The Story of *Green v. McDonnell Douglas*[1]

by David Benjamin Oppenheimer[2]

In most cases, the identity of the plaintiff in a discrimination case is unpredictable, an accident of history. Anonymous heroes randomly become famous, to lawyers and law students, before fading back into obscurity. But if you'd conducted a poll in St. Louis Missouri in 1964—or 1974 or '84 or '94—asking which St. Louis resident was most likely to have his or her civil rights case decided by the U.S. Supreme Court, the name Percy Green would likely have been at the top of the list.

Arrested over 100 times in civil rights protests,[3] known for bringing publicity to civil rights issues with tactics like climbing the St. Louis Gateway Arch while under construction (to bring attention to the lack of black workers on the project), or revealing the secret identity of the master of ceremonies (the ''veiled prophet'') at an all-white charity ball by literally unmasking him, Percy Green has been a civil rights activist for over forty years,[4] and at the age of 69 shows no signs of slowing down. How did he come to be the plaintiff in the seminal case that (1) establishes the right to bring a civil action under Title VII despite the absence of a ''reasonable cause'' finding by the EEOC; (2) defines discrimination as differential treatment, (3) describes the circumstantial evidence required to establish a prima facie case, and (4) sets forth the respective evidentiary burdens for plaintiffs and defendants in an intentional discrimination claim?

How Percy Green Became A Civil Rights Activist.

Green was born in St. Louis in 1935, and grew up in the segregated South-side neighborhood called ''Compton Hill.'' He attended segregated schools, and was among the relatively few African Americans of his

[1] *McDonnell Douglas Corporation v. Green*, 411 U.S. 792 (1973).

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[3] Percy Green, *Biographical Sketch* at 3 (on file with author) (hereinafter *Green Biographical Sketch*).

[4] *Id.*

generation to finish high school, graduating in 1954.[5] After graduating, he went to work as a page at Washington University's medical clinic, while studying radio and television repair through a correspondence program with the DeVry Technical Institute.[6]

In 1956 Green earned his certificate in radio and television mechanics and was hired by McDonnell Aircraft (later McDonnell Douglas) as a radio and electric mechanic. He was one of a handful of skilled black workers in the plant. Then in 1958 he was drafted into the United States Army, where he served for two years.[7] The army had been integrated by order of President Truman just a few years earlier,[8] and Green's service in an integrated environment made it harder for him to accept the segregation that was still the norm in St. Louis in 1960 when he came home. He returned to his job at McDonnell Aircraft, still one of only a handful of skilled black workers in a city with a large black population.[9] He soon began attending meetings of a civil rights group, the Congress of Racial Equality (CORE); in 1962 he signed up as a member.[10]

The Civil Rights Movement In The 1950's and Early 1960's.

Green became active in the civil rights movement just as the movement was reaching an historic turning point. In the 1940's and much of the 1950's, the strategy of the civil rights leadership focused on law reform. The most important civil rights organization at that time was the National Association for the Advancement of Colored People (NAACP), and its most celebrated victories were legal victories won by its Legal Defense Fund (LDF). Thurgood Marshall, the LDF chief counsel, had designed the litigation strategy that led to the Supreme

[5] Among Americans born in 1931–35, approximately 2/3 of whites and 1/3 of blacks finished high school. National Center for Education Statistics, Digest of Education Statistics 1997, Table 8 (Years of school completed by persons age 25 and over and 25 to 29, by race/ethnicity and sex: 1910 to 1996).

[6] *Green Biographical Sketch*, *supra* note 3, at 1–2; interview notes from author's interview with Percy Green, in San Francisco, California (November 11, 2004) (on file with author); reply letter from Percy Green, to David Oppenheimer (November 27, 2004) (on file with author).

[7] *Id.*

[8] *See* Morris J. MacGregor, Jr., Integration of the Armed Forces, 1940–1965 at Chapter 17 (Center of Military History, United States Army 1985).

[9] Blacks composed 13% of the St. Louis area labor force, but only 5% of McDonnell Douglas's St. Louis workforce, and Green was the only Black technician among over one hundred whites. See NAACP Brief for Appellant at 14, *Green v. McDonnell Douglas Corp.*, 463 F.2d 337 (8th Cir.1972).

[10] *Green Biographical Sketch, supra* note 3 at 1–2; interview notes from author's interview with Percy Green, *supra* note 6; reply letter from Percy Green, *supra* note 6.

Court's holding in *Brown v. Board of Education*[11] that racial segregation in public education was unconstitutional. The NAACP was committed to implementing the *Brown* decision and to filing lawsuits challenging Jim Crow laws and practices throughout the South (and, less frequently, in the North and West).

But a parallel movement began taking shape among black Americans in the mid–1950's, led by social activists, many of them ministers, not lawyers. That movement rejected the strategy of law reform litigation in favor of confronting the moral wrong of segregation, discrimination and racial inequality through direct action, often in the form of non-violent civil disobedience. In 1955, the Rev. Dr. Martin Luther King Jr. became the leading voice in support of direct action tactics, and the nature of the civil rights movement began to change.[12]

On December 1, 1955, a 42 year old seamstress (and committed social activist) named Rosa Parks refused to give up her seat to a white man on a Montgomery, Alabama city bus. Parks was arrested and convicted of violating the segregation laws, which required blacks to sit in the back of the bus, and to yield their seats to whites if the white section was full. Parks' refusal, and her conviction four days later, inspired a mass meeting of Montgomery's black community. Dr. King, a 26 year old minister who had recently arrived in Alabama, was unanimously elected to lead a protest, and under his leadership the community decided to boycott the busses until they were desegregated.[13] The direct action civil rights movement was born.[14]

The Montgomery bus boycott propelled Dr. King to a national stage, and the boycott, along with the sit-in, pray-in, stall-in, read-in, and other forms of direct action non-violent civil disobedience, became the preferred method of protest for civil rights activists. Between 1956 and 1962 (the year Percy Green joined CORE), Dr. King, still in his twenties, was the leading voice of the civil rights movement. His organization of minister-activists, the Southern Christian Leadership Conference

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[11] 347 U.S. 483 (1954).

[12] On the civil rights movement of the 1950's and 60's, and Dr. King's leadership, *See generally*, Taylor Branch, Parting the Waters: America in the King Years 1954–63 (1988).

[13] *Id.* at 128–205.

[14] To appreciate what America looked like as the bus boycott began, consider this. On the day it commenced it was reported in Montgomery's leading paper, the morning *Advertiser*, but it was not the leading race relations story. What was? A story from Georgia about the Governor's decision to prohibit Georgia Tech from playing ''in the upcoming Sugar Bowl, because its opponent, the University of Pittsburgh, was discovered to have a lone Negro on the team as a reserve running back, and because Sugar Bowl officials had agreed to allow Pittsburgh fans to be seated on a non-segregated basis.'' Georgia Tech students rioted in protest, and the Governor backed down. *Id.* at 134.

