

THE MISLEADING METAPHOR OF THE SLAP IN THE FACE: AN ANALYSIS OF *ASH V. TYSON*

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Judges, officials, resisters, martyrs, wardens, convicts, may or may not share common texts; they may or may not share a common vocabulary, a common cultural store of gestures and rituals; they may or may not share a common philosophical framework. There will be in the immense human panorama a continuum of degrees of commonality in all of the above.¹

*Ash v. Tyson Foods, Inc.*² began as a garden-variety disparate treatment race discrimination case.³ Plaintiffs Anthony Ash and John Hithon, two African American men, alleged that they had been denied promotions to shift manager because of their race. At trial they introduced direct evidence of racial animus, including the fact that the deciding official had addressed each of them as “boy.”⁴ They also introduced indirect evidence of discrimination under the *McDonnell Douglas* framework.⁵ Under that framework, they demonstrated that they met the qualifications for the promotion, and that they were denied the promotion in favor of white applicants.⁶ They also introduced evidence that the defendant’s articulated nondiscriminatory reason for its actions (that the selected employees were better qualified) was pretextual.⁷ In particular, plaintiffs introduced evidence that, although the company’s written policies indicated that promotions should be based on seniority and that preference should

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¹ Robert M. Cover, *Violence and the Word*, 95 *YALE L.J.* 1601, 1629 (1986).

² 126 S. Ct. 1195 (2006).

³ The petitioners filed suit claiming, *inter alia*, that their failure to be promoted violated their rights under Title VII and 42 U.S.C. § 1981. *Ash v. Tyson Foods, Inc.*, 2005 U.S. App. LEXIS 7219, at **2 (11th Cir., Apr. 19, 2005).

⁴ *Id.* at **8.

⁵ *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). In *McDonnell Douglas*, the Court held that an employee must first present a prima facie case of discrimination. Then the employer may offer a “legitimate, nondiscriminatory reason” for the employment action, and the employee is then entitled to try to show that the offered reason is pretextual. *Id.* at 802–05.

⁶ Petition for Writ of Certiorari at 5, *Ash v. Tyson Foods, Inc.*, 126 S. Ct. 1195 (2006) (No. 05-379).

⁷ *Id.*

be given to those based at the particular plant,⁸ the deciding official had selected one white applicant who had substantially less seniority and one who came from outside the plant.⁹ At trial, the jury rendered verdicts for the plaintiffs awarding substantial compensatory and punitive damages.¹⁰ However, the district court for the Northern District of Alabama granted defendant's motion for judgment as a matter of law,¹¹ finding that the plaintiffs failed to demonstrate that Tyson's articulated reasons for denying the promotions were proof of intentional discrimination.¹²

The United States Court of Appeals for the Eleventh Circuit affirmed in part and reversed in part. First, the court held that "while the use of 'boy' when modified by a racial classification like 'black' or 'white' is evidence of discriminatory intent, the use of 'boy' alone is not evidence of discrimination."¹³

Second, the court reaffirmed the standard set forth in *Cooper v. Southern Co.*,¹⁴ that "pretext can be established through comparing qualifications only when 'the disparity in qualifications is so apparent as virtually to jump off the page and slap you in the face.'"¹⁵ Ash and Hithon petitioned for certiorari.

The Supreme Court granted certiorari, and in a four-page *per curiam* opinion, vacated the judgment of the Court of Appeals.¹⁶ First, holding that the word "boy" was not necessarily benign, the Court explained, "[a]lthough it is true that the disputed word will not always be evidence of racial animus, it does not follow that the term, standing alone, is always benign. The speaker's meaning may depend on various factors including context, inflection, tone of voice, local custom, and historical usage."¹⁷

⁸ Tyson Food's written qualifications for the position of shift manager required three to five years of experience. Petition for Writ of Certiorari at 5, *Ash*, 126 S. Ct. 1195 (2006) (No. 05-379) (citing Plaintiff's Exhibit 2). Tyson's Personnel Policy suggested that promotions should be considered one of the "benefits and rights for team members who establish seniority within the company." *Id.* A separate Personnel Policy suggested that, when filling vacancies, priority should be given to those employees already working within the complex with the vacancy. *Id.* While Ash testified that he specifically asked to be considered for the position, Hatley claimed that Ash had admitted to "not [being] ready for the shift manager's position," and thus did not consider him. *Id.* at 17a.

