

CRIMINAL LAW—SEARCH AND SEIZURE—CONSISTENT WITH THE FOURTH AMENDMENT, A COURT CAN ORDER AN ADMITTED SEXUAL OFFENDER TO SUBMIT TO AN HIV TEST UNDER THE VIOLENCE AGAINST WOMEN ACT—*United States v. Ward*, 131 F.3d 335 (3d Cir. 1997).

On the evening of December 4, 1995, the defendant-appellant, David J. Ward, kidnapped a twenty-four-year-old woman while she was working at a Marriott Courtyard Hotel in New Jersey. *See United States v. Ward*, 131 F.3d 335, 337 (3d Cir. 1997). Ward jumped the woman from behind, bound both her hands and feet, and brought her to his truck that was parked in a nearby wooded area. That night Ward sexually assaulted his victim and then left the state with her. During the next three days, Ward sexually assaulted the victim on numerous occasions. On December 7, in Indianapolis, the victim managed to escape after she was left alone in the defendant-appellant's truck. *See id.* at 337-38. Upon escape, she contacted the police. *See id.* at 338. Ward fled in his truck but the police apprehended him a short time later in Springfield, Illinois.

On January 30, 1996, a grand jury in the United States District Court for the District of New Jersey indicted Ward for violating 18 U.S.C. § 1201, a federal kidnapping statute that addresses the sexual assault of a victim. *See id.* Ward eventually pled guilty to this charge. *See id.* The court then ordered Ward to submit to a blood test to determine the presence of human immunodeficiency virus (HIV), which causes AIDS. *See id.* In determining Ward's sentence, the district court noted that under the United States Sentencing Guidelines a criminal's sentence may be increased based upon prior convictions for similar crimes. *See id.* In 1983, a Minnesota state court convicted Ward of sexually assaulting a victim at knife point; this prior conviction for a similar crime led to Ward's lengthy sentence of 720 months imprisonment for the current crime. *See id.* Ward subsequently appealed the lower court's decision, arguing that the court erred in ordering him to submit to an HIV test and in increasing his sentence based on the 1983 Minnesota conviction. *See id.*

On appeal, the United States Court of Appeals for the Third Circuit held that ordering an HIV test does not violate a sexual offender's right to be free from unreasonable searches and seizures, although the court also held that the district court should have relied on the Violence Against Women Act (VAWA) rather than relying on its inherent power to order the test. *See id.* at 337. Accordingly, the appellate court remanded the case to

the district court to make the factual findings required by VAWA to determine the permissibility of ordering an HIV test. *See id.* The Third Circuit also held that the 720-month sentence was appropriate and that the district court correctly considered the previous sexual assault conviction. *See id.* at 343.

Judge Rosenn, writing for a unanimous court, initially discussed the conflict between the two versions of VAWA and the district court's reliance on its inherent authority to order an HIV test. *See id.* The judge noted that the district court did not rely on VAWA because of an inconsistency between the codification and the version of VAWA contained in the *Statutes at Large*. *See id.* at 338. The court observed that VAWA empowers district courts to order criminal defendants charged with particular offenses specified in subsection (a) to submit to an HIV test. *See id.* at 339. The Third Circuit noted, however, that the codified version of VAWA fails to mention which individuals the court can order to submit to a blood test and only lists the word "omitted" under subsection (a). *See id.* On the other hand, the appellate court explained, the version of VAWA contained in the *Statutes at Large* specifies those individuals who should be required to submit to an HIV test. *See id.* Accordingly, Judge Rosenn remarked, the district court held that the codified version, which it erroneously believed trumped the *Statutes at Large* version, was void for failure to list the persons the court could require to submit to a blood test. *See id.* Therefore, the judge stated, the district court reasoned that it could not use VAWA and had to rely instead on its inherent power to order an HIV test. *See id.* at 338.

The Third Circuit next corrected the district court by citing to authority that holds that a *Statutes at Large* version trumps the codified version of an act when the two conflict. *See id.* at 339-40 (citing *American Bank & Trust Co. v. Dallas County*, 463 U.S. 855 (1983)). Judge Rosenn proclaimed that VAWA is valid because the *Statutes at Large* version specifies the people that the court can order to submit to a blood test. *See id.* at 339. The Third Circuit therefore (1) ruled that the district court should not have relied on its inherent authority and (2) remanded the case for the lower court to make the factual findings required by VAWA and to determine the appropriateness of ordering an HIV test. *See id.* at 337.

The court then addressed Ward's claim that, regardless of whether the court order results from VAWA or a court's inherent power, a compelled HIV test violates his Fourth Amendment protection against unreasonable searches and seizures. *See id.* at 340. Judge Rosenn commented that the Fourth Amendment prohibits only *unreasonable* searches and seizures. *See id.* Finding that the compelled HIV test is clearly a search under the Fourth Amendment, the judge indicated that the only issue was its reason-

ableness. *See id.* The Third Circuit determined that a search conducted according to the procedures specified in VAWA could not be unreasonable. *See id.* The appellate court noted that VAWA provides an individual with more protection than that provided in the Fourth Amendment. *See id.* Under VAWA, the court observed, a blood test is tolerated only if the accused is “charged with a sexual assault that poses a risk of transmitting HIV, there has been a probable cause determination that the subject of the search committed the assault, the victim requested the test, and the test would provide information necessary for the victim’s health.” *Id.* at 340-41 (citing 42 U.S.C. § 14011(b)(2) (1995)). Further, Judge Rosenn remarked, the accused must receive notice that the victim has asked for a test and must be provided with the opportunity to oppose the order. *See id.* at 341 (citing 42 U.S.C. § 14011(b)(1) (1995)). Lastly, the judge observed, the results of the test are kept confidential with only limited disclosure. *See id.* (citing 42 U.S.C. § 14011(b)(5) (1995)).

Judge Rosenn further explained that VAWA provides a great deal of protection in that it requires probable cause that the individual committed the offense, affords the accused the opportunity to object to the test, and mandates that the results be kept confidential except for very limited disclosure. *See id.* On the other hand, the appellate court clarified, the Fourth Amendment requires probable cause, but does not give an individual the opportunity to object before the search is conducted and does not require the government to keep the results confidential. *See id.* The Third Circuit explained that a compelled HIV test ordered under VAWA does not violate an individual’s right to be free from unreasonable searches and seizures because of the protection afforded by VAWA. *See id.*

Next, the court rejected Ward’s argument that the government could not meet the “special needs” test required before testing his blood and thereby violated his Fourth Amendment rights. *See id.* Judge Rosenn explained that a demonstration of “special needs” that outweighs the intrusion on an individual’s legitimate expectation of privacy obviates the need for a warrant or individualized suspicion. *See id.* at 342. The judge held that the government did not need to show “special needs,” but could easily meet the burden if required. *See id.* at 341. In the present case, the Third Circuit remarked, the government had a strong “special need” to order the test. *See id.* at 341, 342. For example, the appellate court observed, the government can order the test in order to inform the victim of the results, which will either give the victim peace of mind or allow the victim to obtain treatment as early as possible. *See id.* at 342. Judge Rosenn commented that the invasion on an individual’s expectation of privacy is minimal considering the risk that such individual has posed to the victim. *See id.* The judge proclaimed that ordering the test without a “special

needs” hearing is therefore permissible because it is clear that “special needs” exist that outweigh the invasion of privacy. *See id.*

Finally, the court addressed Ward’s contention that the court erred in considering his prior criminal conviction in sentencing. *See id.* The Third Circuit explained that the United States Sentencing Guidelines permit a longer sentence if the defendant’s criminal history includes a previous sentence for conduct similar to the instant offense. *See id.* Judge Rosenn noted that the district court increased Ward’s offense level by two levels because of his 1983 conviction for sexual assault. *See id.* In fact, the judge recognized, Ward’s counsel admitted at trial that Ward met the criteria for an upward departure in sentencing based on his prior conviction. *See id.* The Third Circuit held that the district court acted within the guidelines and within its discretion in increasing the sentence based on the prior conviction. *See id.* at 342, 343.