(SCLC), founded in 1957, was the social movement counterpart to the NAACP's law reform movement.[15] (And usually it was NAACP LDF lawyers whom the SCLC ministers turned to when they were arrested and jailed.)

Dr. King toured the country, speaking out for civil rights, and for direct action. In 1957 and 1958, he was in Little Rock to help the nine black children, and their families, who in the face of mobs of violent whites, and under the protection of federal troops, de-segregated Central High School. In 1960 Dr. King embraced and inspired the college students who sat-in at a lunch counter in Greensboro that catalyzed students across the country to begin similar sit-in campaigns. That same year he helped found the Student Non–Violent Coordinating Committee (SNCC) to help organize college students to join and lead the movement. Dr. King was a key leader of the freedom rides of 1961 (organized by CORE), where black (and a few white) civil rights activists from the North tried to de-segregate the interstate busses and bus terminals of the South.

But by 1962, the year Percy Green joined CORE, many activists saw Dr. King's leadership as waning. He had suffered a series of strategic defeats, most notably in 1961–62 in Albany Georgia, where a direct action campaign to de-segregate the city's schools, parks and busses had collapsed under the weight of dissension among the activist-leaders, on how to respond to injunctions issued against the protests. Dr. King's commitment to non-violence, in the face of white violence directed at the movement, had undermined his reputation among militants. His image had moved from that of a courageous confrontationalist to a compromiser, while groups like SNCC in the South and CORE in the North were increasingly militant.[16]

Late in 1962 Percy Green joined his first picket line, to protest Kroger's grocery stores' refusal to hire black workers. The protests succeeded in persuading Kroger's to hire black checkout clerks, stock clerks and butchers at the three Kroger's stores located in the black community in St. Louis.[17] As Green marched to protest Kroger's policies, Dr. King was planning a series of demonstrations that would galvanize

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[15] *Id.* at 221–222.

[16] As King's biographer Taylor Branch writes: ''Of the handicaps early in the Birmingham crisis, perhaps the most serious was King's image as a reluctant and losing crusader. He had been largely out of the public eye for eight months, since his retreat from Albany. His name had faded. He appeared to be a worthy symbol from the 1950's who had overreached himself trying to operate as a full-fledged political leader.'' Taylor Branch, Parting the Waters: America in the King Years, *supra* note 12, at 709.

[17] Interview notes from author's interview with Percy Green, *supra* note 6; reply letter from Percy Green, *supra* note 6.

the country, and lead to the adoption of the civil rights law under which Green would bring his famous case.

Dr. King In Birmingham—Direct Action and the 1964 Civil Rights Act.[18]

In late 1962 Dr. King was invited to come to Birmingham by local civil rights and church leaders, principally Rev. Fred Shuttlesworth.[19] Rev. Shuttlesworth led the Alabama Christian Movement for Human Rights (ACMHR) (founded in 1956, when the State of Alabama succeeded in banning the NAACP from the State)[20] and served on the board of the SCLC.[21]

Birmingham was widely known as ''Bombingham'' for its bombings[22] and other violence, including the notorious 1961 Mother's Day beatings of freedom riders[23] and the chain whipping of Rev. Shuttlesworth when he tried to enroll his children at a white school following *Brown v. Board of Education*.[24] Between 1957 and 1962 there were sixteen to twenty reported bombings directed at black churches and civil rights leaders, including two at Rev. Shuttlesworth's church, one of which destroyed his home.[25]

At Rev. Shuttlesworth's invitation, Dr. King assigned SCLC executive director Rev. Wyatt Walker and chief aide Rev. Andrew Young to start planning a series of non-violent direct action demonstrations directed at persuading the white business leaders of Birmingham to abandon their support for segregation.[26] Local government was seen as intransigent, with Birmingham's segregation laws the strictest in the nation.

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[18] This section relies substantially on three previously published law review articles of mine: David Benjamin Oppenheimer, *McDonnell Douglas v. Green Revisited: Why Non–Violent Civil Disobedience Should Be Protected From Employer Retaliation By Title VII*, 34 Colum. Hum. Rts. L. Rev. 635 (2003); David Benjamin Oppenheimer, *Kennedy, King, Shuttlesworth and Walker: The Events Leading to the Introduction of the Civil Rights Act of 1964*, 29 U.S.F. L. Rev. 645 (1995); and David Benjamin Oppenheimer, *Martin Luther King,* Walker v. City of Birmingham*, and the Letter From Birmingham Jail*, 26 U.C. Davis L. Rev. 791 (1993) (hereinafter King/Walker).

[19] *See* Martin Luther King, Jr., *Letter From Birmingham Jail* (1963).

[20] *See NAACP v. Alabama ex rel. Flowers*, 377 U.S. 288 (1964).

[21] Branch, *supra* note 12, at 690.

[22] Juan Williams, Eyes On The Prize: America's Civil Rights Years, 1954–1965 179 (1987).

[23] *See* Robert Weisbrot, Freedom Bound: A History of America's Civil Rights Movement 55–63 (1990).

[24] Williams, *supra* note 22, at 181.

[25] Michal R. Belknap, Federal Law and Southern Order 99 (1987).

[26] Branch, *supra* note 12, at 688–89.

But if boycotts, sit-ins and mass arrests in the business district could slow down trade during the busy Easter season, perhaps local business leaders would join with the Black leadership out of economic self-interest.

Rev. Shuttlesworth tried a similar plan with some success the prior summer.[27] A boycott by Black patrons had reduced business substantially, and in response many businesses agreed to remove their ''white only'' signs from dressing rooms and drinking fountains. But when Public Safety Commissioner Eugene ''Bull'' Connor threatened to enforce the segregation laws by arresting and prosecuting the white business owners, the signs went back up.[28]

The demonstrations began on Wednesday, April 3, with picketing and sit-ins at downtown department stores.[29] There were marches, sit-ins and arrests each day for the next week, but the numbers participating were below expectations, and Dr. King feared that the campaign was failing. Then, on Holy Thursday, April 11, he was faced with a decision that would change the direction of history, and would reveal the Supreme Court's intolerance of dissent.[30]

The prior night, April 10, the Birmingham City Attorney submitted an *ex-parte* application for an injunction forbidding Dr. King and over one hundred other activists from all public demonstrations. A temporary injunction was immediately issued, and served on Dr. King on Thursday morning.[31] Until then, those arrested were merely charged with violating the segregation laws or with parading without a permit. But now they would be charged with contempt of court for violating a court order.