⁹ The plant manager, Thomas Hatley, hired two white men: Steven Dade, who had worked at the Gadsen plant for less than three years, and Randy King, who had worked for Tyson for thirteen years but had never been employed at the Gadsen plant. *Id.* at 5.

¹⁰ The jury awarded each \$250,000 in compensatory damages and \$1.5 million in punitive damages. Opposition to Petition for a Writ of Certiorari at 5, *Ash*, 126 S. Ct. 1195 (2006) (No. 05-379).

¹¹ Petition for Writ of Certiorari at 7, *Ash v. Tyson Foods, Inc.*, 126 S. Ct. 1195 (U.S. 2006) (No. 05-379).

¹² *Id.*

¹³ *Ash v. Tyson Foods, Inc.*, No. 04-11695, 2005 U.S. App. LEXIS 7219, at 8 (11th Cir. 2005) (citations omitted).

¹⁴ 390 F.3d 695, 732 (11th Cir. 2004).

¹⁵ *Ash*, 2005 U.S. App. LEXIS 7219, at **11.

¹⁶ *Ash v. Tyson Foods, Inc.*, 126 S. Ct. 1195 (2006).

¹⁷ *Id.* at 1197.

The Court also specifically rejected the “slap in the face” standard, holding that the “visual image of words jumping off the page to slap you (presumably a court) in the face is unhelpful and imprecise.”¹⁸ While noting that *Ash* was “not the occasion to define more precisely what standard should govern pretext claims based on superior qualifications,”¹⁹ the Court mentioned three other standards that had been employed by different circuits without choosing between them.²⁰ The Court rejected Tyson’s argument that the “slap in the face” standard was no different from a very high burden for proving qualifications,²¹ unanimously holding that “some formulation other than the test the Court of Appeals articulated in this case” was necessary.²²

The Supreme Court may have been motivated to grant certiorari because the “virtual slap” had become a seemingly insurmountable bar to successful Title VII litigation.²³ However, the Court did not address the question of why the metaphor of the “slap” had become an insurmountable bar. The three very different standards mentioned in the opinion suggest that perhaps the problem with the “slap in the face” standard was not quantitative but qualitative.

In 1926, Benjamin Cardozo wrote that metaphors had “to be narrowly watched, for starting out as devices to liberate thought, they end often by enslaving it.”²⁴ This Comment argues that the “slap in the face” standard enslaved the thinking of courts because it makes several false assumptions. First, it assumes that male and female judges share the common experience of a slap. Second, it assumes that the harm from discrimination is best analogized by the indignity of a slap. Third, it assumes that appellate judges know a slap when they see one, and finally, it assumes that hiring officials need to be slapped into wakefulness before they can be

¹⁸ *Id.*

¹⁹ *Id.* at 1198.

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Federal courts . . . have articulated various other standards, see, e.g., *Cooper* [v. *Southern Co.*] (noting that “disparities in qualifications must be of such weight and significance that no reasonable person, in the exercise of impartial judgment, could have chosen the candidate selected over the plaintiff for the job in question”; *Raad v. Fairbanks North Star Borough School Dist.*, (holding that qualifications evidence standing alone may establish pretext where the plaintiff’s qualifications are “clearly superior” to those of the selected job applicant); *Aka v. Washington Hospital Center* (concluding the factfinder may infer pretext if “a reasonable employer would have found the plaintiff to be significantly better qualified for the job”)

Id. at 1197–98 (internal citations omitted).

²¹ *Ash*, 126 S. Ct. at 1197.