The Third Circuit used sound reasoning in its opinion and reached very important, appropriate conclusions. It is clear that a compelled HIV test ordered under VAWA does not violate an individual’s Fourth Amendment rights. VAWA implements strict guidelines to ensure that an individual’s rights are respected. In fact, the probable cause determination, the opportunity to oppose the test prior to its administration, and the limited disclosure requirements provide more protection than that required by the Fourth Amendment. Further, the Third Circuit acted wisely in requiring the test to be ordered under VAWA as opposed to allowing a court to rely on its inherent power. If a court could order a test based on its inherent power, then the Fourth Amendment protection provided by VAWA would disappear and a person’s Fourth Amendment rights would be jeopardized. Also, challenges to these tests will be greatly reduced or eliminated by requiring the court to look at the criteria in VAWA, which is deemed to comply with the Fourth Amendment, as opposed to relying on its inherent power. It was also prudent to uphold the legality of the extended prison sentence. The district court acted within its discretion, and it is good policy to be tougher on second-time sexual offenders in an attempt to dissuade future incidences.

*Steven Fleischer*

EMPLOYMENT LAW—EMPLOYMENT DISCRIMINATION—A DISABLED EMPLOYEE WHO IS ABLE TO CONTROL HIS CONDITION WITH MEDICATION CAN PROVE A PRIMA FACIE CASE OF EMPLOYMENT DISCRIMINATION ABSENT A SHOWING THAT THE EMPLOYEE MET HIS EMPLOYER'S LEGITIMATE EXPECTATIONS OR THAT THE EMPLOYER TREATED NONDISABLED EMPLOYEES MORE FAVORABLY—*Matczak v. Frankford Candy & Chocolate Co.*, No. 97-1057, 1997 U.S. App. LEXIS 36159 (3d Cir. Nov. 18, 1997).

Plaintiff-appellant Joseph Matczak, an epileptic, began working for the defendant-appellee, Frankford Candy and Chocolate Company (Frankford), as a maintenance supervisor in April 1993. *See Matczak v. Frankford Candy & Chocolate Co.*, No. 97-1057, 1997 U.S. App. LEXIS 36159, at \*2 (3d Cir. Nov. 18, 1997). Approximately three months later, Frankford reassigned Matczak to the position of supervisor of building maintenance. This supervisory position required Matczak to oversee the work of two mechanics and maintain Frankford's facilities. In November of that year, Matczak suffered an epileptic seizure while at work that required him to be hospitalized for seventeen days. This incident marked the first time that Matczak suffered such a seizure, as Matczak normally was able to control his epilepsy with medication.

Matczak returned to work in December 1993. His doctor, however, limited the type of physical activities in which Matczak could engage for the subsequent five and a half months because, during that time, Matczak was prescribed a new type of medication. Matczak's doctor notified Frankford by letter of the restrictions imposed on Matczak's activities. Specifically, the doctor informed Frankford that Matczak could not work at heights, work around moving machinery, or operate a vehicle. Matczak's doctor stated that he was, however, capable of supervising the work activity of others. *See id.* at \*3. When Matczak returned to work, Frankford assigned him to tasks that were in compliance with the doctor's restrictions.

In April 1994, for reasons that remain unclear, Frankford terminated Matczak's employment and offered two conflicting explanations. First, Frankford contended that the company fired Matczak because he failed to perform satisfactorily the tasks to which he was assigned. Second, Frankford asserted that it eliminated Matczak's job because business was slow.

Matczak, however, claimed that Frankford fired him because he suffers from epilepsy and that Frankford's proffered reasons were merely pretext.

Matczak then sued his former employer in the United States District Court for the Eastern District of Pennsylvania alleging violations of the Americans with Disabilities Act (ADA) and the Pennsylvania Human Relations Act (PHRA), as well as claims for negligent and intentional infliction of emotional distress. *See id.* at \*3-4. Pursuant to Federal Rule of Civil Procedure 56(c), Frankford brought a summary judgment motion to dismiss all claims. *See id.* at \*4. The district court granted Frankford's summary judgment motion and held that (1) Matczak could not be considered disabled under the ADA, (2) although a jury could find that Frankford regarded Matczak as disabled, Matczak nonetheless failed to prove a prima facie case of employment discrimination, and (3) Matczak's claims of negligent and intentional infliction of emotional distress lacked merit. *See id.*

On appeal, the United States Court of Appeals for the Third Circuit reversed the district court's holding as to Matczak's disability and discrimination claims and affirmed the district court's dismissal of Matczak's claims of negligent and intentional infliction of emotional distress. *See id.* at \*21. Specifically, the Third Circuit held that a disabled employee who is able to control his condition with medication can prove a prima facie case of discrimination absent a showing that the employee met the employer's legitimate expectations or that the employer treated nondisabled employees in a more favorable manner. *See id.* at \*2.

Judge Lewis, writing for a unanimous court, began the court's analysis by outlining the relevant provisions of the ADA. *See id.* at \*4. The judge explained that under the ADA an employer is prohibited from discriminating "against a qualified individual with a disability" because of that individual's disability. *Id.* (quoting 42 U.S.C. § 12112(a) (1995)). The court offered guidance as to the meaning of these terms by stating that under the ADA a disability is defined as "(A) a physical or mental impairment that substantially limits one or more of the major life activities of [an] individual; (B) a record of such impairment; or (C) being regarded as having such an impairment." *Id.* at \*5 (quoting 42 U.S.C. § 12102(2) (1995)). Furthermore, the Third Circuit noted, "a qualified individual with a disability," is defined as an individual "with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position." *Id.* (quoting 42 U.S.C. § 12111(8) (1995)).

The judge then examined the district court's treatment of Matczak's claims under the aforementioned provisions of the ADA. *See id.* Judge Lewis first observed that Matczak sought the ADA's protection because his epileptic condition is a physical impairment that substantially limits

major life activities. *See id.* The court added that, in the alternative, Matczak argued that Frankford regarded him as having a life-limiting impairment. *See id.* The Third Circuit pointed out that Matczak did not claim that his work performance met Frankford's expectations or that Frankford treated nondisabled employees better than it treated disabled employees. *See id.*

Judge Lewis next criticized the district court's conclusions regarding Matczak's claims. *See id.* at \*5-6. Specifically, the judge denounced the district court's reasoning that Matczak could not be considered disabled because his physical impairment did not substantially limit significant life activities. *See id.* The court further noted that the district court did not consider the impairment to be either permanent or severe because the condition was expected to last no longer than six months. *See id.* at \*6. Moreover, the court criticized the district court's dismissal of Matczak's alternative argument that Frankford regarded him as disabled. *See id.* Even though the district court conceded that a jury could find that Matczak was regarded as disabled, the appellate court explained, the trial court dismissed Matczak's argument because he failed to prove a prima facie case of employment discrimination. *See id.*

The Third Circuit then traced the district court's analysis concerning the elements of a prima facie case of employment discrimination. *See id.* Judge Lewis enunciated that, according to the district court, to prove a prima facie case of discrimination an employee must show that the employee satisfied the employer's legitimate expectations and that the employer more favorably treated employees who did not fall within the protected class. *See id.*

Judge Lewis commenced the court's substantive review of the district court's analysis by critiquing the lower court's conclusion that Matczak could not successfully assert that he is disabled under the provisions of the ADA. *See id.* at \*7. The court first addressed the district court's determination that, because the activities in which Matczak could engage were not significantly limited and because such limitations were only to last a few months, Matczak's epileptic condition did not substantially limit any major life activities. *See id.* at \*7-8. Judge Lewis opined that such reasoning was flawed because it failed to recognize that Matczak's epilepsy would not be cured within five and a half months. *See id.* at \*8. Rather, the court pronounced, the five and a half months merely represented the time period during which Matczak was to take prescribed medication and restrict his activities. *See id.* Moreover, the Third Circuit observed, the district court failed to acknowledge that although Matczak could participate in most life activities he was only able to do so by taking medication to control his epilepsy. *See id.*

