IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DIVISION OF TEXAS
BEAUMONT DIVISION

No. 1:05-CV-841

MONICA L. WILLIAMS

Plaintiff

v.

MEXICAN RESTAURANT, INC.,
d/b/a Casa Ole Restaurant

Defendant

Report and Recommendation
of United States Magistrate Judge

This case is assigned to United States District Judge Thad Heartfield. In a recent Order Reopening Case (Docket No. 48), Judge Heartfield directed the undersigned to determine all pending motions and enter a scheduling order. Two pending motions are (a) plaintiff's motion to vacate and (b) defendant's motion to confirm an arbitrator's award. This report addresses those competing motions.

I. Parties

Plaintiff, Monica L. Williams (Williams), is an African-American female who resides and is domiciled in the city of Jasper, Jasper County, Texas, located within this court's territorial jurisdiction.

Defendant, Mexican Restaurant, Inc. (MRI), is a Texas corporation with its headquarters in Houston, Texas. MRI does business as *Casa Ole* Restaurant

in Jasper, Texas. MRI previously employed Williams as general manager of the Jasper restaurant.

II. Nature Of The Case

This is a private employment discrimination action brought under Title VII of the Civil Rights Act of 1964, as amended.[1] Williams alleges that MRI subjected her to unequal terms and conditions of employment and also terminated her because of her race or color. Specifically, Williams avers that she was not allowed to "step down" from her salaried position as general manager to an hourly-wage waitress or server position whereas a White salaried assistant manager was permitted to do so. Williams also alleges that Martin Romero (former general manager and Williams's predecessor) referred to her as a "Black woman."

III. Proceedings

After exhausting administrative proceedings and obtaining a *favorable* determination from the United States Equal Opportunity Employment Commission (EEOC), Williams filed this lawsuit on December 13, 2005.[2] MRI answered, and then moved the court to compel arbitration under provisions of a written employment agreement between Williams and MRI. Williams did not oppose that motion, and on October 5, 2006, the court granted MRI's motion

[1] 42 U.S.C. § 2000e *et seq.*

[2] Although EEOC found reasonable cause to believe that Title VII violations occurred, it decided not to bring suit in behalf of Williams and elected to close its file.

and ordered the parties to arbitration. Shortly thereafter, the case was administratively closed.

The case then proceeded under auspices of the American Arbitration Association. Randolph P. Tower (Arbitrator Tower) heard the case and issued an award in full settlement and determination of all claims on March 13, 2008. Arbitrator Tower's award favored MRI and wholly denied Williams's claim of unlawful race discrimination.

On April 4, 2008, Williams moved this court to vacate the arbitrator's award. In response, MRI moved the court to confirm the arbitrator's award. These filings prompted Judge Heartfield to reopen this case and refer the competing motions to the undersigned for consideration. Oral argument was presented at a hearing convened on January 20, 2009.

IV. Competing Motions to Vacate and Confirm

Williams contends that Arbitrator Tower's award should be vacated because he manifestly disregarded applicable and controlling law by failing to properly apply the *pretext theory* of employment discrimination. Williams asserts that MRI proffered a whole series of internally inconsistent, conflicting and evolving reasons for its adverse employment action against her, which were, except as noted herein, determined as false by both EEOC and Arbitrator Tower. Williams argues that a proper application of the pretext theory of employment discrimination in light of this *overwhelming* evidence of pretext would have resulted in an inference of unlawful discriminatory animus on the part of the employer. Nevertheless, Arbitrator Tower disregarded that evidence, and chose to accept another proffered reason – *advanced for the first*

time only after the EEOC's Letter of Determination – that a non-Black employee was permitted to step down from her managerial position because, first, she was an *assistant* manager whose level of responsibilities was substantially different than Williams's, and, second, because the non-Black employee was pregnant and suffering from a back injury, conditions that two other federal statutes, the Family Medical Leave Act and the Americans with Disabilities Act, *required* MRI to make an exception to its general no-step-down policy.

Second, Williams contends that the arbitrator's award should be vacated because it offends public policy. This argument is not fleshed out well, but presumably it follows a syllogistic formulation that (a) employment discrimination based on race or color violates public policy; (b) plaintiff conclusively proved that she was discriminated against because of race; and (c) the arbitrator's award denying her claim "permits MRI to discriminate with impunity. . . ." thereby violating public policy.

In response, and also in support of its motion to confirm the award, MRI argues that Williams's asserted ground for vacatur – manifest disregard of the law – is no longer viable under Hall Street Assocs. v. Mattel, Inc., ___U.S.___, 128 S. Ct. 1396, 170 L. Ed. 2d 254 (2008). Alternatively, MRI argues that Arbitrator Tower did not disregard plaintiff's pretext theory, and, in any event, Arbitrator Tower was not obliged to even consider the pretext theory because Williams failed to first establish a *prima facie* case of race discrimination as demonstrated by the arbitrator's determination that the evidence "does not establish that [Williams] was treated differently from a similarly situated

employee in nearly identical circumstances." Lastly, MRI contends that the arbitrator's award does not violate any defined public policy.

V. Factual Background

This synopsis of underlying facts is approximate at best. A more complete or accurate version of operative events is unavailable because to date there has been no judicially-supervised discovery in this case. The court has not been furnished with the complete EEOC administrative investigation file, nor have the parties furnished a complete set of documentary evidence submitted to Arbitrator Tower. Finally, no stenographic transcript of the testimony adduced before Arbitrator Tower was created.