²² *Id.* at 1198.

²³ See Petition for Writ of Certiorari, *supra* note 6, at 9–14.

²⁴ Bernard J. Hibbitts, *Making Sense of Metaphors: Visuality, Aurality, and the Reconfiguration of American Legal Discourse*, 16 *CARDOZO L. REV.* 229, 235 (1994) (citing *Berkey v. Third Ave. Ry. Co.*, 155 N.E. 58, 61 (N.Y. 1926)).

expected to recognize a minority or female candidate's superior qualifications.

The Court calls the "slap in the face" standard "imprecise."²⁵ Perhaps it is imprecise because it can mean very different things depending on who is interpreting it. While the "slap in the face" standard has many flaws, its most severe flaw is that it may lead male and female judges to perform quite different acts of imagination. The social significance of a man being slapped by a woman is different from and, in an important way, opposite to the social significance of a woman being slapped by a man.²⁶ Stereotypically, a man who is slapped by a woman is assumed to have done something wrong. He may have made an unwanted sexual advance, an offensive remark, or an obscene gesture.²⁷ A man who is slapped by a woman is generally seen as the wrongdoer despite the fact that *she* was physically violent. A male judge may empathize with the person slapped and feel caught. He may see himself in the role of the discriminator who becomes aware of the wrongfulness of his conduct as a result of his victim's response.

A woman who is slapped by a man, by contrast, is generally seen to be the victim of a wrong. She is a victim of violence, of the whims of someone more often physically powerful than she. She is also the victim, once removed, of a society that allows men to slap.²⁸ As a result, the insistence that the court itself feel slapped may ask a female judge to imagine herself as the victim of discrimination, assaulted by the power of the individual discriminator. While she may not be able to accurately imagine what it would be like to be the defendant, she has been asked to imagine herself in the position of the victim and not the perpetrator.

The "slap in the face" standard also misconstrues the nature of the harm that comes from discrimination. The very phrase suggests an injury that offends the dignity of the person slapped. It is different from a blow. Getting "slapped in the face" is distinct from being punched, beaten, or hit. Both suggest physical harm, but the former connotes "an insult or rebuff"²⁹ or a "reprimand or reproof"³⁰ and the latter connotes a serious physical injury. A slap in the face suggests an injury to one's pride and conveys dignitary harm, while not suggesting significant physical harm.³¹

²⁵ *Ash*, 126 S. Ct. at 1197.

²⁶ See Kathe Mazur & Danny Sandford, *Women and Men: A Big Dance*, 27 *DRAMA REV.* 77, 81 (1983) (discussing how Anne Bogart's dance performed the gendered nature of the slap: "Women slap women, men slap women, women slap men. In this sequence . . . Bogart works with the different feelings when a man and a woman execute the same task") (parenthesis omitted).

²⁷ While this is not uniformly true, it is a common assumption.

²⁸ See Nancy Berns, *Degendering the Problem and Gendering the Blame: Political Discourse on Women and Violence*, 15 *GENDER & SOC'Y* 262 (2001) (discussing society obscuring male violence blaming the female victim).

²⁹ WEBSTER'S UNABRIDGED DICTIONARY 2137 (10th ed. 1996).

³⁰ THE OXFORD ENGLISH DICTIONARY XV 651 (2d ed. 1989).

³¹ Consider the current prevalence of the term "bitch-slapped." The Oxford English Dictionary defines "bitch-slap" as "to deliver a stinging slap to (a person), esp. in order to

When Anthony Ash was refused a promotion, he suffered harm, and this harm was real, whether or not it offended his dignity. It may have meant as little as a few more cents an hour or it may have meant as much as promotion to a more desirable job, but either way it caused injury that was independent of the injury to his dignity. If Ash was deprived of his position because of racial discrimination, the harm that the discrimination caused him was real and significant, whether it was loud and notorious or unspoken and subtle.