Judge Lewis remarked that the court would initially seek guidance from the ADA in order to determine how much weight to place on Matczak's ability to control his disability with medication. *See id.* at \*8-9. The judge, however, quickly observed that the ADA does not expressly state whether a court should consider mitigating measures such as medication when assessing whether an impairment substantially limits an individual's major life activities. *See id.* Without express statutory language on point, the Third Circuit proclaimed, the court could be guided by other sources. *See id.* at \*9. Accordingly, the appellate court considered the interpretive guidelines established by the Equal Employment Opportunity Commission (EEOC). *See id.* In assessing these guidelines, Judge Lewis instructed that such guidelines advocate determining whether an impairment substantially limits an individual's major life activity without considering mitigating measures such as prosthetic devices or medicines. *See id.* Although the EEOC's guidelines are not binding on the court, the judge professed that the guidelines should be afforded much deference and weight because Congress instructed the EEOC to establish regulations with which to administer the ADA. *See id.* In addition to the EEOC guidelines, the Third Circuit examined the ADA's legislative history and proclaimed that based on such history Congress did not intend to include mitigating measures in determining disability. *See id.* at \*10. Therefore, the court concluded that individuals who are able to control their disabilities with medication still fall within the protective ambit of the ADA. *See id.* at \*11.

As applied to this case, Judge Lewis announced that the district court erroneously held that Matczak could not seek the protections of the ADA because he was not considered disabled under the statute. *See id.* In reaching this conclusion, the appellate court stressed that not all individuals who suffer from epilepsy should be considered disabled as some epileptics merely suffer benign symptoms of the disease, such as minor muscle jerks. *See id.* at \*11-12. The judge reiterated that the Third Circuit's holding merely states that a determination of whether Matczak is disabled is a genuine issue of material fact and, accordingly, should be resolved by a jury and not as a matter of law. *See id.* at \*12.

The appellate court next addressed Matczak's alternative claim that he suffered discrimination because Frankford regarded him as disabled and that therefore Frankford's proffered reasons for terminating him were pretext. *See id.* The court noted that the district court's dismissal of this claim was based on the belief that Matczak neglected to present a prima facie case of employment discrimination. *See id.* The district court based this conclusion, the judge observed, on Matczak's failure to offer evidence that would prove both Frankford's satisfaction with the work Matczak performed and Frankford's favorable treatment of employees outside the protected class. *See id.*

In considering a claim that an employer's proffered reason for termination serves as pretext for an employer's discrimination, the judge instructed, courts should employ the analytical framework set forth by the United States Supreme Court in *McDonnell Douglas Corp. v. Green*. *See id.* at \*12-13 (citing 411 U.S. 792 (1973)). Judge Lewis described this framework as consisting of a three-part burden-shifting formula. *See id.* at \*13. First, the court explained, an employee must establish a prima facie case of employment discrimination by a preponderance of the evidence. *See id.* Second, the judge enunciated, if the employee meets this burden the employer must then present a legitimate, nondiscriminatory reason for taking adverse action against the employee. *See id.* Finally, Judge Lewis observed, the employee must be offered the opportunity to prove that the employer's proffered reason is in fact pretext. *See id.*

Based on this framework, Judge Lewis declared that the controlling issue before the court was whether the two elements that the trial court found lacking were requisite elements of a prima facie case of discrimination. *See id.* To resolve this question, the court further explained the holding in *McDonnell Douglas*. *See id.* The judge pronounced that a prima facie case of discrimination contains four elements under *McDonnell Douglas*: (1) the plaintiff falls within a protected class, (2) the plaintiff was sufficiently qualified for the job, (3) despite being qualified, the plaintiff was terminated, and (4) the position remained open and the defendant sought applicants with the same qualifications as those of the plaintiff. *See id.* at \*13-14. The Third Circuit cautioned, however, that the *McDonnell Douglas* Court did not want this four-prong standard to serve as the dispositive test for a prima facie case of discrimination. *See id.* at \*14. Rather, the court postulated, the elements of a prima facie case can differ depending on the factual situation at hand. *See id.* Therefore, Judge Lewis stressed, it is impossible for the court to lay out every possible required element of a prima facie case. *See id.* On the other hand, the judge announced, the court can decide whether specific elements must be present in every prima facie case of employment discrimination. *See id.*

Next, the Third Circuit reviewed prior case law and concluded that the two elements the district court found lacking were not required to prove a prima facie case of employment discrimination. *See id.* at \*14-19. In reaching this conclusion, the court analyzed the first element that the district court found lacking—Matczak's failure to show that his work met Frankford's legitimate expectations. *See id.* at \*14. The judge criticized the district court's reliance on this element, reasoning that such a showing would require a subjective assessment of the situation. *See id.* It is impossible, Judge Lewis continued, for a court to evaluate whether an employee has met an employer's legitimate expectations. *See id.* On the other hand, the court postulated, a court can easily determine if an employee has satis-

fied certain objective standards, such as educational requirements. *See id.* Accordingly, the appellate court noted that a survey of prior case law revealed a prohibition against a requisite showing that an employee satisfied an employer's expectations. *See id.* at \*14-15. The Third Circuit commented that because such a showing involves subjective evaluations, it is more appropriately left to consideration at a later stage of the *McDonnell Douglas* analysis. *See id.* at \*15. For example, Judge Lewis professed, because subjective evaluations are likely to hide pretext, they are more aptly analyzed at the pretext stage. *See id.*

Judge Lewis then reaffirmed the district court's conclusion that Matczak was qualified for the job because, as Frankford conceded, Matczak's job entailed supervising others and did not require Matczak to engage in any medically prohibited activities. *See id.* Upon reaching this conclusion, the judge remarked, the district court should have ended its inquiry. *See id.* at \*16. Once the district court found that Matczak was objectively qualified for his job, Judge Lewis continued, the district court should not have required the additional proof that Matczak's work performance met Frankford's subjective expectations. *See id.*

The court subsequently addressed the second element that the district court found lacking in Matczak's prima facie case of discrimination—Frankford's favorable treatment of employees falling outside the protected class. *See id.* The judge recognized the lack of clear guidance as to whether such favorable treatment is a requisite element of a prima facie case of discrimination. *See id.* Noting the *McDonnell Douglas* Court's mandate that the four-prong standard established in that case not be applied in a rigid manner, the court pointed out that the relevant Third Circuit opinions offered conflicting guidance. *See id.* For instance, Judge Lewis observed, in several cases the Third Circuit found favorable treatment to be an element of a prima facie case of discrimination, whereas other Third Circuit employment discrimination opinions made no mention of this element. *See id.* at \*16-17.

The appellate court resolved this conflict by focusing on a prior Third Circuit decision that specifically addressed the issue of favorable treatment. *See id.* at \*18. In *Olson v. General Electric Astrospace*, Judge Lewis explained, the court held that a plaintiff could use favorable treatment as one alternative to the fourth prong of the *McDonnell Douglas* standard. *See id.* (citing *Olson v. General Elec. Astrospace*, 101 F.3d 947, 951 (3d Cir. 1996)). Thus, the judge suggested, a plaintiff could satisfy the fourth prong of the *McDonnell Douglas* framework by showing that the employer filled the plaintiff's position with an individual who did not fall within the plaintiff's protected category. *See id.* Judge Lewis reasoned that *Olson* therefore proves that, by allowing favorable treatment of mem-

bers outside the protected class to serve as an alternative element to a prima facie case of discrimination, favorable treatment can, but need not, be present at the prima facie stage of the litigation. *See id.* Thus, the judge concluded that the district court erroneously held that favorable treatment is a requisite element of a prima facie case. *See id.* at \*19.

Finally, the Third Circuit addressed and dismissed Matczak's claims of negligent and intentional infliction of emotional distress. *See id.* at \*19-20. Before beginning a survey of these claims, however, the court noted that both emotional distress claims are issues of state law and therefore should be governed by Pennsylvania tort law. *See id.* at \*19. As an initial matter, Judge Lewis announced that all claims arising out of the employment relationship should be exclusively decided pursuant to Pennsylvania's workers' compensation statute and not by common law. *See id.* at \*20.