Consequently, the "facts" reported here are gleaned primarily from the arbitrator's award or from the scenario advocated by Williams without specific rebuttal from MRI. As such, they are incomplete and, perhaps, inaccurate in some respects. However, a comprehensive and precise factual background is not crucial to proper analysis of the competing motions. The reader needs only a general understanding of what happened, and, therefore, the following narrative suffices:

MRI hired Williams as a waitress in June, 2001. She was successful, well-liked, and promoted to assistant manager in 2003. During that time, the general manager was Martin Romero, a long-time employee who allegedly referred to Williams as a "Black woman." Romero and Williams worked

together until he resigned in 2004. Williams then was promoted to Romero's position as general manager.[3]

On February 7, 2005, Williams asked to step down to a less stressful and time-demanding waitress position. Her immediate supervisors asked Williams to rethink her request, but Williams persisted. On Friday, February 11, 2005, Williams was told to take the weekend off with pay. Upon returning to work the following Monday, Williams was terminated, and police officers were called to escort her off the premises.[4]

Shortly *after* Williams's termination, MRI's Human Resources Director, Nancy Cross, informed her that an unwritten "No-Step-Down" policy prevented *salaried* employees from stepping down to *hourly* jobs in the same restaurant. Williams was, however, offered work as an hourly-compensated waitress at two other locations within a 50-mile radius of Jasper. Williams declined both offers, and elected instead to pursue a claim of unlawful employment discrimination.

Williams asserts that a White salaried employee, Heather Woods (Woods), was permitted to step down from her management position *at the Jasper restaurant* to an hourly position *at the Jasper restaurant*. Williams further contends that MRI was required by Arbitrator Tower to respond to an

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[3] According to the Charge of Discrimination (EEOC Form 5) filed by Williams March 1, 2005, she was promoted to general manager because a "non-Black female who was unable to perform the job as General Manager requested to step down and assume the duties of Waitress." See (Docket No. 33).

[4] Arbitrator Tower found that petty cash was reconciled and Williams's keys were taken from her when she left work the preceding Friday. Further, Arbitrator Tower found that Williams had already filed a claim for unemployment compensation with the Texas Employment Commission before she returned to work, ostensibly to continue as a General Manager. Williams assumed they only needed her keys to operate the restaurant during her weekend off.

interrogatory, and MRI's response ultimately acknowledged "a dozen instances in which non-Black salaried employees were allowed to step down to hourly jobs in the same restaurant."

Before the EEOC, MRI initially responded that Williams was not fired, but had resigned. After several witnesses (MRI employees) confirmed that Williams never sought to resign, but was fired, MRI then took the position that Williams's request to step down was *tantamount* to a resignation, an explanation ultimately rejected by EEOC and the Texas Workforce Commission (TWC), and also at odds with the award of Williams's unemployment compensation benefits (which are not available to employees who leave work voluntarily).[5]

MRI then argued to the EEOC that its treatment of Williams was due to *performance problems*. This explanation also was rejected by EEOC and TWC. Similar evidence also was not accepted by Arbitrator Tower.

Next, MRI proffered to the EEOC that Williams was treated differently because she *refused training*. This proffered reason was abandoned by MRI in an amended interrogatory answer. See (Attachments to plaintiff's "Motion to Vacate 'Arbitrator's Award' and Place Case on Trial Docket," Docket No. 33).

MRI also described its no-step-down policy as prohibiting a *management* employee from stepping down to a *non-management* position in the same restaurant, and distinguished Heather Woods's step-down by characterizing it

[5] The Texas Unemployment Compensation Act provides that an individual is disqualified from receiving unemployment compensation benefits if the individual left work voluntarily or if the individual was discharged for misconduct connected with the individual's last work. See Tex. Lab. Code Ann. §§ 207.044-207.045 (Vernon 2005).

as one in which Ms. Woods stepped down from one management position to another management position as bookkeeper. Subsequent evidence revealed, however, that Woods stepped down to an hourly waitress position.

Before the arbitrator, MRI *amended* its interrogatory answer on June 20, 2007, to state that its policy prohibited only *general* managers, not *assistant* managers, from stepping down to hourly positions. This also was designed to show that Williams and Woods were not similarly situated because Woods was an assistant manager whereas Williams was a general manager. Such assertion was inconsistent with MRI's previous concession that Woods was a manager *subject to the policy*.

In yet another forensically-inspired iteration, MRI claimed that its no-step-down policy applied to *all managers*, i.e., general and assistant, but that *assistant* managers (like Heather Woods) were sometimes granted exceptions. MRI also distinguished Williams from Woods by asserting that a *significant lapse of time* existed between when Woods acted as manager and when she stepped down. According to Williams, however, payroll records disproved this assertion.

MRI eventually proffered its last reason for treating Woods differently and more favorably than Williams. MRI asserted that federal statutes, the Americans with Disabilities Act (ADA) and Family Medical Leave Act (FMLA), required MRI to allow Woods to step down because of her pregnancy and a back injury.

VI. Arbitrator's Award

On March 13, 2008, Arbitrator Tower entered his award, accompanied by a statement of reasons. Initially, he found that MRI was "*ineffective in its handling*" of Williams's claim, and further concluded that MRI's "*proffer of multiple unsupported and inconsistent reasons for its actions . . . obscured the truth and needlessly complicated the issues involved*." Nonetheless, Arbitrator Tower accepted MRI's contentions that Williams and Woods were not similarly situated employees because of their differing levels of responsibilities and also because Woods had physical impairments or deficits that MRI was required to accommodate under other federal laws. He then stated that his "*careful review of the credible evidence, including the timeline [sic] of relevant events"* established that *"racial discrimination was not the basis"* for Williams's termination. Therefore, he concluded that Williams "*failed to sustain her burden of proof regarding her claim of unlawful racial discrimination*."