As Thomas Ross argues, the power of metaphor “is the power to shatter and reconstruct our realities.”³² When the Eleventh Circuit employed the metaphor of the slap, it inappropriately focused on the wrong kind of harm. The “slap in the face” standard ignores the economic effects of being denied a promotion. It assumes that the relevant inquiry is simply a question of insult, and overlooks the fact that an employee not promoted because of discrimination suffers serious harm even if his dignity is not offended. In a case like *Ash*, the relevant question is not “was the discrimination severe enough to offend the dignity of the employee?” The relevant question is simply, “was there discrimination?”

The “slap in the face” standard directs judges to worry about dignity and forget about economic loss—to ask what might offend them and ignore what might hurt the actual employee. In *Clark v. Alfa*,³³ a district court concluded that the disparity in the qualifications was insufficient to constitute discrimination because “this court’s face does not feel slapped.”³⁴ Thus, the “slap in the face” standard has effectively created a test under which the court will only find discrimination if the choice of the less-qualified employee insults the *court’s* dignity. While it is certainly important to avoid obvious and embarrassing discrimination, an individual plaintiff is equally concerned with the subtle and polite discrimination that has deprived her of the job that she deserves. The “slap in the face” standard ignores that harm.³⁵

humiliate one regarded as inferior.” THE OXFORD ENGLISH DICTIONARY, Draft Entry, http://dictionary.oed.com.ezp2.harvard.edu/cgi/entry/00319422?query_type=word&query_word=bitch+slap&first=1&max_to_show=10&sort_type=alpha&result_place=2&search_id=mjac-X85vg9-424&hilite=00319422 (June 2003).

³² Thomas Ross, *Metaphor and Paradox*, 23 GA. L. REV. 1053, 1053 (1989).

³³ *Clark v. Alfa Ins.*, No. 00-AR-3296-S, 2002 U.S. Dist. LEXIS 27183 (N.D. Ala. May 28, 2002).

³⁴ *Id.* at 4.

³⁵ See also Hibbitts, *supra* note 24, at 236.

As an integral part of our mentality, metaphors can also shape our thoughts and even our actions. Calling chess a battle (or hearing someone else call it a battle) certainly encourages me to conceive of it, however inaccurately, as a harsh, even potentially violent confrontation between grim-faced opponents. The psychological impact of the metaphor may be all the more powerful if I have had little or no previous experience with the game.

Id.

As clear from the lack of Title VII plaintiff victories in the Fifth, Tenth, and Eleventh Circuits over the past five years,³⁶ the courts do not necessarily “know [a slap in the face] when they see it.”³⁷ The doctrine has proven insurmountable because it directs judges to ask if they feel personally slapped by the employer’s justification rather than apply a uniform standard. The standard assumes that judges can seamlessly shift between their identity and that of the employee. As Bernard Hibbitts has argued, though, legal metaphors “are most useful and most successful . . . when they associate an unfamiliar and/or abstract referent with something familiar and/or concrete.”³⁸ The position of a worker who has been discriminated against because of her gender or his race is not something familiar to most appellate judges.

The “slap in the face” standard also ignores the different economic realities of appellate judges and most victims of employment discrimination. The assumption that appellate judges know what many jurors undoubtedly know—what it means for an applicant or an employee to be denied a job unjustly and how that denial can be a slap—is flawed.³⁹ “Visceral and compact, [metaphor] dusts off well-loved stories, common human experiences, and transformative events, enlisting them in the construction of meaning.”⁴⁰ However, a metaphor can only do its work when a common experience (or at the very least, a common historical memory) exists. The paucity of decisions upholding plaintiffs’ race and sex discrimination victories seems to suggest that there is nothing common to a judge about a slap.⁴¹ Analogizing it to a slap in the face simply describes one foreign experience with another.