Despite this acknowledgment, the court briefly considered Matczak's emotional distress claims and enunciated the applicable standards for negligent and intentional infliction of emotional distress. *See id.* First, Judge Lewis explained that to prove negligent infliction of emotional distress a plaintiff must show some form of bodily injury. *See id.* Although Matczak showed that he cried once a week since the day he was fired, the court determined that such action does not constitute bodily injury. *See id.* As to the claim of intentional infliction of emotional distress, the judge instructed that Matczak must prove that Frankford's conduct was either extreme or outrageous. *See id.* at \*20-21. Such a showing, Judge Lewis commented, is extremely rare in the employment context. *See id.* at \*21. Accordingly, the court concluded that, although Matczak claimed that Frankford acted in a discriminatory manner, Frankford's conduct could not be considered either extreme or outrageous. *See id.* Judge Lewis therefore upheld the district court's dismissal of Matczak's claims of negligent and intentional infliction of emotional distress. *See id.*

The Third Circuit applied sound judgment to the issues at hand and correctly ruled against affirming the dismissal of Matczak's disability and discrimination claims. Critical to Judge Lewis's astute analysis was the court's reliance on both EEOC guidelines and legislative history to interpret an aspect of disability law upon which the ADA is silent. Despite this silence, when an organization such as the EEOC, charged with aiding in the administration of a federal statute, offers the same statutory interpretation that is offered in the statute's legislative history, courts are left with no option but to apply such an interpretation.

Furthermore, the court correctly decided against expanding the elements necessary to prove a prima facie case of employment discrimination. Proving a prima facie case of discrimination is not meant to be an arduous

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task for a plaintiff; courts following the lead established in *McDonnell Douglas* require little proof at the prima facie stage of litigation. Therefore, requiring a plaintiff to show that he satisfied his employer's legitimate expectations and that his employer treated employees outside the employee's protected class more favorably lacks merit and is unsubstantiated by case law.

Courts, however, would be wise to demand these and other significant proofs at a later stage in the litigation. Disability and discrimination cases have become a type of "cottage industry" in this country. Based on a combination of liberally-written case law and imprudent judicial decisionmaking, employees have come to believe that they have carte blanche to sue their employers over anything remotely resembling issues of disability and discrimination. As a result, the workplace has or at the least threatens to become expressionless. Without a comfortable work environment, productivity declines and the nation as a whole suffers. Courts have the power to change this trend and therefore should seize this opportunity by demanding significant proof from plaintiffs who claim disability and discrimination in the workplace and by sanctioning attorneys who clog court dockets with meritless employment claims.

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CREDIT REPORTING AGENCIES—FAIR CREDIT REPORTING ACT—IN ORDER TO DISCHARGE ITS DUTY TO REINVESTIGATE AND CORRECT INACCURATE INFORMATION UNDER SECTION 611(A) OF THE FAIR CREDIT REPORTING ACT, A CONSUMER REPORTING AGENCY SHOULD INDEPENDENTLY VERIFY DATA IF THE AGENCY KNOWS OR SHOULD KNOW THAT THE ORIGINAL SOURCE OF THE INFORMATION MAY BE UNRELIABLE AND THE COST OF INVESTIGATING IS LESS THAN THE POTENTIAL HARM THAT REPORTING INACCURATE INFORMATION MAY CAUSE THE CONSUMER—*Cushman v. Trans Union Corp.*, 115 F.3d 220 (3d Cir. 1997).

In 1993, someone using the identifying information of plaintiff-appellant, Jennifer Cushman, applied for and received three credit cards under her name. *See Cushman v. Trans Union Corp.*, 115 F.3d 220, 222 (3d Cir. 1997). This unknown person, who may have been a member of Cushman's Pennsylvania household, charged a total of approximately \$2400 to these cards between 1993 and 1994 without Cushman's knowledge. Cushman was at that time a permanent resident of Pennsylvania but was attending college in Vermont. In 1994, a bill collector informed the plaintiff-appellant that Trans Union Corporation (TUC) would be publishing a consumer credit report denoting that Cushman was delinquent on her payments to the three credit grantors. Cushman then wrote to TUC notifying the agency that she had neither requested nor used those cards and suggested that the three cards had been obtained fraudulently by a third party. Cushman did not contact the credit grantors.

A TUC clerk conducted an investigation that consisted of contacting the credit grantors to compare their respective records regarding Cushman's personal information and inquiring as to whether Cushman had requested opening a fraud investigation with these creditors. TUC's investigation revealed that Cushman's identifying information in the TUC report matched that in two of the creditors' files and that Cushman had not reported the fraud to the credit grantors. TUC therefore retained two delinquency entries in Cushman's credit report concerning those creditors. TUC was unable initially to contact the third credit grantor to verify the information, so this entry was deleted from Cushman's credit report. TUC's clerks who are responsible for performing these investigations are paid \$7.50 an hour and are generally expected to complete ten investigations per hour. TUC subsequently sent Cushman an updated report containing two

of the three delinquent entries and allowed her to submit a form that would cause a special handling statement to be placed on her report.

Cushman responded to TUC with a second letter in which she repeated her complete disagreement with the facts in the report and offered to submit affidavits stating that the reported delinquencies were not hers. TUC then conducted another investigation identical to the initial one, but nevertheless retained the delinquency entries on Cushman's report. TUC never described its reinvestigation procedures to Cushman. After Cushman filed suit, TUC verified the delinquency information with the third credit grantor and reinserted this entry on Cushman's credit report.

Several months later, Cushman disputed the delinquencies with all three credit grantors for the first time. One of the creditors compared Cushman's handwriting to that on the credit application, and each of the three creditors ultimately concluded that the cards were fraudulently obtained. TUC then deleted the entries from plaintiff-appellant's credit report.

Cushman initiated this action in the United States District Court for the Eastern District of Pennsylvania alleging defamation, and negligent and willful failure to reinvestigate the delinquent entries in violation of sections 611(a), 616, and 617 of the Fair Credit Reporting Act (FCRA) and the State of Vermont's FCRA. *See id.* After deleting the entries from Cushman's report, TUC moved for summary judgment. *See id.* The district court denied this motion and stated that the relevant inquiry was whether TUC could have concluded that the accounts were fraudulently opened by reasonably investigating the matter. *See id.* at 222, 226. The court, however, sua sponte granted TUC judgment as a matter of law on all claims after Cushman presented her case. *See id.* at 222-23. Cushman subsequently appealed. *See id.*

The United States Court of Appeals for the Third Circuit reversed and remanded the district court's decision. *See id.* at 221, 226. The Third Circuit held that a consumer credit reporting agency's duty to reinvestigate inaccurate information may entail independently verifying the accuracy of information provided by a subscriber. *See id.* at 225. Furthermore, the court held that whether the agency is required to go beyond its initial source of information depends on two factors. *See id.* The court identified the first factor to be whether the consumer has notified the agency or the agency knows or should know that the original source may be unreliable. *See id.* The appellate court defined the second factor to be the cost of independently verifying the accuracy of the original source as compared to the potential harm that reporting inaccurate information could cause the consumer. *See id.* The court concluded that the trier of fact must weigh these two factors to determine whether a consumer credit reporting agency ade-

quately discharged its duty to reinvestigate inaccurate information. *See id.* at 225-26.

Writing for a unanimous court, Judge Cowen commenced the analysis by reviewing the FCRA's language and observing that the statute's purpose is to ensure that consumer reporting agencies adopt reasonable procedures to report credit information in a manner that is fair to the consumer. *See id.* at 223. The court then rejected TUC's contention that subsections (b) and (c) of the FCRA provide the only remedy to consumers who dispute the accuracy of information in their credit reports and decided that Cushman had a cause of action under section 611(a) of the FCRA. *See id.*

The Third Circuit explained that subsections (b) and (c) allow a consumer to add a statement in his or her credit report explaining the nature of a disagreement under subsection (a) when the dispute has not been resolved between the consumer and the agency. *See id.* Relying on cases from other circuits, Judge Cowen asserted that the remedy under subsections (b) and (c) is triggered only after a subsection (a) reinvestigation has been performed but fails to resolve the dispute. *See id.* Accordingly, the judge concluded that when a consumer's complaint is that the agency has not even conducted a reasonable reinvestigation section 611(a) authorizes a separate claim. *See id.* at 223-24.