Arbitrator Tower's statement of reasons indicates what other evidence he found credible. First, he noted that *all* of MRI's witnesses, most of whom were no longer employed or controlled by MRI, confirmed that MRI did, indeed, have a long-established no-step-down policy. Second, he found it probative that Martin Romero, a Hispanic male, also was denied permission to step down from his position as a salaried general manager to an hourly-compensated cook. Third, he concluded that no-step-down policies are customary in the industry, and have legitimate, non-discriminatory business reasons.[6] Concomitantly,

[6] The reason given by Arbitrator Tower was "potential for possible management conflict between the new manager and the manager who steps down to a subordinate position."

Arbitrator Tower concluded that such a policy as applied to Williams was based on legitimate non-discriminatory business reasons that were not pretextual in nature.

To say that Williams and her legal counsel were both flabbergasted and outraged is an understatement. Their bewilderment is easily understood. Arbitrator Tower's determination that MRI's *last* proffered reason for refusing to permit Williams to step down to a server position and then terminating her was not pretext is, indeed, astonishing given that it was but the latest in an embarrassingly long string of evolving reasons that everyone tasked with evaluating Williams's claim, including Arbitrator Tower, rejected. Logic and common sense would propel anyone to distrust the hypothesis that MRI waited to reveal its true and innocent explanation until first exhausting a host of phony reasons. Further, to suggest that the ADA and FMLA would require an employer to reassign a pregnant employee with a back injury to a more physically strenuous and demanding job borders on preposterous.

But is it enough for Williams to demonstrate that Arbitrator Tower reached a daft conclusion? To answer that question, the court must first identify and illuminate legal principles that control the ultimate question of whether Arbitrator Tower's award should be vacated or confirmed.

VII. Governing Legal Principles

This section contains threshold discussions of judicial oversight of arbitration awards and the elements of proof in Title VII employment discrimination suits.

A. Vacating Arbitration Awards

The Federal Arbitration Act (FAA)[7] was enacted "to replace judicial indisposition to arbitration with a 'national policy favoring [it] and plac[ing] arbitration agreements on equal footing with all other contracts.'" Hall Street Assocs. v. Mattel, Inc., 128 S. Ct. 1396, 1402 (2008) (quoting Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 443, 126 S. Ct. 1204, 1206 (2006)). Under this statute, arbitration contracts governed by the FAA are "valid, irrevocable, and *enforceable*." § 2; see also Hall Street, at 1402 (emphasis added). Indeed, a federal district court *must* confirm an arbitration award "'unless' it is vacated, modified, or corrected 'as prescribed' in §§ 10 and 11." Hall Street, at 1402; see also §§ 9-11.

The FAA "supplies *mechanisms* for . . . a judicial decree confirming an award, an order vacating it, or an order modifying or correcting it." Hall Street at 1402 (emphasis added); §§ 9-11. These "mechanisms" – stated in Section 10 of FAA and reprinted in the note below[8] – allow judicial oversight much

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[7] 9 U.S.C. §§ 9-14 (2000 ed. and Supp. V).

[8] Section 10 provides:

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration-

(1) where the award was procured by corruption, fraud, or undue means;

(2) where there was evident partiality or corruption in the arbitrators, or either of them;

(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior

(continued...)

narrower than judicial review of governmental agency administrative determinations. With respect to the latter, a court may reverse an agency decision that is not supported by substantial evidence, or when the agency did not apply correct principles of law.[9] But neither error ordinarily constitutes a sufficient ground for vacating an arbitration award.[10] Thus, the standard of judicial review of an arbitration award is exceedingly deferential, and has been characterized by one court as being "among the narrowest known to the law." Pri-Fit Worldwide Fitness, Inc. v. Flanders Corp., No. 2:00 CV 0985 G, 2006 WL 1073556, at *1 (D. Utah Apr. 20, 2006); see also Am. Laser Vision, P.A. v. Laser Vision Inst., L.L.C., 487 F.3d 255, 257 (5th Cir. 2007) (citing Kergosien v. Ocean Energy, Inc., 390 F.3d 346, 352 (5th Cir. 2004).[11]

Insufficient evidence or even wholesale disregard of evidence by an arbitrator is not a sufficient basis for a court to vacate an award. See, e.g., Stolt-

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[8](...continued)
by which the rights of any party have been prejudiced; or

(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10 (2000 ed., Supp. V).

[9] El Paso Elec. Co. v. F.E.R.C., 201 F.3d 667, 671 (5th Cir. 2000) (citing Gulf State Util. Co. v. Fed. Energy Regulatory Comm'n, 1 F.3d 288, 291 (5th Cir. 1993)).

[10] Halliburton Energy Servs., Inc. v. NL Indus., 553 F. Supp.2d 733, 754 (S.D. Tex. 2008) (quoting Apache Bohai Corp. LDC v. Texaco China BV, 480 F.3d 397, 409 (5th Cir. 2007)).

[11] "Judicial review" may be a misnomer because it connotes a procedure available to parties who have not affirmatively opted out of the court system. One court perceptively characterizes proceedings challenging arbitration awards as a mechanism for enforcing the parties' agreement to arbitrate rather than as judicial review of the arbitrator's decision. Stolt-Nielsen SA v. AnimalFeeds Intern. Corp., 548 F.3d 85, 95 (2d Cir. 2008).

