim for back pay because of the drastic effect it would have on pension funds. *Id.* at 722.

28. Although the monthly benefits for men and women were equal, the Department determined that its women employees, on the average, will live longer than its male employees. Since the cost of a pension for a woman was greater, the Department required its female employees to make monthly contributions to the fund which were 14.84% higher than the contributions of comparable male employees. *Id.* at 705.

29. 652 F.2d at 906.

30. Section 706(k) of Title VII provides: "In any action or proceeding under this title the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs . . . ." *See also* 42 U.S.C. § 2000e-5(k) (1976).

31. 652 F.2d at 906-07. Although the case was based on 42 U.S.C. § 2000e-5(k) (1976 & Supp. IV 1980), the court noted that this section was patterned after section 706(k) of Title VII. Thus, either provision was applicable. 652 F.2d at 907 n.1.

32. 652 F.2d at 907, citing Williams v. Alioto, 625 F.2d 845, 847 (9th Cir. 1980); Sethy v. Alameda County Water District, 602 F.2d 894, 897-98 (9th Cir. 1979), *cert. denied*, 444 U.S. 1046 (1980).

33. 652 F.2d at 907-09.

that no fees may be awarded for time spent preparing unrelated claims dismissed by the district court.[34] However, plaintiffs were entitled to an award for all time spent in pursuit of their remedy for gender discrimination, even though it included time spent on unsuccessful, but related, issues.[35]

In *Bartholomew v. Watson*,[36] however, the Ninth Circuit rejected an award "for all time expended" on a civil rights suit and held that the proper amount of attorney's fees should be a reasonable amount for services performed on the prevailing issues.[37]

In *Bartholomew*, prison inmates filed complaints for declaratory and injunctive relief alleging that practices of the Oregon Corrections Division had violated their civil rights.[38] The parties agreed to a stay in the district court pending a state court determination as to whether the challenged procedures complied with subsequent state legislation governing such procedures. Following a state court ruling in favor of the defendants,[39] plaintiffs filed the action in district court and obtained some, although not all, of the relief they sought.[40]

Attorney's fees were awarded to the plaintiffs under the Civil Rights Attorney's Fees Awards Act of 1976.[41] Included in the award were fees for services performed in the state court proceedings. The district court also awarded the full amount claimed by plaintiffs' attorneys even though they had not pre-

34. *Id.* at 909.

35. *Id.* The plaintiffs made claims under Title VII of the 1964 Civil Rights Act, section 1983 of the 1866 Civil Rights Act, the fourteenth amendment of the United States Constitution, and the California Constitution. They prevailed only on the Title VII claim. *Id.* at 906.

36. 665 F.2d 910 (9th Cir. 1982) (per Alcaron, J.; the other panel members were Kennedy, J. and Copple, D. J., sitting by designation).

37. *Id.* at 914-15.

38. The plaintiffs brought their claim under 42 U.S.C. § 1983 (1976), which provides: "Every person who, under color of any statute, ordinance, regulation . . . subjects any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured . . . for redress."

39. Bonney v. Oregon State Penitentiary, 16 Or. App. 509, 519 P.2d 383, *aff'd*, 270 Or. 79, 526 P.2d 1020 (1974).

40. *See* Bartholomew v. Reed, 477 F. Supp. 223 (D. Or. 1979).

41. 42 U.S.C. § 1988 (1976) provides: "In any action or proceeding to enforce a provision of [42 U.S.C. § 1983], the court, in its discretion, may allow the prevailing party, . . . a reasonable attorney's fee as part of the costs."

vailed on all the issues. The award for work performed in the state court was affirmed by the Ninth Circuit on the ground that such an award furthers the legislative purpose of attorney's fees in civil rights cases.[42] However, while the Ninth Circuit panel agreed that plaintiffs were the "prevailing parties",[43] it limited the award to time spent only on the prevailing issues.[44]

In *Thornberry v. Delta Airlines*,[45] the Ninth Circuit affirmed an attorney's fee award which had resulted in a settlement of a Title VII complaint.[46] To determine the amount of the section 706(k) award, the court relied upon *Manhart* in holding that the award could not be deemed excessive because it included fees for time spent in preparing claims which were dismissed by the district court.[47]

The action in *Thornberry* alleged that the defendant had a discriminatory employment structure.[48] The defendant agreed to a settlement which included a monetary award for the individual plaintiffs and increased promotional opportunities for women employees. The panel found it acceptable to award attorney's fees even though the plaintiff did not obtain every form of relief sought.[49] It emphasized that the plaintiffs had pursued several claims to remedy the same injury of gender discrimination. Therefore, there was no cause to reduce the award to time spent on the prevailing issues.