In a decision that Andrew Young later pointed to as the ''beginning of [Dr. King's] true leadership,''[32] Dr. King decided to demonstrate despite the order.[33] The following afternoon, Good Friday, he led a march of fifty-two demonstrators from the Sixteenth Street Baptist Church (where four girls would be murdered in a bombing a few months later)[34] toward City Hall.[35] Within a few blocks, they were stopped and arrested

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[27] *Id*. at 643.

[28] Martin Luther King, Jr., Why We Can't Wait 53 (1963).

[29] Branch, *supra* note 12, at 708–09.

[30] The Court's intolerance of dissent is discussed *infra* at pp. 20 and pp. 22.

[31] King/Walker, *supra* note 18, at 805–806.

[32] Voices of Freedom: An Oral History of the Civil Rights Movement 130 (Henry Hampton and Steve Fair eds., 1990).

[33] Branch, *supra* note 12, at 728–30.

[34] *Id*. at 890–91.

[35] Petition for writ of certiorari, *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969) at 5–6.

for marching in violation of the injunction. Dr. King was handcuffed, dragged to a paddy wagon, and delivered to the Birmingham jail, where he would spend Easter weekend in solitary confinement in an unlighted cell. He used his time there to write what is now widely regarded as the most important essay of the civil rights movement, and one of the most influential statements of principal ever published—the *Letter From Birmingham Jail*.[36]

In the aftermath of Dr. King's arrest, two consequences can be traced with wildly different trajectories. One is the re-vitalization of the Birmingham campaign, leading to President Kennedy's decision to introduce the Civil Rights Act.[37] The other was Dr. King's conviction for contempt;[38] in its affirmance by the Supreme Court we can better understand the Court's deep hostility toward dissent, even when expressed through non-violent civil disobedience, and its dicta condemning such non-violent civil disobedience in Percy Green's case.[39]

The Birmingham campaign, re-vitalized by Dr. King's courage on Good Friday, was recast as a children's campaign.[40] Thousands of Birmingham's Black teenagers (and a few pre-teens) volunteered to be trained in non-violence and skip school to demonstrate, facing expulsion from school as well as jail sentences. On May 2, 1963 well over a thousand young people marched, with nearly a thousand arrested. In a single day the jails were full, and thousands more students were ready to march and go to jail.[41]

Bull Connor responded in the Southern segregationist tradition, meeting non-violence with violence.[42] With no room in the jails, he attacked the young marchers with police dogs and high intensity fire hoses. In Birmingham, the attacks were popular with local whites; they gathered to cheer as the police turned the water cannons on the demonstrators.[43] But outside the South, the media depictions of the attacks on the children had a dramatic effect on white public opinion.[44] A

[36] For a copy of the *Letter From Birmingham Jail see* www.thekingcenter.org/prog/non/letter.html (last visited March 26, 2005).

[37] Discussed *infra* at 8–9.

[38] *See Walker v. City of Birmingham*, 388 U.S. 307 (1967).

[39] *See infra* at pp. 20 and 22.

[40] King/Walker, *supra* note 18, at 818; Branch, *supra* note 12, at 750–54.

[41] King/Walker, *supra* note 18, at 818–19; Branch, *supra* note 12, at 758.

[42] Branch, *supra* note 12, at 759.

[43] *City Firemen Again Hose Down Rock–Throwing Demonstrators*, Birmingham News, May 4, 1963, at 2.

[44] King/Walker, *supra* note 18, at 820–821.

few days earlier, Time magazine and the New York Times were criticizing Dr. King as an unwelcome outsider in Birmingham; now they were editorializing against the police violence.[45]

Under pressure from the President and the Justice Department, the white business leaders agreed to negotiate with the civil rights leaders.[46] On May 10 a settlement was reached. The fitting rooms in the stores would be de-segregated immediately. Public rest rooms and drinking fountains would follow within 30 days, with lunch counters in another 30 days. Department stores would start hiring Black sales clerks. A biracial committee would be formed to discuss de-segregating the parks and schools, and hiring Black city employees. Money would be raised so that the 2,000 demonstrators still in jail could be released.[47]

On May 21, President Kennedy asked the Justice Department to begin drafting a civil rights law.[48] On June 11, as Governor George Wallace stood in the doorway at the University of Alabama to prevent black students from registering, and then stepped aside,[49] the President announced to the nation that he would support a civil rights act, citing the events in Birmingham as a demonstration that the time had come for such legislation.[50] The following day, Medger Evers, the head of the NAACP in Mississippi was assassinated.[51] On June 19, as Medger Evers was buried in Arlington National Cemetery, the President fulfilled his pledge, introducing the bill that would, after his death, become the 1964 Civil Rights Act.

I know of no evidence that the President was aware that he took this historic act on the ninety-eighth anniversary of ''Juneteenth,'' the holiday that commemorates the date, on June 19, 1865, that word reached the slaves of Texas that two years earlier President Lincoln had issued the Emancipation Proclamation, granting them their freedom.[52]

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[45] Compare *Poorly Timed Protest*, Time, Apr. 1963 at 30–31; Editorial, *Racial Peace in Birmingham?*, N.Y. Times, Apr. 17, 1963, at 40; with *Outrage in Alabama*, N.Y. Times, May 5, 1963, Section 4 at 10E.

[46] Branch, *supra* note 12, at 780–81.

[47] David J. Garrow, Bearing The Cross 258–59 (1986).

[48] Branch, *supra* note 12, at 807–08.

[49] *See* Claude Sitton, *Alabama Admits Negro Students; Wallace Bows to Federal Force*, N.Y. TIMES, June 12, 1963 (reprinted in Reporting Civil Rights, Part One (2003) at 824).

[50] *See Transcript of the President's Address*, N.Y. TIMES, June 12, 1963, at 20.

[51] *See* Claude Sitton, *N.A.A.C.P. Leader Slain in Jackson; Protests Mount*, N.Y. TIMES, June 13, 1963 (reprinted in Reporting Civil Rights, Part One (2003) at 831).

[52] *See* Texas State Library and Archives Commission, Juneteenth, *at* <http://www.tsl.state.tx.us/ref/abouttx/juneteenth.html> (last visited March 26, 2005).

But President Kennedy saw and described the Civil Rights Act as a second Emancipation Proclamation.[53]

From Birmingham to Cloture: How Title VII Was Crafted and Adopted.