Nielsen SA v. AnimalFeeds Intern. Corp., 548 F.3d 85, 91 (2d Cir. 2008) (stating that "manifest disregard of the evidence" is not a proper ground for vacating an arbitrator's award); Petroleum Separating Co. v. Interamerican Ref. Corp., 296 F.2d 124, 124 (2d Cir. 1961) (affirming decision denying motion to vacate arbitration award for insufficient evidence). Similarly, an arbitrator's wrong call on the law generally must be confirmed despite a reviewing court's disagreement with it so long as there is even a colorable justification for the outcome reached by the arbitrator. See Stolt-Nielsen SA, 548 F.3d at 94; see also BNSF Ry. Co. v. Brotherhood of Maint. of Way Employees, 550 F.3d 418, 423 (5th Cir. 2008) (quoting United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 38, 108 S. Ct. 364, 370, 98 L. Ed. 2d 286 (1987) ("Courts thus do not sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts.")). Thus, incorrect, even wacky, legal interpretations by arbitrators usually survive judicial challenges. Stolt-Nielsen SA, 548 F.3d at 95 (citing Wise v. Wachovia Sec., LLC, 450 F.3d 265, 269 (7th Cir. 2007)); Pfeifle v. Chemoil Corp., 73 F. App'x 720, 722-23 (5th Cir. 2003) (citing El Dorado Sch. Dist. No. 15 v. Cont'l. Cas. Co., 247 F.3d 843, 847 (8th Cir. 2001) and Widell v. Wolf, 43 F.3d 1150, 1151 (7th Cir. 1994) (stating that an arbitrator's clear or gross errors will not authorize courts to annul arbitration awards)). Only an arbitrator's explicit rejection of controlling precedent or willful flouting of governing law or some similar egregious impropriety suffices to justify judicial vacatur of an arbitration award. Id.

In an early case, the Supreme Court acknowledged that judicial power to vacate arbitration awards is severely limited, explaining that "interpretations of the law by arbitrators, *in contrast to manifest disregard* are not subject, in the

federal courts, to judicial review for error in interpretation." Wilko v. Swan, 346 U.S. 427, 436-37, 74 S. Ct. 182, 187 (1953) (emphasis added). Many lower courts interpreting Wilko were spurred by this language to formulate a "manifest disregard of the law" standard to apply to cases presenting challenges to arbitrator awards. See, e.g., McCarthy v. Citigroup Global Markets, Inc., 463 F.3d 87, 91 (1st Cir. 2006); Hoeft v. MVL Group, Inc., 343 F.3d 57, 64 (2d Cir. 2003); Scott v. Prudential Sec., Inc., 141 F.3d 1007, 1017 (11th Cir. 1998). The Fifth Circuit also embraced this test. See Williams v. Cigna Fin. Advisors Inc., 197 F.3d 752, 759 (5th Cir. 1999) (recognizing for the first time the non-statutory "manifest disregard" standard); see also Apache Bohai Corp. LDC v. Texaco, 480 F.3d 397, 405 (5th Cir. 2007); Kergosien, 390 F.3d at 354; Prestige Ford v. Ford Dealer Computer Servs., Inc., 324 F.3d 391, 395-96 (5th Cir. 2003) (stating that"manifest disregard" is a judicially-created rule).

More recently, however, the Supreme Court held that the statutory "mechanisms" (reprinted in note 8, *supra*) are the *exclusive* grounds for vacating arbitration awards, and that "manifest disregard of the law" is not a separate, independent basis for vacatur outside the grounds stated in Section 10 of the FAA. See Hall Street, 128 S. Ct. at 1403. But the Supreme Court did not explicitly reject the "manifest disregard" test, choosing instead to ruminate that lower courts employing the test were, perhaps, merely referring to statutory grounds in a collective sense, or using "manifest disregard" as a shorthand term for Sections 10(a)(3) and (4), which authorize vacatur when arbitrators engage in misconduct or exceed their powers. Id. at 1404.

Hall Street's rejection of non-statutory grounds for vacatur caused lower courts to grapple with its implications for the "manifest disregard" doctrine.

Stolt-Nielsen SA, 548 F.3d at 94. Some courts have suggested that the doctrine no longer survives.[12] Others conclude that the doctrine remains a valid test reconceptualized as a judicial gloss on the specific and exclusive statutory grounds in Section 10 of FAA.[13] To date, the Fifth Circuit has not weighed in on the post-Hall Street debate, but has twice declined to address it. See, e.g., Rogers v. KBR Technical Svcs., Inc., No. 08-20036, 2008 WL 2337184, at *2 (5th Cir. June 9, 2008) ("because we affirm . . . and hold that the arbitration award is confirmed, there is no need in the instant case to determine whether those non-statutory grounds for vacatur . . . remain good law. . . ."); Halliburton Energy Servs., Inc. v. NL Indus., Inc., No. 08-20277, 2009 WL 33648 (5th Cir. Jan. 7, 2009) ("we need not decide [the] question [of whether "manifest disregard survives Hall Street] because the plaintiffs have not met the "manifest disregard" test even if it is still applicable.").

This lingering ambiguity has prompted judges in this district to proceed cautiously. In Householder Group v. Caughran, No.4:07-CV-316, 2008 WL 4254586, at *3 (E.D. Tex. Sept. 17 2008), Judge Richard A. Schell elected to limit the court's analysis to "the statutory grounds enumerated in the FAA" in light of the Supreme Court's holding in Hall Street. And, in Acuna v. Aerofreeze, Inc., No. 2:06-CV-432, 2008 WL 4755749, at *2 (E.D. Tex. Oct. 29,

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[12] See, e.g., Ramos-Santiago v. United Parcel Serv., 524 F.3d 120, 124 n.3 (1st Cir. 2008); Robert Lewis Rosen Assocs., Ltd. v. Webb, 566 F. Supp.2d 228, 233 (S.D.N.Y. 2008); Prime Therapeutics LLC v. Omnicare, Inc., 555 F. Supp.2d 993, 999 (D.Minn. 2008); Hereford v. D.R. Horton, Inc., No. 1070396, 2008 WL 4097594, at *5 (Ala. Sept. 5, 2008).

