

May 31, 2006

To the Honorable Chief Justice and the
Honorable Associate Justices of the
California Supreme Court
350 McAllister Street
San Francisco, CA 94102-4797

Re: Washington v. Trustees of the California State University
DCA 4, Div. One, No. D046471

To the Court:

Pursuant to Rule 28, California Rules of Court, I, Sumi Cho, submit this amicus curiae letter to support the Petition for Review of Pat Washington in this case. As a Professor of Law at DePaul University College of Law, I have an interest in this matter because employment discrimination law is my area of scholarly research and expertise. This letter summarizes the main arguments I make in my U.C. DAVIS LAW REVIEW article, “*Unwise, “Untimely,” and “Extreme”: Redefining Collegial Culture in the Workplace and Revaluating the Role of Social Change, 1[1]*” which focuses on how employers effectively “rearticulate” discriminatory acts as shortcomings of the employee—i.e., as “incivility” or “lack of collegiality.”

In my recent article, I review employment discrimination cases in which the employer-defendant invokes collegiality-based reasons to defend its actions against an employee-plaintiff’s allegations of discrimination. In too many of these cases, I argue that courts fail to disentangle the discriminatory act alleged from the act of incivility, and thereby commit the analytical mistake of accepting “collegiality” as a “legitimate, non-discriminatory rationale” for an employer-defendant’s adverse actions. Judicial interpretations of antidiscrimination law too often permit traditional, power-neutral definitions of “collegiality” to frustrate claims of employee-plaintiffs experiencing a hostile, unequal workplace. To allow an employer-defendant to prevail at summary judgment on the basis of an employee-plaintiff’s alleged lack of collegiality produces a Kafka-esque result in which discriminatory perpetrators not only get away with discriminating or retaliating against an employee-plaintiff, but also succeed in inflicting a “second injury” by converting the victim into a “troublemaker.”

The current judicial approach to analyzing competing claims of discrimination vs. uncollegiality tends to simply cycle the claims in rote order through the *McDonnell-Douglas* proof structure. However, doing so often treats collegiality as a “trump card” of the employer that is wholly unrelated to the underlying claim of discrimination, harassment, or retaliation. This “trump card” approach frequently leads to an inappropriate award of summary judgment for the employer-defendant.

1[1] 39 U.C. Davis L. Rev. 805 (2006).

Three sets of problems often emerge from courts' award of summary judgment in cases on the basis of "lack of collegiality." First, courts have no developed mechanism or mode of analysis to ferret out whether the "personality conflict," "lack of collegiality" or "inability to get along with others" is indeed a legitimate, nondiscriminatory reason ("LNR") forwarded by the employer, or merely pretext for discrimination complained about by plaintiff. Otherwise stated, courts consistently fail to inquire into how linked or derivative the underlying act of discrimination grieved by the employee is to the perception of incivility by the employer-defendant. In my article, I offer ten criteria for courts to use to assess whether and employer-defendant's collegiality rationale should be accepted as a "LNR" for an adverse employment action.^{2[2]}

Second, absent such a method or mechanism to disentangle meritorious defenses from pretextual assertions, courts seem to be "double crediting" an employer's "LNR" not only at the second stage of the traditional *McDonnell-Douglas* burden-shifting structure, but also at the pretext stage where mere articulation of an alleged lack of collegiality serves to effectively nullify any pretextual showing by the plaintiff. Given the inferential proof structure developed for circumstantial cases of disparate treatment employment discrimination, there is a logical fallacy that attaches to such treatment—i.e., that the assertion of uncollegiality as the Employer's LNR for its adverse actions against the employee-plaintiff is presumptively *non-discriminatory*. Once the employer's stated "collegiality" rationale is accepted at face value by courts as its LNR, the burden then shifts to plaintiff-employee to disprove the Employer's collegiality rationale. This burden of proof is overwhelming not only because plaintiffs must start from scratch since the prima facie presumption "drops" from the case once the collegiality rationale is merely articulated, but also because of the high level of deference afforded academic employers in the reasons offered for adverse employment actions.

Third, courts seem to lose sight of complex workplace dynamics involving power and discrimination and how such power dynamics impact upon the workplace culture. As such courts seem to adopt an overly simplistic "either/or" approach to the "she said discrimination"/"he said incivility" paradox. Rather than assuming that it's either discrimination or uncollegiality, courts should consider that it might be both, and that plaintiffs are viewed by co-workers as uncollegial because they have been the victims of discrimination. In other words, the problem with the deployment of the collegiality rationale by an employer-defendant is that it may very well be the "true" reason for the employer's actions, *and* still be discriminatory. The burden-shifting structure of *McDonnell-Douglas* neither anticipates nor appreciates this possibility.

Granting or affirming summary judgment in cases in which employer-defendants merely rearticulate discrimination as incivility represents not only an injustice to individual employee-plaintiffs, but also the operation of contemporary employment discrimination through neutral-sounding means. As such, contemporary employment discrimination laws vex plaintiffs by their inability to ferret out the superficial denials and explanations of increasingly sophisticated employers, human resources

^{2[2]} Id. at 840-42.

administrators, and general counsels. In a post-civil rights society professing to be “colorblind,” most employers know that there should be no public pronouncements of their intent to discriminate.

Before such neutral sounding reasons can be credited as non-discriminatory, courts should adopt more searching inquiries to prevent mere re-articulation of discrimination as the employee-plaintiff’s personality disorder or lack of social skills or judgment. Foregoing this inquiry means that employee-plaintiffs will be subjected to a “popularity contest” for their claims, often in a hostile environment in which their jury may also be their discriminatory perpetrators, or in the alternative, co-workers under the vise of a hegemonic understanding of collegiality who prefer not to confront or contradict those in power. As an analogy, foregoing a more searching inquiry might be equivalent to allowing harassers to define whether their harassing behavior was welcome, pervasive, or severe. Certainly, anti-discrimination law could not countenance such an ironically unjust result.

Very truly yours,

Sumi Cho, Professor
DePaul University College of Law

PROOF OF SERVICE

I, Sumi Cho, declare as follows:

I am not a party to the within action. My business address is DePaul University College of Law, 25 E. Jackson Blvd., Chicago, IL 60604.

On May 31, 2006, I served copies of the following documents:

1. Amicus Curiae Letter

on the parties to this action by placing true copies thereof in sealed envelopes with first class postage thereon fully prepaid and depositing the same in the United States mail at (City), California, addressed to:

Richard A. Paul
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I declare under penalty of perjury that the foregoing is true and correct. Executed on 31st day of May 2006 in Chicago, Illinois.

Sumi Cho, Professor
DePaul University College of Law