Next, the court turned to the critical issue of the scope of a credit reporting agency's duty to reinvestigate alleged inaccurate information in a consumer's credit report. *See id.* at 224-26. Addressing TUC's claim that section 611(a) merely requires an agency to confirm the verity of the disputed information with the source that provided it, the Third Circuit noted that the Fifth and Seventh Circuits have already considered and rejected this contention. *See id.* at 224 (citing *Henson v. CSC Credit Servs.*, 29 F.3d 280, 286-87 (7th Cir. 1994); *Stevenson v. TRW, Inc.*, 987 F.2d 288, 293 (5th Cir. 1993)). Judge Cowen agreed with the Seventh Circuit that once an agency is notified that a consumer disputes information in her credit report the reasonable reinvestigation requirement of section 611(a) may obligate the agency independently to verify the disputed information. *See id.* (citing *Henson*, 29 F.3d at 286-87). The judge reasoned that, although it would be too burdensome to require an agency initially to verify all information, once it is notified of a dispute, the agency could target its resources to conduct a more efficient and thorough investigation. *See id.* The court posited that because the consumer will already have pinpointed the claimed inaccuracy the agency would then have to reinvestigate only that piece of disputed information. *See id.* at 225. Moreover, the Third Circuit observed, a cost-benefit analysis of requiring the agency to inquire beyond the original source will probably weigh in favor of the consumer. *See id.*

Adopting the reasoning of the Fifth Circuit, the Third Circuit postulated that in a reinvestigation scenario the plain language of section 611(a) requires a credit reporting agency to bear some of the responsibility for evaluating the verity of information provided by the initial source. *See id.* at 224 (citing *Stevenson*, 987 F.2d at 293). Agreeing with the Fifth Circuit, Judge Cowen determined that in cases where fraud is alleged the FCRA places the burden to investigate squarely on the reporting agency and does not require the consumer to resolve the dispute with the credit grantor. *See id.* (citing *Stevenson*, 987 F.2d at 293). Citing congressional intent as evinced through the FCRA, the judge elaborated that credit reporting agencies that reap profits by collecting and disseminating credit information bear “grave responsibilities” to guarantee the accuracy of such information. *See id.* The appellate court proffered that agencies must do more than merely parrot information provided by other sources. *See id.* at 225.

Further rejecting TUC’s contention that section 611(a) does not require it independently to verify information, the Third Circuit enunciated that TUC’s interpretation would merely replicate the obligations imposed on reporting agencies under section 611e(b). *See id.* Remarking that courts should avoid interpretations that render statutory language superfluous, the appellate court expounded that TUC’s interpretation would impermissibly render the two sections duplicative. *See id.* Continuing, Judge Cowen dismissed TUC’s reliance on a Second Circuit case, *Podell v. Citicorp Diners Club, Inc.* *See id.* (citing 112 F.3d 98, 101-02 (2d Cir. 1997)). The judge distinguished *Podell* from this case by noting that *Podell* did not allege that the scope of the consumer credit reporting agency’s reinvestigation was unreasonably narrow. *See id.* The Third Circuit countered that *Podell* was not on point because *Podell*’s complaint was only that the agency had failed to inform him that a reinvestigation had occurred, thus depriving him of the opportunity to note the dispute in his credit file. *See id.*

Concluding the court’s analysis on this issue, Judge Cowen reiterated that a consumer credit reporting agency may be obliged independently to verify the accuracy of information supplied by subscribers in order to fulfill its obligation reasonably to reinvestigate disputed information pursuant to section 611(a) of the FCRA. *See id.* (citing *Henson*, 29 F.3d at 287). The judge further held that two factors must be considered to determine whether the scope of the agency’s duty to investigate broadens beyond its original source of information. *See id.* First, the court asserted that this expanded duty may arise if the reporting agency knows or should know that its source of information is unreliable or if the consumer has notified the agency that its source may be inaccurate. *See id.* Second, the appellate court imposed a duty to weigh the cost of independently verifying the information of the

original source against the potential harm that may befall the consumer as a result of inaccurately reported information. *See id.* Moreover, the Third Circuit emphasized that the trier of fact must weigh these factors to determine whether the agency complied with the FCRA. *See id.* at 225-26.

Reviewing the proceedings in the district court, the Third Circuit concluded that Cushman presented sufficient evidence to enable a jury to render a verdict in her favor. *See id.* at 226. The appellate court hypothesized that a jury could have determined that TUC was on notice that Cushman claimed the accounts were fraudulently opened by a third party. *See id.* Furthermore, the court proclaimed, a jury could have found that TUC therefore should have known that the three credit grantors were not reliable to the extent that Cushman had not informed them of the fraud. *See id.* Continuing, Judge Cowen theorized that a reasonable jury could have decided that the seventy-five cents expended by TUC for the reinvestigation was too little when compared to the harm that reporting the wrongful information would cause Cushman. *See id.* Reiterating that the district court erred in arrogating this role, the judge reversed the district court's grant of judgment as a matter of law. *See id.*

Next, the Third Circuit reinstated Cushman's claim for punitive damages under section 611(n) of the FCRA and remanded to the district court to determine whether TUC's alleged violation of section 611(a) was willful. *See id.* at 227. Determining the standard for willful noncompliance, Judge Cowen declined to adopt the Fifth Circuit's approach, which limits punitive damage awards to cases of willful misrepresentations or concealments. *See id.* at 226-27 (citing *Stevenson*, 987 F.2d at 294). The judge, however, stated that a defendant's actions "must be on the same order as willful concealments or misrepresentations." *Id.* at 227. The court postulated that punitive damages may be awarded when an agency adopts its reinvestigation procedures with either knowledge or reckless disregard that such procedures violate consumers' rights under the FCRA. *See id.*

Similarly, the Third Circuit reinstated Cushman's claims for violations of Vermont's FCRA and defamation. *See id.* at 227-30. Analyzing the Vermont FCRA claims, the court first concluded that a jury could have found that Cushman was a resident of Vermont and therefore entitled to the protections of Vermont's FCRA. *See id.* at 228-29. Next, Judge Cowen reversed and remanded the district court's grant of judgment as a matter of law on Cushman's claim that, under Vermont's FCRA, TUC failed to notify her promptly that the delinquency entry of the third creditor had been reinserted after she filed suit. *See id.* at 229. The judge ordered a jury determination of whether TUC's notification to Cushman's attorneys during discovery was sufficiently prompt. *See id.* The appellate court also revived Cushman's claim that TUC failed to provide her with any description

of its reinvestigation policy in contravention of Vermont's FCRA, because there was sufficient evidence that TUC did violate this provision of the statute. *See id.*

Finally, the court examined Cushman's defamation claim. *See id.* at 229-30. Observing that the district court decided that Cushman failed to produce any evidence of malice, which is required to avoid the FCRA's preemption of state defamation causes of action, the appellate court remanded for a redetermination of this issue. *See id.* at 229. Reversing the district court, the Third Circuit concluded its analysis by determining that Cushman satisfied the publication element of her defamation claim because TUC published the erroneous information to two of the credit grantors and a bill collector. *See id.* at 230. Accordingly, Judge Cowen declared that the district court also erred in granting judgment as a matter of law to TUC on Cushman's defamation claim. *See id.*

The Third Circuit has broadened the duties of consumer credit reporting agencies regarding reinvestigations. Given the importance of credit reports, it is equitable to place the burden of ensuring the accuracy of the information reported on the agencies that profit from disseminating credit data. However, identity theft is probably not the type of inaccurate information for which Congress intended to penalize credit agencies. Two aspects of the court's decision will unduly hinder both credit reporters and credit grantors in cases of identity theft.