[13] See, e.g., Stolt-Nielsen SA, 548 F.3d at 94-95; Mastec N. Am., Inc. v. MSE Power Sys., Inc., No. 1:08-cv-168, 2008 WL 2704912, at *3 (N.D.N.Y. July 8, 2008); Chase Bank USA, N.A. v. Hale, 19 Misc.3d 975, 859 N.Y.S.2d 342, 349 (2008).

2008), Judge T. John Ward chose to examine a challenge to an arbitration award under *both* the manifest disregard standard and the four statutory factors explicitly articulated in the statute.

B. Title VII Employment Discrimination

Williams seeks to recover under Title VII of the Civil Rights Act of 1964, codified at 42 U.S.C. §2000e-2 *et seq*. This federal statute declares it to be an unlawful employment practice for an employer –

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

78 Stat. 255, 42 U.S.C. § 2000e-2(a)(1) (emphasis added). The Act and its implementing regulations establish an administrative mechanism for making, investigating and resolving complaints, and permits aggrieved individuals whose complaints are not resolved satisfactorily at the administrative level to bring private causes of action to remedy violations in courts. 42 U.S.C. § 2000e-5(f).

Well-developed jurisprudence recognizes an important distinction between adverse employment actions that are unfair *generally* and unfair actions taken *because* of race, color, sex, etc. Title VII protects employees only from the latter. A natural tendency to blur that distinction compelled courts to clarify that a necessary element of proof is a showing that an employer *intentionally* discriminated against an employee *because* of the employee's *protected status*. Reeves v. Sanderson Plumbing Prod., Inc., 530 U.S. 133, 141,

120 S. Ct. 2097, 2105, 147 L. Ed. 2d 105 (2000). In other words, a complaining party must show that his or her protected trait, e.g., race, color, gender, etc., motivated the employer when making the challenged employment decision. Id. (quoting Hazen Paper Co. v. Biggins, 507 U.S. 604, 620, 113 S. Ct. 1701, 123 L. Ed. 2d 338 (1993)); U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 716, 103 S. Ct. 1478, 1482, 75 L. Ed. 2d 403 (1983).

To punctuate that point, courts quickly dispelled the notion that employment discrimination laws are "*intended to be a vehicle for judicial second-guessing of business decisions, [or] . . . to transform the courts into personnel managers.*"[14] Similarly, courts observed that management does not have to make *proper* decisions, but only *non-discriminatory* ones.[15]

Given this, employer defendants in Title VII actions frequently contend early on that plaintiffs have *no evidence* that a protected trait (e.g., race, sex, etc.) motivated their employment actions. Utilizing Rule 56, Federal Rules of Civil Procedure, employers often request summary dismissals prior to trial. It was incumbent on the courts, therefore, to devise a method to winnow wheat from chaff, i.e., develop an analytical framework for *pretrial* determinations identifying cases which should be dismissed without trials while insuring that important Congressional goals (eliminating invidious discrimination in the workplace and remedying it through private suits) are not diluted or impaired.

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[14] See Bienkowski v. Am. Airlines, Inc., 851 F.2d 1503, 1507-08, (5th Cir. 1988).

[15] See Little v. Republic Ref. Co., 924 F.2d 93, 97 (5th Cir. 1991) (stating that "even an incorrect belief than an employee's performance is inadequate constitutes a legitimate, non-discriminatory reason" for termination).

Such an evaluative model was created in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). There, the court articulated its renowned burden-shifting test. A plaintiff must first create a presumption of discrimination by making out a *prima facie* case of prohibited discrimination. Second, the burden of production then shifts to the defendant to articulate legitimate non-discriminatory reasons for its actions. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089, 1091, 67 L. Ed. 2d 207 (1981). Third, the burden of production then shifts back to the plaintiff to show that the defendant's proffered reasons are pretext. Ramirez v. Gonzales, 225 F. App'x 203, 206 (5th Cir. 2007). Failure to carry the burden at any stage results in the opposite party prevailing on a pretrial motion for summary judgment.

The McDonnell Douglas model for determining pretrial motions for summary judgment continues to date. See, e.g., Bright v. G B Bioscience, Inc., No. 07-20906, 2008 WL 5210657, at *5 (5th Cir. Dec. 15, 2008). However, as a result of statutory amendments contained in the Civil Rights Act of 1991,[16] plaintiffs may now satisfy their stage-three burden alternatively by showing that the defendant's proffered reason, while true, was only one reason for its conduct, and another motivating factor was the plaintiff's protected status. Courts refer to this alternative approach as the "modified McDonnell Douglas" or "mixed motive" standard. Desert Palace, Inc. v. Costa, 539 U.S. 90, 94, 123 S. Ct. 2148, 2149, 156 L. Ed. 2d 84 (2003); Rachid v. Jack in the Box, 376 F.3d 305, 312 (5th Cir. 2004).

[16] Pub. L. No. 102-166, 105 Stat. 1071 (1991).

In practice, courts addressing pretrial motions for summary judgment must parse the available evidence into discrete segments. Has the plaintiff produced evidence which, if accepted, proves a *prima facie* case?[17] If not, summary judgment is in order. If so, has the defendant employer articulated a legitimate nondiscriminatory reason for its action? If not, summary judgment is denied. If so, has the plaintiff produced evidence showing either that the proffered reason was pretext or that another motivating factor was the plaintiff's protected status? If so, summary judgment is improper.