In *Rivera v. City of Riverside*,[50] the Ninth Circuit upheld

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42. 665 F.2d at 912-13. The court relied upon the Supreme Court's opinion in New York Gaslight Club, Inc. v. Carey, 447 U.S. 54 (1980), which dealt with section 706(k) of the 1964 Civil Rights Act. In *Gaslight*, the Court held that the state proceedings were included within the protection of section 706(k), stressing the humanitarian and remedial policies of Title VII and the statute's structure of cooperation between federal and state enforcement authorities. *Id.* at 70-71. The *Bartholomew* court stated that the same factors which apply in a section 706(k) award in state proceedings militate in favor of awarding attorney's fees under section 1988. 665 F.2d at 913.

43. 665 F.2d at 914.

44. *Id.* at 915.

45. 676 F.2d 1240 (9th Cir. 1982) (per Ferguson, J.; the other panel members were Farris and Nelson, JJ.), *petition for cert. filed*, 51 U.S.L.W. 3099 (U.S. Aug. 17, 1982) (No. 82-192).

46. 676 F.2d at 1241.

47. *Id.* at 1243.

48. *Id.* at 1241.

49. *Id.* at 1243.

50. 679 F.2d 795 (9th Cir. 1982) (per Pregerson, J.; the other panel members were

the district court's award of attorney's fees which included time spent on unsuccessful claims to remedy a violation of plaintiffs' civil rights. The suit was brought alleging civil rights and pendent state tort violations.[51] The plaintiffs were awarded damages on the tort and section 1983 claims, as well as attorney's fees pursuant to 42 U.S.C. section 1988.

In affirming the award, the panel relied upon *Manhart*'s "related claim to remedy the same injury" theme. It found this approach consonant with Congress' unequivocal view that access to the judicial system should be available to those who wish to vindicate civil rights violations.[52] The panel expressed the view that to reduce awards for unsuccessful related claims brought in good faith would militate against that policy.[53]

The common theme in civil rights cases in the Ninth Circuit is that attorney's fees will be awarded to the prevailing party for all time spent on successful issues. In instances where the plaintiff was only partially successful in obtaining the relief sought, she will be considered the prevailing party for purposes of applying 42 U.S.C. section 1988 if she has been successful on any significant issue in litigation which achieves some of the benefit sought in bringing the suit.[54] In cases to remedy a single injury—e.g., discrimination—fees for time spent on related, but unsuccessful, claims should be awarded notwithstanding the language in *Bartholomew.*

Although *Bartholomew* held that the plaintiffs should be awarded attorney's fees only for time spent on the prevailing "issues", the facts of the case indicate that, though the court used the word "issues", it meant the word more in terms of "claims for relief."[55] The plaintiffs in *Bartholomew* sought injunctive and declaratory relief for eleven separate claims of con-

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Hug and Tang, JJ.), *petition for cert. filed,* 51 U.S.L.W. 3075 (U.S. Aug. 10, 1982) (No. 82-156).

51. 679 F.2d at 796. Specifically, plaintiff alleged violations of the first, fourth, and fourteenth amendments, and 42 U.S.C. §§ 1981, 1983, 1985(3), and 1986 (1976). *Id.* at 796 n.1.

52. *Id.* at 797.

53. *Id.*

54. *See supra* text accompanying note 32.

55. *See* Twin City Sportservice v. Charles O. Finley & Co., 676 F.2d 1314 (9th Cir.), *cert. denied,* 103 S. Ct. 364 (1982).

stitutional violations resulting from factually distinct acts by the defendants, prevailing on four of them.[56] *Manhart*, *Rivera*, and *Thornberry* are factually distinguishable in that they involved multiple, but related, forms of relief to remedy a single injury. Thus, under section 1988, fees should be excluded for work performed only on unsuccessfully asserted claims for relief.

56. Bartholomew v. Reed, 477 F. Supp. 223 (D. Or. 1979).