The following day, June 20th, Congressman Emanuel Celler (D. NY), chair of the House Judiciary Committee, introduced the President's bill, H.R. 7152; he referred it to a special subcommittee he chaired, which he packed with liberal Democrats.[54] The Kennedy bill as introduced focused on public accommodations, voting rights in federal elections and segregation in education.[55] In the employment arena, the section that would become Title VII was very weak, limited to a toothless permanent committee within the executive branch to lobby for voluntary employment de-segregation.[56] Kennedy was under pressure to include a Fair Employment Practices Commission (FEPC) based on the National Labor Relations Board (NLRB); his decision to forego an FEPC was controversial, and unpopular with the major civil rights groups and the AFL–CIO.[57]

But in the fall of 1963, Celler, working with the liberal Leadership Conference on Civil Rights, amended the bill substantially, including its fair employment section.[58] Celler's amendment replaced the administration's proposal with a bill drafted by Congressman Powell (D. NY) and his Labor and Employment Committee.[59] The new bill included a strong administrative agency, called the Equal Employment Opportunity Commission (EEOC), modeled on the NLRB and the stronger state FEPCs.[60] The moderate Republicans who represented the swing votes in the House, with the support of the Kennedy administration, demanded that the EEOC's powers be amended, but accepted Celler's insistence on an FEP-type agency. They asked, and Powell agreed, that the agency's enforcement powers be reduced from quasi-judicial to prosecutorial.[61]

[53] *See Transcript of the President's Address*, N.Y. TIMES, June 12, 1963, at 20.

[54] *See* Hugh Davis Graham, The Civil Rights era: Origins and Development of National Policy 1960–1972 (Oxford University Press 1990) at 89, 125.

[55] Graham, *supra* note 54 at 78–79; See also Richard K. Berg, *Equal Employment opportunity Under The Civil Rights Act of 1964*, 31 Brooklyn L. Rev. 62, 64 (1964); Francis J. Vaas, *Title VII: Legislative History*, 7 B.C. Indus. & Com. L. Rev. 431, 434 (1965–66).

[56] Graham, *supra* note 54 at 80–81, 95.

[57] *Id.* at 82–83, 95.

[58] *Id.* at 125–127.

[59] H.R. 405; see Graham, *supra* note 54 at 126–127.

[60] Graham *supra* note 54 at 125–132; Berg, *supra* note 55 at 64–65; Vaas, *supra* note 55 at 435.

[61] Berg, *supra* note 55 at 65; Graham, *supra* note 54 at 131–132; Vaas, *supra* note 55 at 436–437. Vaas describes the change as having ''the objective of allaying the fear that the EEOC would develop into another expensive octopus like the NLRB.'' *Id.* at 450.

Had the bill passed in this format, there would have been no private right of action under Title VII, and no *Green v. McDonnell Douglas*.

In the wake of President Kennedy's assassination, the civil rights bill passed the House with an EEOC with prosecutorial powers; but in the Senate, Southern Democrats mounted a filibuster. A compromise (the ''Leadership Compromise'') was engineered by Senate Minority Leader Everett Dirksen (R. Ill.), working with a bi-partisan group of Senate leaders, the Attorney General, and President Johnson.[62] As part of the compromise**,** Dirksen agreed that Title VII retain its broad prohibition of discrimination, and that the EEOC be permitted to investigate and conciliate complaints, but that the power to prosecute be shifted from the EEOC to the Department of Justice, which he saw as posing a smaller threat to business.[63] Then, in a final amendment as the compromise went to the Senate floor, the bill was further weakened (from the perspective of 1964) by retaining Justice Department prosecution only in cases where there was a ''pattern and practice'' of discrimination. In other cases, the only enforcement power would be placed in the hands of the complaining party, who could bring a private law suit in the United States District Court.[64]

Critically (as it turned out), a fee-shifting provision was included. Under the typical ''American rule,'' each party in civil litigation pays its own attorneys' fees; but as a result of the Leadership Compromise, Title VII provides that a prevailing plaintiff may recover his or her reasonable attorneys' fees from the defendant. The decision to authorize fee shifting has been critical in making private representation of Title VII plaintiffs viable.[65]

Thus was Title VII's private right of action born, making possible private employment discrimination litigation like Percy Green's case. The bill as amended passed in the Senate on June 19, 1964,[66] one year to the day from President Kennedy's sending the administration bill to Congress,[67] and 99 years from the original ''Juneteenth.''

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[62] Graham, *supra* note 54 at 87.

[63] Graham, *supra* note 54 at 146–148.

[64] Berg, *supra* note 55, at 62, 67; In 1972 the Justice Department's enforcement power was shifted from the Justice department to the EEOC, as part of a compromise aimed, again, at preventing cease-and-desist powers in the EEOC. Graham, *supra* note 54 at 426–431.

[65] At least one early commentator was skeptical that courts would award significant attorneys' fees to Title VII litigants. See R. Wayne Walker, *Title VII: Complaint And Enforcement Procedures And Relief And Remedies*, 7. B. C. Indus. & Com. L. Rev. 495, 501–506 (1965–66).

[66] Vaas, *supra* note 55 at 446.

[67] *Transcript of the President's Address*, N.Y. Times, June 12, 1963 at 20.

Percy Green and McDonnell Douglas.

In the spring of 1963, inspired by the Birmingham campaign, Percy Green began working with CORE to persuade the Jefferson Bank of St. Louis to hire black workers. Demonstrations included picketing and sitting in at the bank's main downtown branch. As in Birmingham, the bank went to court and obtained an injunction, prohibiting protesters from demonstrating or disturbing its business. And, as in Birmingham, the civil rights leaders were divided on how to respond to the injunction, with moderates urging compliance, and militants (including Green) urging non-violent civil disobedience. Once again, as in Birmingham, the militants prevailed. Green and other non-violent demonstrators sat in at the bank, singing freedom songs, requiring it to close early. In response, the St. Louis sheriff arrested nineteen CORE leaders, including City Alderman William L. Clay, who later became the first black U.S. Representative from Missouri. Alderman Clay and the others served several months in jail for violating the injunction. (Green was not among the nineteen.)[68]

The long jail sentences of the CORE leaders left the group's members dispirited and disinclined to continue its campaign of direct action. As a result, several of the more militant CORE activists, including Green, left CORE in early 1964 and founded a new organization, the Action Council to Improve Opportunities for Negroes (later, simply ACTION) to carry on direct action campaigns.[69]

In the summer of 1964, Green and his colleagues in ACTION concluded that the newly enacted Civil Rights Act was merely words on paper unless someone insisted on its enforcement. The Act (and a prior Executive Order)[70] required federal projects to use contractors pledged to non-discrimination. But in the heart of St. Louis the federal government was building the Gateway Arch, a 630 foot high arch celebrating St. Louis' status as the gateway to the West and the starting point for the Lewis and Clark expedition, using no black contractors and no black construction workers. So in July, 1964, soon after the Act was signed by the President, Percy Green and his ACTION colleague Richard Daly climbed 125 feet up the arch to bring attention to the lack of minority participation. In the aftermath of his arch climb, Green became a well known figure in St. Louis.