As for this third step (involving the issue of pretext), the *ultimate* question is whether a proffered reason is pretext for *unlawful discrimination*. McDonnell Douglas Corp. v. Green, 411 U.S. at 804; see also Bright v. G B Bioscience, Inc., No. 07-20906, 2008 WL 5210657, at *5 (5th Cir. Dec. 15, 2008) (quoting St. Mary's Honor Center v. Hicks, 509 U.S. 502, 503, 113 S. Ct. 2742, 2745, 125 L. Ed. 407); Russell v. McKinney Hosp. Venture, 235 F.3d 219, 222 (5th Cir. 2000). At the *pretrial* stage, however, a plaintiff satisfies the burden of production simply with evidence indicating that the employer's proffered

[17] For cases alleging disparate treatment in terms and conditions of employment, a *prima facie* case is established by evidence (1) that the plaintiff was a member of a protected class; (2) that the plaintiff was qualified for the position; (3) that the plaintiff experienced an adverse employment action; and (4) that similarly situated individuals were treated more favorably. Wesley v. Yellow Transp., Inc., No. 3:05-CV-2266-D, 2008 WL 294526, at *9 (N.D. Tex. Feb. 4 2008) (citing Bryan v. McKinsey & Co., 375 F.3d 358, 360 (5th Cir. 2004)). A slightly different formulation exists for discriminatory discharge cases. See, e.g., Johnson v. Pointe Coupee Parish Police Jury, 261 F. App'x 668, 670-671 (5th Cir. 2008) (citing St. Mary's Honor Center v. Hicks, 509 U.S. 502, 506 (1993)); Frank v. Xerox Corp., 347 F.3d 130, 137 (5th Cir. 2003) (citing Bauer v. Albemarle Corp., 169 F.3d 962, 966 (5th Cir.1999)).

reason is *false*.[18] Moreover, and significantly here, "[e]vidence demonstrating that the employer's explanation is false or unworthy of credence, taken together with the plaintiff's *prima facie* case, is likely to support an inference of discrimination [or retaliation] even without further evidence of the defendant's true motive.'" Staten v. New Palace Casino, LLC., 187 F. App'x 350, 358 (5th Cir. 2006) (quoting Laxton v. Gap, 333 F.3d 572, 578 (5th Cir. 2003)). Additional evidence of discriminatory animus is not required "because 'once the employer's justification has been eliminated, discrimination may well be the most likely alternative explanation. . . .'" Laxton, 333 F.3d at 578 (quoting Reeves, 530 U.S. at 147). As explained by the Supreme Court,

> [T]he trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose. Such an inference is consistent with the general principle of evidence law that the factfinder is entitled to consider a party's dishonesty about a material fact as affirmative evidence of guilt.

Reeves, 530 U.S. at 147 (internal quotation marks and citations omitted). Such a showing does not *compel* a judgment for the plaintiff, but it is *permissible* for a trier of fact to infer the ultimate fact of discrimination from the falsity of the employer's explanation. Id. at 146-47.

McDonnell Douglas and its progeny establish analytical standards governing determination of *pretrial motions*. The elements of a Title VII cause of action to be proven at a *plenary trial*, i.e., facts that juries must determine,

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[18] Pretext may be established "by showing that the employer's proffered explanation is false or 'unworthy of credence.'" Staten v. New Palace Casino, LLC., 187 F. App'x 350, 358 (5th Cir. 2006) (quoting Laxton v. Gap, 333 F.3d 572, 578 (5th Cir. 2003)); see also Reeves, 530 U.S. at 143. "An explanation is false or unworthy of credence if it is not the real reason for the employment action." Laxton, 333 F.3d at 578; see also Staten, 187 F. App'x at 358.

differ. At full-scale trials, juries are not tasked with determining whether plaintiffs have proven *prima facie* cases, whether defendant employers have articulated legitimate, non-discriminatory reasons for their actions, whether plaintiffs have shown that the employers' proffered reasons are pretexts, etc. Indeed, the Fifth Circuit expressly rejects such a procedure at trial:

> This Court has consistently held that district courts should not frame jury instructions based upon the intricacies of the *McDonnell Douglas* burden shifting analysis. *See, e.g., Walther v. Lone Star Gas Co.,* 952 F.2d 119, 127 (5th Cir.1992) ("Instructing the jury on the elements of a prima facie case, presumptions, and the shifting burden of proof is unnecessary and confusing."); *Olitsky v. Spencer Gifts, Inc.,* 964 F.2d 1471, 1478 (5th Cir.1992) (same). Instead, we have held that district courts should instruct the jury to consider the ultimate question of whether a defendant took the adverse employment action against a plaintiff because of her protected status. *Cf. Walther,* 952 F.2d at 127*; Olitsky,* 964 F.2d at 1478.

Kanida v. Gulf Coast Medical Personnel LP, 363 F.3d 568, 576 (5th Cir. 2004).

As the above-quoted language suggests, plenary trials are concerned not with McDonnell Douglas intricacies, but rather with *ultimate questions* of whether plaintiffs show that their employers *intentionally discriminated* against them *because of their protected status*. See St. Mary's Honor Center, 509 U.S. at 503; Russell, 235 F.3d at 222. Consequently, it is not enough *at trial* for a plaintiff simply to persuade the fact-finder that the employer's explanation of its actions is false. Rather, the fact-finder must believe plaintiff's account of intentional discrimination. Reeves, 530 U.S. at 146-47; see also Tureaud v.

Grambling State University, 294 F. App'x 909, 916 (5th Cir. 2008); Kanida, 363 F.3d at 575.