First, reporting agencies are now subject to expanded duties to investigate otherwise accurate information when a consumer fails to notify the credit source that his identifying information was improperly used. A consumer should at least be required to notify credit grantors of alleged fraud before the creditor or the agency is charged with incurring investigation expenses for the protection of the consumer.

Second, the court's reading of FCRA's remedy provisions will prevent credit grantors from obtaining information that could warn them to verify an applicant's identity before granting credit. The explanatory statement provided for in sections 611(b) and (c) is the best remedy in cases of identity theft. So long as an agency does not factor this information in the consumer's credit rating, retaining this information would put potential credit grantors on notice without harming the consumer. This would ultimately benefit all credit consumers by reducing credit card fraud. Unfortunately, this decision will prevent creditors from obtaining this information.

*Elizabeth McCrae*

EMPLOYMENT LAW—SEXUAL HARASSMENT—A POLICE OFFICER ACTS UNDER COLOR OF STATE LAW FOR PURPOSES OF 42 U.S.C. § 1983 WHEN HE SEXUALLY HARASSES A COWORKER WHOSE SHIFT HE SUPERVISES, EVEN THOUGH THE OFFICER LACKS ANY AUTHORITY TO HIRE, FIRE, OR MAKE EMPLOYMENT DECISIONS REGARDING THE COWORKER—*Bonenberger v. Plymouth Township*, 132 F.3d 20 (3d Cir. 1997).

Plaintiff-appellant, Cheryl Bonenberger, was employed by the Plymouth Township Police Department as a dispatcher from February 1993 until April 1994, when she quit due to alleged sexual harassment by her acting supervisor, Sergeant Joseph La Penta. *See Bonenberger v. Plymouth Township*, 132 F.3d 20, 22 (3d Cir. 1997). Although Sergeant Carbo evaluated Bonenberger's work and had the power to hire and fire her, when Carbo was not present La Penta was responsible for supervising Bonenberger and other dispatchers by arranging their duties and determining their break schedules. *See id.* at 22, 23 n.3. Thus, when the other supervisors were off duty, La Penta alone had control over the dispatchers. *See id.* at 22.

Plaintiff-appellant alleged that she was consistently accosted by La Penta while at work and had to endure unwelcome sexual touchings such as buttock pinching and breast fondling. Several other members of the police department allegedly witnessed the incidents of harassment, including Sergeant Carbo, whose duty it was to investigate such behavior. *See id.* at 26, 27 n.7. On one occasion, while Bonenberger was having a conversation with Sergeant Carbo and although she protested, La Penta touched Bonenberger's breasts. *See id.* at 26. Sergeant Carbo's only reaction was to smile. Later, La Penta grabbed Bonenberger's buttocks in front of three other officers, including Sergeant Galetti, who was also responsible for investigating incidents of harassment. *See id.* at 26, 27 n.7. This incident was confirmed by the police department's own internal investigation. *See id.* at 22. Shortly after Sergeant Galetti witnessed La Penta's advances, the police department modified its sexual harassment policy to protect dispatchers. *See id.* at 26-27.

Bonenberger brought both federal and state law claims in the United States District Court for the Eastern District of Pennsylvania against the Plymouth Township Police Department, Plymouth Township, and Sergeant La Penta. *See id.* at 22. Specifically, Bonenberger asserted that La Penta violated her rights to equal protection of the law, both officially and as an

individual, and that the police department also violated those rights by its failure to discipline La Penta. *See id.* at 23. The plaintiff-appellant further claimed that the police department violated her rights under Title VII in failing (1) to stem La Penta's quid pro quo behavior and (2) to reform the hostile work environment. *See id.* Moreover, Bonenberger charged the sergeant with intentional infliction of emotional distress and battery. *See id.* Finally, Bonenberger brought a claim against the police department under the Pennsylvania Human Relations Act. *See id.*

The district court granted the motions of the defendants-appellees for summary judgment on each of the federal law claims. *See id.* at 22-23. The court reasoned that because La Penta did not have the authority to hire or fire Bonenberger, he was not acting under color of state law and thus could not be liable for a § 1983 claim. *See id.* at 23. The district court also decided that the police department was not liable under § 1983 because it adequately trained and disciplined La Penta by both maintaining a sexual harassment policy and providing regular training to prevent such behavior. *See id.* at 25. Finally, the district court announced that Bonenberger's Title VII claim had no merit because the respondeat superior element was not met. *See id.* at 26. Upon the resolution of all claims for which the district court held original jurisdiction, the state law claims were dismissed because the district court refused to entertain supplemental jurisdiction under 28 U.S.C. § 1367(c)(3). *See id.* at 23 & n.1. Bonenberger subsequently appealed the decision granting summary judgment of the federal claims as well as dismissal of the state law claims. *See id.* at 22-23.

The United States Court of Appeals for the Third Circuit, examining the record de novo, reversed in part and affirmed in part. *See id.* at 23. The appellate court reversed the order granting summary judgment for the § 1983 claim against Sergeant La Penta, holding that a police officer acts under color of state law when he sexually harasses a coworker whose shift he supervises, even though the officer lacks any authority to hire, fire, or make employment decisions regarding the coworker. *See id.* at 22, 23. The Third Circuit also reversed the district court's order granting summary judgment to the police department for the Title VII hostile work environment claim and reversed the dismissal of plaintiff's state law claims. *See id.* at 23, 29. Finally, the court affirmed the orders granting summary judgment regarding the Title VII claim of quid pro quo harassment and the § 1983 claim against the police department. *See id.*

Judge Lewis, writing for a unanimous court, first analyzed the plaintiff's claims brought under 42 U.S.C. § 1983. *See id.* at 23. The judge began by delineating what is required to maintain a right of action under § 1983. *See id.* The court explained that liability hinges upon state action; harassment without color of state law empowering the perpetrator fails to

meet § 1983 requirements. *See id.* In essence, the Third Circuit elaborated, a § 1983 claim is about abuse of state authority through a supervisory position. *See id.* at 24. The court noted, however, that simply being a state employee and committing a tort on duty does not suffice; official authority must be exercised. *See id.*

Based on this discussion, the Third Circuit determined that Sergeant La Penta, although not technically Bonenberger's supervisor, could be held liable for a violation of 42 U.S.C. § 1983. *See id.* The court emphasized the degree of control that the defendant-appellee exercised over the plaintiff-appellant when no other supervisors were present, noting that disobedience on Bonenberger's part would have resulted in insubordination and would have been grounds for discipline. *See id.* Judge Lewis distinguished the instant fact pattern from cases relied on by the trial court that addressed similar situations. *See id.* In one case, the court wrote, the dispatchers were employed by a private company and not by the police department itself, so that the harassing police officers did not wield any authority over them. *See id.* (citing *Woodward v. Worland*, 977 F.2d 1392 (10th Cir. 1992)). The Third Circuit found another case where the officers were of the same rank to be equally inapposite. *See id.* (citing *Rouse v. City of Milwaukee*, 921 F. Supp. 583 (E.D. Wis. 1996)). Unlike either of those cases, the court reasoned, La Penta was the equivalent of Bonenberger's supervisor and utilized such authority to harass her. *See id.*

Judge Lewis noted that to hinge arguments of authority on the label of being a supervisor would create a "perverse incentive" for governments to create supervisors without titles in order to avoid liability. *See id.* at 25. Substantively, the judge wrote, such adherence to form over function would defeat the purpose of the statutory protections. *See id.* Finally, the Third Circuit created a test for determining who acts under color of state law, writing that, when the state "places an official in the position of supervising a lesser-ranking employee and empowers him or her to give orders which the subordinate may not disobey without fear of formal reprisal, that official wields sufficient authority to satisfy the color of law requirement of 42 U.S.C. § 1983." *Id.* at 24-25. Applying this principle, the appellate court determined that Sergeant La Penta could be considered Bonenberger's supervisor and thus reversed the grant of summary judgment in the sergeant's favor. *See id.* at 25.