On August 28, 1964 Green was laid off from his position at McDonnell Douglas. Fourteen white employees with less seniority were retained, leading Green to believe that his layoff was retaliation for his

[68] *Green Biographical Sketch* at 2–3; interview notes from author's interview with Percy Green, *supra* note 6; reply letter from Percy Green, *supra* note 6.

[69] *Id.*

[70] Exec. Order No. 11,246, 41 C.F.R. Part 60–1.

civil rights advocacy.[71] Assuming it was, it was not a violation of the newly passed Civil Rights Act, because Congress gave employers a year to prepare for the new law, providing that Title VII would not take effect until July 5, 1965.

In response to his lay-off, Green began protesting his termination, and McDonnell Douglas' civil rights practices, through a combination of letter-writing, filing charges with various government agencies, picketing, and several acts of non-violent civil disobedience.[72] If he hadn't already, he soon captured the attention of the company's management, as well as their enmity, by such actions as picketing the home of James F. McDonnell, chairman of the McDonnell Douglas board of directors.[73]

In September of 1964 Green organized and participated in a ''stall-in'' designed to tie up the major roads leading to the McDonnell Douglas production plant at shift change time, and thus draw attention to the company's civil rights record. As the district court described it, the stall-in consisted of ''five teams, each consisting of four cars would 'tie up' five main access roads into McDonnell at the time of the morning rush hour. The drivers of the cars were instructed to line up next to each other completely blocking the intersections or roads. The drivers were also instructed to stop their cars, turn off the engines, pull the emergency brake, raise all windows, lock the doors, and remain in their cars until the police arrived. The plan was to have the cars remain in position for one hour. Acting under the 'stall in' plan, plaintiff drove his car onto Brown Road, a McDonnell access road, at approximately 7:00 a.m., at the start of the morning rush hour. Plaintiff was aware of the traffic problems that would result. He stopped his car with the intent to block traffic. The police arrived shortly and requested plaintiff to move his car. He refused to move his car voluntarily. Plaintiff's car was towed away by the police, and he was arrested for obstructing traffic. Plaintiff pleaded guilty to the charge of obstructing traffic and was fined.''[74] The court omits that the stall-in occurred without violence.[75] It took place a substantial distance from the plant and, despite the plans to block traffic for an hour, lasted only about ten minutes.[76] Egress was not totally

[71] NAACP Brief for Appellant at 16 [hereinafter NAACP Brief], *Green v. McDonnell Douglas Corp.*, 463 F.2d 337 (8th Cir.1972) (hereinafter *Green*, Circuit Court).

[72] See *Green v. McDonnell–Douglas Corp.*, 318 F.Supp. 846, 848 (E.D. Mo. 1970) (hereinafter *Green*, district court).

[73] NAACP Brief, *supra* note 71 at 18.

[74] *Green,* District Court, 318 F.Supp. 846, 849 (E.D. Mo. 1970).

[75] *Green,* Circuit Court, 463 F.2d 337, 348 (8th Cir. 1972); NAACP Brief, *supra* note 71, at 28.

[76] *Green,* Circuit Court, 463 F.2d 337, 348 (8th Cir. 1972); NAACP Brief, *supra* note 71, at 27.

blocked; some cars could still get by.[77] Green's guilty plea was to a traffic offense, for which he paid a $50 fine.[78]

Green also participated in an ACTION demonstration against McDonnell Douglas described as a ''lock-in,'' though he was not arrested.[79] The demonstration included peaceful picketing as well as the lock-in, in which a chain and padlock were placed on the front door of a McDonnell Douglas building to prevent the occupants from leaving.[80] Green was present at the lock-in, and engaged in lawful picketing, but his role in the chaining of the doors was unclear.[81]

In January, 1965, McDonnell Douglas began advertising for the position from which Green had been ''laid off.'' Knowing that Title VII had not yet taken effect, and believing he would not be re-hired because of his civil rights advocacy, Green did nothing. But in July, 1965 Title VII became effective. On July 26, 1965, McDonnell Douglas again advertised openings for Green's previous position.[82] He applied the next day and was rejected.[83]

Green v. McDonnell Douglas in the District Court[84]

When McDonnell Douglas turned down Green's employment application, he filed an administrative action with the newly formed EEOC.[85] He complained that McDonnell Douglas's refusal to hire him was both race discrimination in violation of Title VII Section 703(a)(1)[86] and retaliation for his prior opposition to McDonnell Douglass's employment policies, in violation of Title VII Section 704(a).[87] The company admitted

[77] NAACP Brief, *supra* note 71, at 27.

[78] *Green,* Circuit Court, 463 F.2d 337, 348 (8th Cir. 1972).

[79] *McDonnell Douglas v. Green*, 411 U.S. 792, 795 (1973) (hereinafter *Green*).

[80] *Green,* Circuit Court, 463 F.2d 337, 348 (8th Cir. 1972); NAACP Brief, *supra* note 71, at 28.

[81] *Green*, 411 U.S. at 795.

[82] *Green*, 411 U.S. at 802.

[83] *Green*, 411 U.S. at 796.

[84] This section relies substantially on my previously published law review article: David Benjamin Oppenheimer, *McDonnell Douglas v. Green Revisited: Why Non–Violent Civil Disobedience Should Be Protected From Employer Retaliation By Title VII*, 34 Colum. Hum. Rts. L. Rev. 635 (2003).

[85] *Green*, 411 U.S. at 796.

[86] 42 U.S.C. § 2000e–2(a)(1) [§ 703(a)(1)] (1964) (''It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual . . . because of such individual's race, color, religion, sex, or national origin.)''

[87] 42 U.S.C. § 2000e–2(e) [§ 704(a)] (1964) (''It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for

they had refused to re-hire Green because of his protests of company policy, including the picketing of McDonnell's house, the lock-in, and the stall-in, and insisted that they were entitled to reject an application from someone who had participated in illegal conduct directed at them.[88]

The EEOC made a ''reasonable cause'' finding on Green's section 704 retaliation claim, but made no finding on his section 703 discrimination claim.[89] Conciliation failed, and on March 19, 1968 the EEOC issued a right-to-sue letter.[90] On April 15, 1968 Green filed a civil action in the United States District Court for the Northern District of Missouri, alleging retaliation in violation of section 704.[91] On March 20, 1969 Green amended the complaint to add a claim of discrimination in violation of section 703.[92]

On May 13, 1969 the district court struck the section 703 race discrimination claim, holding that a finding of ''reasonable cause'' by the EEOC was a jurisdictional pre-requisite to a civil action under Title VII.[93] On September 25, 1970, following a bench trial, the district court found that Green's involvement in the stall-in and lock-in were misconduct that were not protected activities under Title VII; that is, under Title VII McDonnell Douglas was permitted to retaliate against Green for engaging in unlawful actions directed against the company.[94] The district court entered judgment for McDonnell Douglas.