VIII. Application and Analysis

The parties devote much of their written and oral arguments to debating whether Williams's principal attack on Arbitrator Tower's award – manifest disregard of the law – remains viable in light of Hall Street's declaration that the four grounds for vacatur specified in Section 10 of the FAA (see note 8, *supra*) are the exclusive grounds for judicial reversal. Resolving that debate is unnecessary here because Williams's challenge is as readily analyzed and determined under Section 10 grounds – 10(a)(3) and (4) – as under manifest disregard jurisprudence. The outcome is the same whether the court examines Arbitrator Tower's alleged failure to apply the pretext theory of employment discrimination as a "manifest disregard of the law" or as "misconduct" (10(a)(3)) or as "exceeding his power" (10(a)(4).

Arbitrator Tower's award was astonishing, eye-popping and, perhaps, soft-witted. But careful application of the principles articulated above in Section VII mandates a conclusion that his award must be confirmed. First, Williams's principal challenge – properly viewed and also as argued – really is an argument that ALJ Tower's award reflects manifest disregard of the *evidence*, not the law. No circuit has adopted "manifest disregard of the facts" as a ground for vacatur. Thomas H. Oehmke, Commercial Arbitration, Evidentiary Issues § 149:10. Errors – even clear or gross errors – in an arbitrator's *factual* findings "do not justify either review or vacatur on the merits of a controversy." Id.; see also Major League Baseball Players Ass'n v.

Garvey, 532 U.S. 504, 509, 121 S. Ct. 1724, 1728, 149 L. Ed. 2d 740 (2001); United Paperworkers Intern. Union, 484 U.S. at 36; Am. Laser Vision, 487 F.3d at 260; Kergosien, 390 F.3d at 358; Widell v. Wolf, 43 F.3d 1150, 1151 (7th Cir. 1994); Acuna, 2008 WL 4755749, at *3 ("[w]e will not second-guess multiple, implicit findings and conclusions underpinning the award. We do not decide if the award was free from error.") (internal quotations omitted)). Indeed, "[f]actual conflicts are the stuff of contested proceedings and determining the facts is the charge of every arbiter who sits as a trier of fact." Thomas H. Oehmke, Commercial Arbitration, Evidentiary Issues § 144:1; see also In re Goldbronn, 263 B.R. 347, 358 (Bankr. M.D. Fla. 2001).

Second, the court cannot conclude, in any event, that Arbitrator Tower's award reflects manifest disregard of the *law*. Arbitrator Tower conducted a plenary hearing wherein he was not constrained by McDonnell Douglas intricacies, but only by the ultimate question of whether Williams showed that MRI intentionally discriminated against her because of her protected status. It was, therefore, not incumbent on Arbitrator Tower to engage in an elaborate *prima facie* case/articulated legitimate reason/pretext analysis.

Williams's pretext evidence surely was relevant, and Arbitrator Tower clearly considered it. He explicitly found that MRI obscured the truth and needlessly complicated issues by proffering multiple, unsupported and inconsistent reasons for its actions. He simply chose not to regard that evidence as sufficiently weighty to prove that MRI intentionally discriminated against Williams because of her protected status. Many judges and most jurors might have accepted such gross and repugnant pretext evidence as affirmative and

sufficient evidence of intentional race or color based discrimination. But Arbitrator Tower was not required by law to make that inference or to give it controlling weight. The pretext inference is merely permissive, not mandatory. Reeves, 530 U.S. at 147; see also St. Mary's Honor Center, 509 U.S. at 524 ("That the employer's proffered reason is unpersuasive, or even obviously contrived, does not necessarily establish that the plaintiff's proffered reason of race is correct. That remains a question for the factfinder to answer. . . ."); Townsend v. Lumbermens Mut. Cas. Co., 294 F.3d 1232, 1241 (10th Cir. 2002); Russell, 235 F.3d at 223 ("a showing of pretext does not automatically entitle an employee to a judgment as a matter of law."). Therefore, the court has no basis to conclude that Arbitrator Tower's award reflects manifest disregard of law, misconduct or usurpation of unauthorized power.[19]

IX. Public Policy

As mentioned briefly in Section IV, above, Williams offers a second reason for vacating Arbitrator Tower's award: violation of public policy. This ground for vacatur derives from the basic notion that no court will aid an order to commit an immoral or illegal act. See American Jurisprudence Trials § 94:211 (2008). "A court may refuse to enforce an arbitration award that is contrary to public policy." Prestige Ford, 324 F.3d at 396. The public policy relied on "must be explicit, well defined, and dominant." Id. (quoting W.R. Grace & Co. v. Rubber Workers, 461 U.S. 757, 766, 103 S. Ct. 2177, 2183, 76 L. Ed. 2d 298

[19] Cf. Householder Group v. Caughran, 576 F. Supp.2d 796, PP (E.D. Tex. 2008) (arbitrator did not exceed his powers for refusing to enter default judgment against a party for failing to timely answer where National Association of Securities Dealers rules merely permitted, but did not require entry of default judgment).

(1983)); see also Sarofim v. Trust Company Of The West, 440 F.3d 213, 219 (5th Cir. 2006). "The policy advanced must reference 'laws and legal precedents' rather than 'general considerations of proposed public interests.'" Id. (quoting W.R. Grace & Co., 461 U.S. at 766). The relevant focus is on, not the mischief producing the award, but the *result* of implementing the award. Thomas H. Oehmke, Commercial Arbitration, Public Policy Bars Relief § 150:2.