Moreover, this standard is an inadequate metaphor by which to measure the degree of the disparity. A slap in the face can wake you up; get your attention; rouse you from a stupor. To say that the decision to deny promotion to a qualified minority or female candidate has to be so outrageous as to be a “slap in the face” is to suggest that one should assume that the hiring official is asleep at the switch. Thus, the “slap in the face” standard only

³⁶ See Petition for Writ of Certiorari at 10, *Ash*, 126 S. Ct. 1195 (2006) (No. 05-379) (discussing cases in which plaintiffs were unsuccessful).

³⁷ *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964).

³⁸ Hibbitts, *supra* note 24, at 234.

³⁹ See Ross, *supra* note 32, at 1053. “The mystery of metaphor begins with its paradoxical nature. A metaphor says two contradictory things at once. When we hear ‘floating lien,’ we know that liens do, and do not, float. The literal falseness and the metaphorical sense are at once embodied in the metaphor.” *Id.*

⁴⁰ Robert Tsai, *Fire, Metaphor, and Constitutional Myth-Making*, 93 GEO. L.J. 181, 190 (2004). The problem with the “slap in the face” standard may be its visceral nature. Steven Winter argues that a metaphor provides “a source domain of more readily comprehended, embodied experience.” Steven L. Winter, *The Meaning of “Under Color of” Law*, 91 MICH. L. REV. 323, 332 (1992). The visceral slap is perhaps too embodied, and thus too foreign for the appellate court.

⁴¹ Alternatively, an employment discrimination “slap” may be *too* common (in a different sense) for a judge to recognize or so common as to be below his dignity.

makes sense if one assumes that the hiring official is not paying attention when evaluating the qualifications of candidates for a position. This assumption is inconsistent with the Supreme Court's *McDonnell Douglas* framework.⁴²

The "slap in the face" standard assumes that employers do not analyze their employees' qualifications carefully when considering promotions and that they frequently innocently miscalculate candidates. However, the *McDonnell Douglas* test is based on the assumption that employers are conscientious when making hiring decisions. As the *Ash* Court describes the test: "[A] plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated."⁴³ The jury then must determine not the merits of each candidate's qualifications, but whether the hiring official knew that one candidate was superior to another. The relevant question concerns not only the level of disparity but what the hiring official believed. And when determining what the hiring official knew, the default assumption should be that he looks at qualifications; analyzes them carefully; and normally assesses qualifications correctly, unless a discriminatory motive plays a part. The "slap in the face" standard suggests that the only way that the jury can infer that race was the reason that an employer chose an objectively less-qualified employee is if the inferior qualifications are so obvious—and the employer so culpable—that his mistake should have jumped off the page to slap the employer in the face.

The "slap in the face" standard also seems to suggest that the hiring official is unaware of the importance of avoiding discrimination. However, one would expect that when race or gender is at play, an employer should be particularly careful so that he does not let his unconscious biases lead him to make the wrong decision. To suggest that the employer does not already know of the risk of bias suggests a hiring official is ignorant of one of his basic legal duties, which is avoiding illegal discrimination. The "slap in the face" standard effectively gives the employer a license to let his biases determine who he will hire or promote. Instead of attempting to expose pervasive discrimination, the "slap in the face" standard effectively condones it. A legal duty which is only triggered by a "slap" is not much of a legal duty at all. Instead, the courts should remind hiring officials that if the qualifications are close, it is their responsibility to look inward at their own potential (even unconscious) biases and to ensure that legitimate candidate qualifications rather than prejudices dictate their choice.

⁴² *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

⁴³ *Ash*, 126 S. Ct. at 1197 (quoting *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 148 (2000)).

By deciding that an employer's use of the word "boy" can suggest discriminatory animus, the Supreme Court forced the lower courts to interpret from within a broader "nomos—a normative universe"⁴⁴ in which a history of oppression can turn the benign to malignant. By rejecting the "slap in the face" standard, the Court forced the lower courts to recognize that a metaphor developed within a narrower nomos—one in which the experience of oppression is rare—is unlikely to reflect the experience of society as a whole.

⁴⁴ Robert Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4, 4 (1983).