Green v. McDonnell Douglas in the Circuit Court of Appeals.

Green appealed to the United States Court of Appeals for the Eighth Circuit.[95] The court ruled on three critical issues:[96] (1) whether the district court properly found that an EEOC ''reasonable cause'' finding was a jurisdictional pre-requisite to a private lawsuit; (2) whether the district court properly found that Green had failed to establish unlawful

employment . . . because he has opposed any practice made an unlawful employment practice by this subchapter.''); see *Green*, 411 U.S. at 796.

[88] NAACP Brief, *supra* note 71, at 18, *citing* letter from McDonnell Douglas to Green, *Green,* Circuit Court, 463 F.2d 337 (8th Cir. 1972).

[89] *Green*, 411 U.S. at 792.

[90] *Id.* at 797–98.

[91] *Green,* District Court, 299 F.Supp. 1100, 1101 (E.D. Mo. 1969).

[92] *Id.*

[93] *Id.*

[94] *Green,* District Court, 318 F.Supp. 846, 847, 851 (E.D. Mo. 1970).

[95] *Green*, Circuit Court, 463 F.2d at 338.

[96] *Id.* The court also ruled on several other contentions outside the scope of this discussion.

retaliation in violation of section 704, because Green's unlawful protest activities were not protected from retaliation by Title VII; and (3) if the section 703 discrimination claim was not jurisdictionally barred, whether Green had established that his rejection constituted race discrimination.

On the first question, the court joined four other circuits in finding that a reasonable cause finding by the EEOC was not a jurisdictional pre-requisite to a civil action.[97] Thus, the district court should have considered Green's claim that McDonnell Douglas refused to re-hire him because of his race.

On the section 704 retaliation claim, the Circuit court focused on whether Green's participation in the stall-in justified McDonnell Douglass's decision.[98] As the court characterized the arguments: ''According to Green, since the 'stall-in' was a non-violent protest designed to call attention to McDonnell's allegedly discriminatory practices, this activity commands the protection of [section 704] . . . McDonnell, on the other hand, asserts that the unlawfulness of this protest removes it from the protection of that section.''[99] Here the court sided with McDonnell Douglas, affirming the district court's holding that Green's participation in the stall-in was not protected from employer retaliation, and that an employer could thus lawfully refuse to hire an applicant who had engaged in unlawful conduct directed at the employer, as long as the retaliation was not racially motivated.[100]

Turning to the merits of the section 703 race discrimination claim,[101] the court ordered a remand. Although the court concluded that Green's unlawful protests were legally sufficient misconduct to justify McDonnell Douglas refusing to re-hire him, it was concerned about whether the company would have refused to re-hire a white former employee under similar circumstances. There was reason to suspect that McDonnell Douglas might have treated a white protester differently. Apparently, on November 8, 1965, just a few months after the company refused to re-hire Green, a white employee was arrested in an automobile ''slow down'' demonstration in support of a labor strike; in that instance, the company reached an agreement with the union and the Federal Media-

[97] *Id.* at 342.

[98] The court found that there was insufficient evidence regarding Green's role in the lock-in. *Green*, Circuit Court, 463 F.2d at 341.

[99] *Id.* at 341.

[100] *Id.* at 341.

[101] The court issued two opinions on this question. The court's original opinion was modified following a petition for rehearing by McDonnell Douglas. The final modified opinion is described herein.

tion Service to let the white man keep his job.[102] The court held that Green was entitled to argue that McDonnell Douglas' refusal to re-hire him, while it re-hired or retained a white employee under similar circumstances, established that the real reason for refusing to re-hire Green was his race.[103]

The Circuit court set forth the respective burdens on the applicant and employer for a Title VII case in which the theory of discrimination was differential treatment. ''When a black man demonstrates that he possesses the qualifications to fill a job opening and that he was denied the job which continues to remain open, we think he presents a prima facie case of racial discrimination. However, an applicant's past participation in unlawful conduct directed at his prospective employer might indicate the applicant's lack of a responsible attitude toward performing work for that employer. Of the several civil rights protests which Green directed against McDonnell, the employer selected two, the 'lock-in' and the 'stall-in', as reasons for its refusal to rehire Green. Green should be given the opportunity to show that these reasons offered by the Company were pretextual, or otherwise show the presence of racially discriminatory hiring practices by McDonnell which affected its decision.''[104]

Thus, the case was remanded to the district court to determine whether the employer's reason for refusing to re-hire Green was his unlawful protests or his race. If he could show that the protests were offered by McDonnell Douglas as a pretext, and that the real reason was his race, he'd be entitled to a judgment despite his having participated in illegal demonstrations against the company. Green could show that the decision was racially motivated by showing that the company treated an otherwise similarly situated white employee who unlawfully protested company policies differently than it treated him.

McDonnell Douglas sought review on the question of whether the circuit court erred in permitting Green to go forward on his discrimination claim, arguing it was procedurally barred by the EEOC's failure to issue a ''reasonable cause'' finding, and substantively barred because Green's participation in unlawful demonstrations directed at McDonnell Douglas provided the company with a legitimate basis for rejecting his application for employment.[105] The Supreme Court granted certiorari.[106]

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[102] *Green*, District Court (on remand), 390 F.Supp. 501, 502–03 (E.D. Mo. 1975).

[103] *Green*, Circuit Court, 463 F.2d at 353.

[104] *Id.*

[105] *Green*, 411 U.S., at 800.

[106] *Id.* at 798.

McDonnell Douglas v. Green in the Supreme Court.

In the Supreme Court, a unanimous decision by Justice Powell announced four important new rules for the litigation of Title VII cases. First, the Court affirmed the Eighth Circuit's decision that an EEOC ''reasonable cause'' finding is not a jurisdictional prerequisite to filing a civil action under Title VII.[107] Had the Court agreed with the district court, administrative practice before the EEOC would have become far more important, and the agency would have certainly become much more powerful; the EEOC decision-making process would have become critical to the outcome of discrimination claims, as claimants and employers engaged in administrative litigation to obtain, or prevent, issuance of a reasonable cause finding. By finding that the EEOC's determination was not jurisdictional, the Court helped relegate the agency to a position of irrelevance for those claimants with the resources to bring a civil action.