Various courts have examined arbitration issues on public policy grounds. See, e.g., Eastern Assoc. Coal Corp. v. United Mine Workers of Am., 531 U.S. 57, 58, 121 S. Ct. 462, 465, 148 L. Ed. 2d 354 (2000) (refusing to vacate an award reinstating employee discharged for failing a drug test because a contractual agreement to reinstate an employee who fails a drug test is not counter to any explicit, well-defined, and dominant public policy); Sarofim, 440 F.3d at 219-20 (vacatur not required where punitive damages were awarded because California law has no public law or policy limiting punitive damages awards in arbitration); MidMichigan Reg'l Med. Ctr.--Clare v. Prof'l Employees Div. of Local 79, Serv. Employee Intern. Union, AFL-CIO, 183 F.3d 497, 506 (6th Cir. 1999) (award reinstating negligent nurse not against public policy because concerns about public safety insufficient to discharge all health care workers whose misbehavior endangers health of a patient); In re Poly-Am., L.P., 262 S.W.3d 337 (Tex. 2008) (courts may refuse on public policy grounds to enforce provisions of arbitration agreements that purport to contractually absolve parties from their statutory or constitutional obligations); State v. AFSCME, Council 4, Local 387, AFL-CIO, 252 Conn. 467, 747 (2000) (vacating an award reinstating employee who made harassing phone calls to legislator because such telephone harassment contravened clearly expressed state law).

The Supreme Court's recent Hall Street decision also calls into question the body of law recognizing public policy as a separate, non-statutory ground for vacatur of arbitration awards. However, since nothing trumps public policy, at least one commentator suggests that violation of public policy remains a viable avenue for challenging an arbitration award. Aaron S. Bayer and Joseph M. Gillis, For the Defense, Arbitration After Hall Street (2008).

Assuming, *arguendo*, that Williams's public policy argument is not foreclosed by Hall Street, it is unavailing here. Williams cites no case, and the court's research fails to unearth one which vacates an arbitrator's award as violating public policy simply because it was based on insufficient evidence, reflected disregard of evidence, constituted an erroneous interpretation of law, or was wrongly decided in the court's view. No such authority exists because it would allow a disaffected party to accomplish indirectly under the imprimatur of public policy what cannot be accomplished directly under FAA.

Williams's public policy challenge is, at best, an *ipse dixit* bootstrapping tactic. She takes it as a given that MRI engaged in conduct prohibited by public policy, and because Arbitrator Tower disagreed with her, his award is contrary to public policy *ipso facto*. But, as concluded earlier, Arbitrator Tower acted within the bounds of his discretion, neither exceeding his powers, engaging in misconduct or manifestly disregarding either the evidence or the law. Public policy, as embodied in the FAA and its interpretive jurisprudence is served, not violated, by enforcing his award.

X. Other Concerns

The formal analyses in sections VIII and IX, above, faithfully adhere to the "narrowest-known-to-the-law" standards that govern judicial scrutiny of arbitration awards. But for any court with an overarching duty to do justice, there remains a lingering question: Was there *any* licit basis for Arbitrator Tower to conclude that Williams was not subjected to unlawful discrimination? The final answer to that question, like beauty, may lie in the eye of the beholder. But the reasons enumerated by Arbitrator Tower clearly constitute a colorable justification for his award.[20] In that circumstance, the court must enforce it. Whatever deficiencies one might perceive in Arbitrator Tower's decision, he cannot be criticized as *explicitly rejecting* controlling precedent, or

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[20] Arbitrator Tower perceived a difference other than race or color between Williams and Heather Woods, the White employee allowed to step down from a general manager position. Arbitrator Tower concluded that Williams and Woods were *not* similarly situated, and that the more favorable treatment afforded Woods was based on legitimate factors not attendant to Williams.

Apart from that, Arbitrator Tower found that MRI's no-step-down policy, albeit unwritten, clearly existed *before* Ms. Williams requested to step down from general manager to a waitress position, and that it was *applied in the same manner* to her immediate predecessor, Martin Romero, who was refused permission to step down from general manager to a cook. He further found that a no-step-down policy is *common in the restaurant industry*, and has a *legitimate, non-discriminatory purpose*. He also considered that Williams was offered alternative employment in the very position she requested at other MRI restaurants.

Arbitrator Tower did not stray by declining to attribute discriminatory animus to MRI because former general manager and Williams's former supervisor, Martin Romero, referred to Williams as a "Black woman." The term "African American" currently may be a preferred and more politically correct appellation, but the word "Black" is not intrinsically demeaning nor generally understood as such. Both the EEOC in its determination letter, Arbitrator Tower in his award, and Williams's counsel in briefing before the court all used "Black" and "White" as impersonal descriptors of protected and non-protected classes of employees for Title VII purposes. Courts routinely follow the same practice. Williams cites no case, and the court's research fails to disclose any similar authority for the proposition that the word "Black" is a clear indicia of intent to discriminate on account of race or color.

willfully flouting governing law, or engaging in any other form of *egregious impropriety*. Absent evidence of such, judicial vacatur is not permitted.

XI. Recommendation

The court should deny plaintiff's motion to vacate the arbitration award and grant defendant's motion to confirm.

XII. Objections

Objections must be: (1) specific, (2) in writing, and (3) served and filed within ten days after being served with a copy of this report. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 1(a), 6(b), & 72(b).

A party's failure to object bars that party from: (1) entitlement to de novo review by a district judge of proposed findings and recommendations, Rodriguez v. Bowen, 857 F.2d 275, 276-77 (5th Cir. 1988), and (2) appellate review, except on grounds of plain error, of unobjected-to factual findings and legal conclusions accepted by the district court, Douglass v. United Servs. Auto. Ass'n., 79 F.3d 1415, 1417 (5th Cir. 1996) (en banc).

SIGNED this 27 day of February, 2009.

Earl S. Hines
United States Magistrate Judge