The Third Circuit continued the § 1983 analysis by rejecting Bonenberger's argument that the police department failed properly to train and discipline its members. *See id.* The court agreed with the district court's decision that the Plymouth Police Department did not act with the "deliberate indifference" that is required for § 1983 to apply. *See id.* Judge Lewis noted that a municipality will only be liable if supervisors both

know of the harassment and act in such a way as to encourage the employee's behavior. *See id.* Thus, the judge wrote, because the Plymouth Police Department maintained a sexual harassment policy that included training for all officers, including Sergeant La Penta, the district court's grant of summary judgment was appropriate. *See id.*

Judge Lewis next addressed Title VII issues, beginning with Bonenberger's claim of a hostile work environment against the Plymouth Police Department. *See id.* Addressing one of the elements for a prima facie case of sexual harassment, the Third Circuit determined that respondeat superior liability exists where the state entity knows of the harassment and does not take sufficient remedial measures against it. *See id.* at 26. In this case, the court reasoned, Bonenberger's direct supervisor, Sergeant Carbo, had actual knowledge of the harassment by La Penta and implicitly approved of it by taking no remedial action against him. *See id.* Judge Lewis explained that in granting the motion for summary judgment, the district court focused solely on the police department's investigation and on the letter of reprimand issued to La Penta after Bonenberger left. *See id.* The judge found the lower court's analysis to be incomplete. *See id.* The court emphasized the differences between Bonenberger's account of the harassment and that of the police department's and determined that a genuine issue of material fact remained as to Title VII liability. *See id.* at 27. The Third Circuit further elaborated that merely having a sexual harassment policy in place, without a grievance procedure, is not enough to avoid liability for a hostile work environment. *See id.*

Finally, the court examined the issue of quid pro quo sexual harassment. *See id.* Judge Lewis reiterated the traditional view of quid pro quo harassment, which normally entails some threat of job loss or decision-making based on submission vel non to the harassment. *See id.* In this case, the judge explained, the plaintiff-appellant knew that the defendant-appellee did not have the power to fire her or the authority to make decisions regarding her employment, even if he made statements to that effect. *See id.* at 27-28. More specifically, the appellate court noted that La Penta never suggested that Bonenberger's employment depended on accepting his sexual advances, and thus no exchange of sex for a job occurred. *See id.* at 28. Although the plaintiff-appellant proposed a creative theory of quid pro quo harassment based on constructive discharge, the Third Circuit reiterated the need for a demand for sexual favors in return for employment. *See id.* Judge Lewis thus upheld the decision to dismiss the quid pro quo claim. *See id.*

Clearly this is a difficult and conflict-prone area of the law, as evidenced by the number of sexual harassment cases the United States Supreme Court will be hearing this Term. On one hand, taxpayers will de-

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spise this case, as it expands the number of state employees who fit under the aegis of civil rights law. Accordingly, it is the taxpayers who will be forced to compensate victims of harassment propagated by coworkers regardless of supervisory titles. After all, it is never just the officer who is sued, but the deep-pockets employer as well.

Conversely, the decision is a logical progression and a boon to women in the workplace who may be harassed by coworkers with power but without official supervisory titles. To hold otherwise would defeat the purpose of 42 U.S.C. § 1983, which seeks to prevent the abuse of power granted to state officials. As the court noted, to exempt employees lacking a title but possessing supervisory power from the protections afforded by § 1983 would indeed be a “perverse” effect. Sergeant La Penta clearly commanded power over Bonenberger, and the Third Circuit made a logical, sound decision by allowing the plaintiff-appellant the chance to prove her case.

*Nicole Huberfeld*

CRIMINAL PROCEDURE—RIGHT TO A UNANIMOUS JURY VERDICT—A TRIAL COURT’S FAILURE TO INFORM JURORS THAT THEY MUST AGREE UNANIMOUSLY ON BOTH THE EXISTENCE OF THE CONTINUING CRIMINAL ENTERPRISE PREDICATE OFFENSES AND THE IDENTITY OF THOSE OFFENSES VIOLATES A CRIMINAL DEFENDANT’S SIXTH AMENDMENT RIGHT TO A UNANIMOUS JURY VERDICT AND THEREFORE CONSTITUTES REVERSIBLE ERROR—*United States v. Russell*, No. 96-7760, 1998 WL 12543 (3d Cir. Jan. 16, 1998).

Defendant-appellant James Russell was involved in an intricate and profitable drug distribution scheme. *See United States v. Russell*, No. 96-7760, 1998 WL 12543, at \*1 (3d Cir. Jan. 16, 1998). The scheme involved pooling his funds with three associates, using those funds to purchase large quantities of cocaine from sources in New York, and then distributing the drugs to dealers in Pennsylvania. Russell was indicted in the United States District Court for the Middle District of Pennsylvania on the following three counts: (1) conducting a continuing criminal enterprise (CCE), (2) conspiracy to distribute controlled substances, and (3) money laundering. Russell’s codefendants turned state’s evidence and testified against him at trial.

In order to prevail on the CCE charge, the government was required to prove, among other things, that Russell committed a drug-related felony under 21 U.S.C. § 13, subchapter I or II, and that this felony “was part of a ‘continuing series of violations’ of the subchapter.” *Id.* at \*2 (quoting 21 U.S.C. § 848(b)(2) (1981)). Pursuant to an earlier Third Circuit decision, the trial judge was required to instruct the jurors that they must agree unanimously on *which* three or more drug-related felonies comprised the continuing series. *See id.* at \*3 (citing *United States v. Edmonds*, 80 F.3d 810, 822 (3d Cir. 1996)).

After issuing a charge that failed to include a specific unanimity instruction, the trial judge held a conference with counsel to determine whether there were any objections to the instructions. *See id.* at \*4, \*5. Russell’s attorney made two objections, neither of which related to the requirement of specific unanimity on CCE predicate offenses. *See id.* at \*13 (Alito, J., concurring and dissenting). After twice confirming that counsel had no additional objections to the instructions, the trial judge engaged Russell’s attorney in a discussion of whether *Edmonds* required that the jurors be given a special verdict page. *See id.* at \*14. The district court de-

cided not to provide a special verdict sheet and this decision was not challenged by the defendant-appellant on appeal. *See id.*

The jury found Russell guilty of both the CCE charge and the conspiracy to distribute controlled substances charge. *See id.* at \*1. Russell appealed his conviction on a number of grounds, the main one claiming that the trial judge improperly instructed the jury with respect to the requirement for specific unanimity on the CCE count. *See id.* Russell claimed that this failure deprived him of his Sixth Amendment right to a unanimous jury verdict. *See id.*

In reversing Russell's conviction on the CCE charge, the United States Court of Appeals for the Third Circuit held that a trial court's failure to inform jurors that they must agree unanimously on both the existence of the CCE predicate offenses and the identity of those offenses violates a defendant's constitutional right to a unanimous verdict and thus constitutes reversible error. *See id.* at \*4, \*9. The court also held that, when both the substance and context of a conversation between a judge and an attorney are sufficient to alert the judge to an objection and the basis for it, the objection is properly preserved for appeal. *See id.* at \*5, \*6.

Writing for the majority, Judge Lewis enunciated the rationale for requiring a specific unanimity instruction in certain limited situations. *See id.* at \*3. The judge explained that such instructions are required when "the complexity of the case, or other factors, creates the potential that the jury will be confused." *Id.* (quoting *United States v. Beros*, 833 F.2d 455, 460 (3d Cir. 1987)). The purpose of the instruction, the court continued, is to ensure substantial juror agreement at each step in the determination of complex cases. *See id.* Unanimity, stressed the majority, is a crucial component in federal jury trials. *See id.*

Relying on recent precedent, the court noted that CCE prosecutions are precisely the kinds of cases where general unanimity instructions are insufficient. *See id.* (citing *Edmonds*, 80 F.3d at 822). Under the CCE statute, reiterated Judge Lewis, the charge "must direct the jury to agree unanimously on *which* of the alleged violations constitute the continuing series." *Id.* (emphasis added). The judge found that while the charge in Russell's case did instruct the jurors of the requirement to agree unanimously on the *existence* of three or more narcotics violations it failed to apprise the jurors of the requirement for unanimous agreement on the *identity* of those offenses. *See id.* at \*4. The majority conceded there was ample evidence of Russell's involvement in several drug-related felonies and, consequently, that the jurors may have all agreed on the identity of three or more predicate offenses. *See id.* The problem, the appellate court countered, is that the instruction allowed the jurors to convict Russell even if

they did not agree on which offenses comprised the continuing series. *See id.*

The majority next addressed the requirements for preserving arguments for appeal. *See id.* at \*4-9. The court first traced the sequence of events surrounding the issuance of the jury instructions in the case. *See id.* at \*5. Judge Lewis recounted that the trial judge conferred with counsel in an on-the-record setting specifically to hear any objections to the charge. *See id.* The judge observed that it was during this meeting that Russell's attorney alerted the district judge that the instructions did not comply with *Edmonds*. *See id.* at \*6.