Second, in language that has become as familiar to employment lawyers as the pledge of allegiance to a school child, the Court set forth the initial burden placed on a plaintiff to establish a prima facie case of discrimination.

> ''This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.''[108]

With this simple test the Court made it possible to prove discrimination with circumstantial evidence. As later cases clarified, under the McDonnell Douglas test the initial burden on the plaintiff was not great, and did not require the production of any direct evidence of discrimination.[109] From the fact that the most likely non-discriminatory explanations were absent (didn't apply, no job available, or not qualified) a trier of fact could infer a discriminatory motive. The prima facie case didn't end the inquiry, but it allowed the plaintiff to force an explanation from the employer on a relatively easy showing.

The Court might have required some showing of direct evidence of discrimination. Had it done so, many discrimination claims would have been foreclosed. The fact that it was satisfied that where an employer

[107] *Id.* at 799.

[108] *Id.* at 802.

[109] See *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993); *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000); *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003).

refused to hire a qualified African American job applicant for an open job, an inference of discrimination could be drawn, and should be drawn absent some other explanation, is a reflection of how pervasive racial discrimination was in the 1970's.[110]

Later decisions established that the test was intended to be flexible. As a result, the Green test for a prima facie case of discrimination has been applied: not only for hiring cases, but for promotion[111] and for firing cases;[112] not only in race discrimination cases, but in all kinds of employment discrimination cases;[113] and not only in employment cases, but in many other areas of discrimination law as well.[114]

Next, the Court explained the effect of a prima facie case. ''The burden must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection.''[115] If the employer meets its burden, the Court held, ''the inquiry must not end here. . . . [The plaintiff must] be afforded a fair opportunity to show that [the employer's] stated reason for [the employee's] rejection was in fact pretext.''[116]

By shifting the burden to the employer to articulate a non-discriminatory reason, the Court made it possible for plaintiffs to go forward without having to guess at the employer's possible explanations. And by allowing the plaintiff to prevail by impeaching the employer's explanation, the Court permitted a plaintiff to establish his or her full proof of discrimination with circumstantial evidence. Here again, the Court might have insisted on direct evidence of discriminatory motive, particularly after the employer had offered a non-discriminatory reason for its decision. By permitting the plaintiff to rely on circumstantial evidence

[110] Although the Court has not abandoned this holding, language in more recent cases suggest that it would not have required the same inference today. *See, e.g., St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993) (affirming district court holding that a finding of pretext does not require a finding of discrimination, and that a pretextual reason offered by the employer was intended as a coverup of a personality conflict, not a coverup of race discrimination).

[111] *See, e.g., Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981).

[112] *See*, *e.g.*, *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993).

[113] *See, e.g.*, *Raytheon Co. v. Hernandez*, 540 U.S. 44 (2003) (disability discrimination); *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000) (age discrimination); *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981) (sex discrimination).

[114] *See, e.g., Williams v. Staples, Inc.*, 372 F.3d 662 (4th Cir. 2004) (public accommodations discrimination); *Mitchell v. Century 21 Rustic Realty*, 350 F.3d 39 (2d Cir. 2003) (housing discrimination); *Dister v. Continental Group, Inc.*, 859 F.2d 1108 (2d Cir. 1988) (ERISA).

[115] *Green,* 411 U.S. at 802.

[116] *Id.* at 804.

the Court substantially eased the burden it might have placed on discrimination claimants.

Finally, the Court explained the kinds of evidence a plaintiff might rely on to prove pretext. In the process, the Court first identified three of the most common forms of evidence used to prove discrimination: comparative (or differential) treatment, statistics, and impeachment of the employer's explanation. Regarding comparative evidence, the Court explained that

> ''[e]specially relevant to such a showing [of pretext] would be evidence that white employees involved in acts against petitioner of comparable seriousness to the 'stall-in' were nevertheless retained or rehired. Petitioner may justifiably refuse to rehire one who was engaged in unlawful, disruptive acts against it, but only if this criterion is applied alike to members of all races.''[117]

In addition to such comparative treatment evidence, the Court held that the plaintiff could also rely on statistical evidence, and evidence that the employer had discriminated against the plaintiff or other minority employees or applicants. As the Court explained:

> ''Other evidence that may be relevant to any showing of pretext includes facts as to the petitioner's treatment of respondent during his prior term of employment; petitioner's reaction, if any, to respondent's legitimate civil rights activities; and petitioner's general policy and practice with respect to minority employment. On the latter point, statistics as to petitioner's employment policy and practice may be helpful to a determination of whether petitioner's refusal to rehire respondent in this case conformed to a general pattern of discrimination against blacks. . . . In short, on the retrial respondent must be given a full and fair opportunity to demonstrate by competent evidence that the presumptively valid reasons for his rejection were in fact a coverup for a racially discriminatory decision.''[118]

The Court's broad language gave civil rights plaintiffs a powerful tool in litigating discrimination claims. Under *McDonnell Douglas*, plaintiffs could demand discovery of an employer's workforce and hiring statistics, and could delve into the employer's treatment of other applicants and employees, either to demonstrate that whites were treated preferentially, or to demonstrate that other minority candidates or employees were treated similarly. It was as if every individual claim could be litigated as if it were a class action.

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[117] *Id.* at 804.

[118] *Id.* at 804–805.

Percy Green, Martin Luther King, and the Supreme Court's Intolerance of Dissent.

The Green decision was a great victory for civil rights advocates. But in the split within the civil rights movement between the supporters of law reform through legislation and litigation, and the supporters of social change through direct action non-violent civil disobedience, the Court was taking sides. For Percy Green, this was not good news. He should not have been surprised though, given how the Court responded to Dr. King's arrest in Birmingham.

Recall that in Birmingham Dr. King was faced with an injunction, issued *ex-parte* on Holy Thursday, prohibiting him from marching, signing, or praying in public. He believed that the injunction was a violation of his First Amendment rights, but he lacked the time to challenge it in court unless he delayed his planned Good Friday march. He decided to march in violation of the injunction, and to challenge any resulting conviction.

Dr. King was convicted, and he appealed the conviction all the way to the Supreme Court.[119] In 1967, the Court took the case and held that under the collateral bar rule Dr. King and the other protesters were barred from challenging the Constitutionality of their convictions because they had not attempted to challenge it in the issuing court before their march. The majority opinion described the situation in Birmingham in 1963 as charged with violence and the potential for great disruption, and expressed sympathy for the authorities. It never identified Dr. King (by then a Nobel Peace Prize winner) as one of the defendants, and generally left a reader with the impression that the violence was instigated by those directed not to march. (In reality, the violence was coming from the same city officials who had sought the injunction.)

In words that have come to be seen as profoundly ironic,[120] the Court exclaimed ''[o]ne may sympathize with the petitioners' impatient commitment to their cause. But respect for judicial process is a small price to pay for the civilizing hand of law, which alone can give abiding meaning to constitutional freedom.''[121] The Court thus characterized Dr. King and other practitioners of non-violent civil disobedience as ''impatient,''[122]

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[119] *Walker v. City of Birmingham,* 388 U.S. 307 (1967).

[120] *See, e.g.*, David Luban, *Difference Made Legal: The Court and Dr. King*, 87 Mich. L. Rev. 2152 (1989).

[121] *Walker,* 388 U.S. at 321.

[122] The problem of white demands for black patience is one of the main themes addressed by Dr. King in the Letter From Birmingham Jail. See Martin Luther King, Jr.,

while the official suppression of the civil rights movement by Southern officials was somehow not only legitimate, but ''civilizing.'' The Court failed to see that direct action, with its commitment to non-violent civil disobedience, itself gave meaning—great meaning—to constitutional freedom. When Dr. King returned to Birmingham to serve his time, he mocked the Court's criticism of his actions, describing his jail sentence as ''a small price to pay.''[123]

This same intolerance of civil disobedience can be seen in the Court's language describing Percy Green's stall-in in the McDonnell Douglas case. Green did not appeal the Circuit Court's decision on the section 704 retaliation claim,[124] so the question of whether an employer could lawfully retaliate against an employee who had engaged in non-violent civil disobedience was not properly before the Court. The decision could have focused on the simple question of whether McDonnell Douglas refused to rehire Green because of his race. But instead of describing the company's decision as either discrimination or non-discrimination, the Court offered the following: ''Respondent admittedly had taken part in a carefully planned 'stall-in,' designed to tie up access to and egress from petitioner's plant at a peak traffic hour. Nothing in Title VII compels an employer to absolve and rehire one who has engaged in such deliberate, unlawful activity against it.''[125] That language, although technically dicta as it applies to a retaliation action, nonetheless foreclosed future retaliation claims against employers that fired employees for participating in unlawful civil rights demonstrations, even if the illegality was minimal, and the demonstration non-violent.

The Court that eliminated Title VII claims for retaliation against unlawful demonstrations included some of the great civil libertarians of the Twentieth Century. Justices Brennan, Douglas, and Marshall signed Justice Powell's unanimous opinion, rather than writing a separate concurrence. It was not their finest moment. By contrast, Presidents Kennedy and Johnson, and the Congress that passed the Civil Rights Act, were willing to overlook the illegality of the demonstrations that persuaded them to outlaw discrimination.[126] They were willing to tolerate

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The Letter From Birmingham Jail, *supra* note 18; see also, Martin Luther King, Jr., Why We Can't Wait, *supra* note 28.

[123] Alan F. Westin & Barry Mahoney, The Trial of Martin Luther King (1974) at 2.

[124] *Green*, 411 U.S. at 797 (n. 6).

[125] *Id.* at 803.

[126] I discuss this theme in greater depth in David Benjamin Oppenheimer, *McDonnell Douglas v. Green Revisited: Why Non–Violent Civil Disobedience Should Be Protected From Employer Retaliation By Title VII*, *supra* note 18.

non-violent dissent, even illegal and disorderly dissent, as a legitimate tool for influencing public policy.

The Aftermath of the McDonnell Douglas v. Green Decision for Percy Green.

On remand, the district court found that Green was rejected by McDonnell Douglas in 1965 when he applied for re-hire because of his illegal activities directed at the company, not because of his race.[127] The court relied, in part, on evidence that beginning in 1965 McDonnell Douglas dramatically increased its employment of African Americans.[128] On appeal, the Eighth Circuit found that the district court findings were not clearly erroneous.[129] No further appeal was taken.

As the case was working its way through the courts, Percy Green returned to school. In 1970, he enrolled at St. Louis University, graduating in 1974 with a B.A. in Urban Affairs. In 1976, he earned a Master of Social Work from Washington University.[130]

Through his student days, and thereafter, Green continued his work as a social activist. A review of his collected newspaper clippings reveals that in the 1970's:[131] he lobbied the U.S. Civil Rights Commission and the U.S. Navy to investigate McDonnell Douglas' hiring practices; he issued a report on police misconduct; he organized high school students to demand that their schools' names be changed to honor black leader; he led protests against local employers Chrysler, Union Electric, Lacede Gas, Southwest Bell, and ITT (maker of Wonder Bread); he organized protests against the lack of black judges in the St. Louis juvenile court system; he organized protests against local real estate practices, targeting real estate agents and slumlords; he protested the decision to build a new convention center, instead of rebuilding black neighborhoods; he penetrated an exclusive charity ball to unmask the secret identity of the master of ceremonies (the ''veiled prophet''); he lobbied the Missouri Legislature against building more prisons; and he lobbied the FCC to deny CBS re-licencing of two local radio stations. By his count, he has been arrested over 100 times in protest demonstrations.

In 1993 Green was appointed to direct the minority and women owned business utilization program for the City of St. Louis. His responsibilities included investigating companies that claimed to be

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[127] *Green,* District Court (on remand), 390 F.Supp. 501 (E.D. Mo. 1975).

[128] *Id.* at 503.

[129] *Green,* Circuit Court (on appeal from remand), 528 F.2d 1102 (8th Cir. 1976).

[130] *Green Biographical Sketch supra* note 3, at 1–2.

[131] Clippings on file with author.

minority-owned or women-owned, and certifying them for participation in affirmative action programs. He was fired in September, 2001. He asserts he was fired for doing his job too well, exposing firms as white or male-owned to the consternation of the Mayor.[132] His Title VII action challenging the termination is pending.[133] Percy Green is, metaphorically, still climbing arches.

McDonnell Douglas v. Green Today.

A Westlaw citation search for the *McDonnell Douglas* case, conducted on April 1, 2005, revealed an astounding 63,236 citations. Among lawyers, the case is not only the starting place in analyzing a discrimination claim, but probably the most recognized Title VII case ever decided, and the reason Percy Green's name is so well known. But in St. Louis, among non-lawyers, Green's name is a household word because of his activism, not his Supreme Court case.

[132] Carolyn Tuft, *Slay's Firing of Green is only the Latest Flap over Embattled Program*, St. Louis Post Dispatch, Oct 7, 2001, at B1.

[133] *Green Biographical Sketch supra* note 3, at 3.

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