The Third Circuit then acknowledged that Russell's lawyer did not explicitly object to the general unanimity instruction. *See id.* at \*5. Judge Lewis argued, however, that the purpose of Federal Rule of Criminal Procedure 30, which deals with the preservation of issues for appeal, is not to mandate strict adherence to linguistic or stylistic formalities. *See id.* (citing *United States v. O'Neill*, 116 F.3d 245, 247 (7th Cir. 1997)). Preserving an issue for appeal, maintained the judge, requires only a communication that is sufficiently specific to notify the court of the existence of an objection and the underlying basis for it. *See id.* at \*6.

In finding that the defendant-appellant adequately preserved the issue for appeal, the majority emphasized that Russell's attorney engaged the trial judge in a lengthy debate over the validity of the charge in light of *Edmonds*. *See id.* The majority determined that the context of the meeting—an on-the-record discussion of possible objections—and the request for a special verdict page sufficiently alerted the trial judge “that Russell believed . . . the instruction was incorrect because it lacked the requisite specificity, and that the basis for this belief was [the Third Circuit's] decision in *Edmonds*.” *Id.* Judge Lewis therefore concluded that the trial judge must have understood that defense counsel was objecting to the charge. *See id.*

After ruling that the issue was properly preserved, the Third Circuit reviewed the jury instructions under the harmless error standard of review. *See id.* at \*8. Judge Lewis explained that because the error implicated the defendant's constitutional right to a unanimous verdict, the court may affirm the trial court “only if the error is harmless beyond a reasonable doubt.” *Id.* (quoting *United States v. Molina-Guevara*, 96 F.3d 698, 703 (3d Cir. 1996)). The judge distinguished the present case from *Edmonds*, where the defendant was actually convicted of each individual offense comprising the continuing series, and decided that it would be impossible in the present case to know conclusively that the jury was in unanimous agreement as to the identity of the predicate offenses. *See id.* The court also cited an additional basis for employing the harmless error standard—specifically, defense counsel's ninety-three pages of proposed alternative

pecifically, defense counsel's ninety-three pages of proposed alternative instructions. *See id.* at \*6. Indicating that it is unsettled whether an alternative instruction is by itself adequate to preserve an appeal, the Third Circuit suggested that an alternative instruction might buttress an otherwise less-than-explicit objection. *See id.* at \*6-7.

Finally, Judge Lewis opined that had the issue not been properly preserved, necessitating the use of the stricter plain error standard, the trial court's defective instruction would nonetheless have amounted to reversible error. *See id.* at \*7. The error was plain, the judge indicated, because "it was 'clear' and 'obvious' from even a cursory reading of our decision in *Edmonds*." *Id.* The majority added without hesitation that the error affected substantial rights because it impinged on Russell's Sixth Amendment right to a unanimous verdict. *See id.*

Judge Alito agreed with the majority's decision to affirm Russell's conspiracy conviction but dissented from the reversal of the CCE conviction. *See id.* at \*12 (Alito, J., concurring and dissenting). More specifically, the judge rejected the majority's finding that Russell's attorney adequately preserved an objection to the general unanimity instruction. *See id.* The judge asserted that the error was not reversible under the plain error standard of review that should apply to such a situation. *See id.*

Judge Alito first posited that *Edmonds* was wrongly decided because the CCE statute does not require any special unanimity instruction. *See id.* at \*13 (Alito, J., concurring and dissenting). In particular, the judge cited "conceptual tension" between the requirement for specific unanimity in some cases—such as predicate felonies—and the absence of such a requirement in others—such as CCE crimes in which the defendant must have supervised, organized, or managed five or more identified individuals. *See id.* at \*12 (Alito, J., concurring and dissenting).

Turning to the core of the judge's disagreement with the majority, Judge Alito first highlighted the importance of properly preserving objections. *See id.* at \*13 (Alito, J., concurring and dissenting). The judge focused on the need for finality and the enhancement of judicial economy that results when unnecessary appeals are eliminated. *See id.* More importantly, explained the judge, Federal Rule of Criminal Procedure 30 promotes accurate verdicts by avoiding retrials once the evidence has become impaired after long delays. *See id.*

Analyzing the trial record, Judge Alito critiqued the factual basis for the majority's finding that the trial judge was notified of an objection. *See id.* at \*13-15 (Alito, J., concurring and dissenting). The judge criticized the majority's decision to treat counsel's request for a special verdict sheet as an objection to the general unanimity instruction—especially when the refusal to provide the requested form was not challenged on appeal. *See id.*

at \*14 (Alito, J., concurring and dissenting). Judge Alito remarked that “[b]y obscuring the important distinction between an objection to a jury instruction and a request for a special verdict sheet, the majority, I believe, has committed a serious error.” *Id.* at \*15 (Alito, J., concurring and dissenting).

Judge Alito argued that the proper standard of review is plain error because the issue was not adequately preserved. *See id.* at \*16 (Alito, J., concurring and dissenting). While agreeing that there was an error, the judge disputed that it was plain. *See id.* at \*17 (Alito, J., concurring and dissenting). For an instruction to be plainly erroneous, the judge instructed, it must be determined that the trial judge’s issuance was derelict. *See id.* (citing *Government of Virgin Islands v. Knight*, 989 F.2d 619, 632 (3d Cir. 1993)). In the present case, Judge Alito contended, the problem with the jury instruction was simply one of incompleteness, not inaccuracy. *See id.* at \*16 (Alito, J., concurring and dissenting). Noting the Supreme Court’s exhortation to use the plain error standard sparingly and only when necessary to avoid a miscarriage of justice, the dissent implied that no miscarriage of justice would occur in affirming Russell’s conviction. *See id.* at \*17 (Alito, J., concurring and dissenting) (citing *United States v. Young*, 470 U.S. 1, 15 (1985)).

The majority’s conclusion that convictions under the CCE statute require a specific unanimity instruction was a straightforward application of the rule announced in *Edmonds* and was therefore correct to that extent. As Judge Alito pointed out, however, the majority passed up an opportunity to resolve the “conceptual tension” between differing interpretations of two provisions of the CCE statute. It is illogical to require jurors to agree unanimously on the identity of the offenses comprising the continuing enterprise while not requiring unanimity on the identity of the five or more persons the defendant is required to have managed and supervised under the statute.

The case is probably more noteworthy for its discussion of what is necessary to preserve issues for appeal. The Third Circuit seemed willing to stretch considerably the facts contained in the trial record in order to find that an objection had been made. Judge Alito’s argument though is more convincing, claiming that defense counsel’s request for a special verdict sheet raised a completely different point. This is especially so when one considers that the attorney explicitly stated, on two occasions, that he had no objections to the charge as read. The court’s willingness to find an implied objection on such weak facts sets a very low bar and threatens to undermine severely the sound justifications for requiring specific and timely objections—one of the oldest and most entrenched rules of trial procedure.

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Finally, the majority's *obiter dictum* on the effect of defense counsel's proposed alternative instructions is interesting for what it suggests. The court appeared to be implying that when an objection is less-than-explicit, a set of proposed alternative instructions may rescue the defective objection by bolstering the "explicitness" of the notice. If the court is moving towards such a sliding scale test, it weakens further the policy behind requiring specific objections.

*Richard Wood*