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NOTES

THE NOTARI¹ ALTERNATIVE: A BETTER APPROACH TO THE SQUARE-PEG-ROUND-HOLE PROBLEM FOUND IN REVERSE DISCRIMINATION CASES

INTRODUCTION

Title VII of the Civil Rights Act of 1964 ("Title VII") prohibits discrimination "against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."² Title VII creates a comprehensive scheme, defining unfair employment practices and providing a federal cause of action for victims of invidious discrimination in the workplace.³

Recognizing the difficulty of proving intentional discrimination in the absence of direct evidence, the Supreme Court, in its watershed 1973 decision *McDonnell Douglas Corp. v. Green*,⁴ established a framework for determining the existence of Title VII race-based employment discrimination on the basis of indirect evidence. Under *McDonnell Douglas*, the plaintiff alleging intentional disparate treatment⁵ under Title VII bears the initial burden of establish-

¹ Notari v. Denver Water Dep't, 971 F.2d 585 (10th Cir. 1992).

² 42 U.S.C. § 2000e-2(a) (1988). Section 703 of the Act provides in pertinent part: (a) Employer Practices. It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

Id.

³ *Id.*

⁴ 411 U.S. 792 (1973).

⁵ The Supreme Court's 1977 decision in *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 335-36 n.15 (1977) defined disparate treatment as

ing a prima facie case of racial discrimination.⁶ A plaintiff attempting to do so may accomplish this by proving the following elements:

1) that he belongs to a racial minority; 2) that he applied and was qualified for a job for which the employer was seeking applicants; 3) that, despite his qualifications, he was rejected; and 4) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.⁷

If the plaintiff makes such a showing, the burden then shifts to the employer to articulate a "legitimate, nondiscriminatory reason for the employee's rejection."⁸ Finally, if the employer provides such a reason, the burden of proof then returns to the plaintiff to prove that the employer's stated reason is in fact a pretext for intentional discrimination.⁹

The *McDonnell Douglas* scheme has been consistently applied in "traditional" discrimination cases where the plaintiff alleging race-based discrimination is a minority.¹⁰ In these cases, an "inference of discrimination" arises when the employer rejects a plaintiff's application for a position for which he is qualified.¹¹ A more complex problem results, however, in the case where the plaintiff is not a member of a minority group. Although this plaintiff, often termed a "reverse discrimination"¹² plaintiff, is entitled to Title VII protec-

the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment. . . . Undoubtedly disparate treatment was the most obvious evil Congress had in mind when it enacted Title VII.

Id.

⁶ See *McDonnell Douglas*, 411 U.S. at 802.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* at 804. The Supreme Court has held that when an employer provides a non-discriminatory reason for an employment decision, the burden shifts to the plaintiff to prove his case "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981).

¹⁰ See, e.g., *Fumco Constr. Corp. v. Waters*, 438 U.S. 567 (1978); *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976); *Bundy v. Jackson*, 641 F.2d 934 (D.C. Cir. 1981).

¹¹ See *Furnco*, 438 U.S. at 577.

¹² See *Parker v. Baltimore and Ohio R.R. Co.*, 652 F.2d 1012, 1013 (D.C. Cir. 1981); see also BLACK'S LAW DICTIONARY 1319 (6th ed. 1990) (defining "reverse discrimination" as "[a] type of discrimination in which majority groups are purportedly discrimi-

tion, the Supreme Court has not addressed whether or how the *McDonnell Douglas* criteria must be modified as applied to such claims.¹³

Circuit and district courts addressing this issue have produced conflicting views. Focusing largely on the first prong of the traditional *McDonnell Douglas* test, the element requiring that the plaintiff advance proof of his status as a minority, these decisions fall across a spectrum of interpretations. At one end are the D.C. and Sixth Circuits, which have held that the first prong should be modified for a reverse discrimination plaintiff.¹⁴ This modification is commonly referred to as the "background circumstances" test.¹⁵ This test requires the plaintiff to surmount the difficult hurdle of offering direct evidence of "background circumstances support[ing] the suspicion that the defendant is that unusual employer who discriminates against the majority."¹⁶ At the other end is the Eleventh Circuit view expressed in *Wilson v. Bailey*, which wholly rejects the "background circumstances" test and simply requires that the plaintiff prove that he is a member of "a class."¹⁷ Between these two views is the approach advanced by the Fourth Circuit in *Holmes v. Bevilacqua*,¹⁸ a traditional discrimination case, and then applied by the Tenth Circuit in *Notari v. Denver Water Dep't*¹⁹ to the reverse discrimination context. Under this approach, the "background circumstances" test is utilized; however, an alternative test is available to the plaintiff who cannot meet this burden.²⁰ Under this test, a plaintiff may establish a prima facie case of reverse discrimination under Title VII by offering direct evidence of discrimination or by indirect evidence sufficient to support with reasonable probability the inference that but for the plaintiff's race he would have

nated against in favor of minority groups").

¹³ See *Harding v. Gray*, 9 F.3d 150 (D.C. Cir. 1993).

¹⁴ See generally *Pierce v. Commonwealth Life Ins. Co.*, 40 F.3d 796 (6th Cir. 1994); *Parker*, 652 F.2d at 1017.

¹⁵ See *Parker*, 652 F.2d at 1017.

¹⁶ *Id.*

¹⁷ *Wilson v. Bailey*, 934 F.2d 301, 304 (11th Cir. 1991). *Wilson* did not provide a definition of "a class" within the context of the *McDonnell Douglas* framework. See *id.* The ambiguity surrounding the Eleventh Circuit approach is discussed in further detail. See *infra* notes 108-35 and accompanying text.

¹⁸ 794 F.2d 142 (4th Cir. 1986).

¹⁹ 971 F.2d 585 (10th Cir. 1992).

²⁰ See *id.*

been promoted.²¹ This approach has the effect of ameliorating the inconsistency resulting from the imposition of an elevated standard upon a reverse discrimination plaintiff.

This Note argues that the best approach to the "square-peg-round-hole" problem inevitably found in reverse discrimination cases is that applied by the Tenth Circuit. Part I of this Note discusses the background history of Title VII and the nature of the *McDonnell Douglas* test, including its application to reverse discrimination claims. Part II discusses each of the approaches to reverse discrimination claims advanced by the circuit courts. Finally, Part III challenges the sufficiency of the "background circumstances" test, suggesting that, in addition to this test, the alternative test applied by the Tenth Circuit should be offered to the reverse discrimination plaintiff who is unable to prove the requisite "background circumstances."

I. TITLE VII AND REVERSE DISCRIMINATION

A. History of Title VII

On July 2, 1964, after submitting numerous civil rights bills, the Eighty-eighth Congress passed H.R. 7152,²² the "Civil Rights Act," which defined unfair employment practices and provided for their prevention.²³ This bill was signed by President Johnson on the same date.²⁴

²¹ *Id.*

²² 110 CONG. REC. 15897 (1964).

²³ Francis J. Vaas, *Title VII: Legislative History*, 7 B.C. INDUS. & COM. L. REV. 431, 457 (1966).

²⁴ *Id.* During his term as Vice President of the United States, Lyndon Baines Johnson had not made clear to his colleagues his commitment to H.R. 7152; however, shortly after his inauguration following President Kennedy's death he stated:

[N]o memorial oration or eulogy could more eloquently honor President Kennedy's memory than the earliest passage of the civil rights bill for which he fought so long. We have talked long enough in this country about equal rights . . . I urge you . . . to enact a civil rights law so that we can move forward to eliminate from this Nation any trace of discrimination and oppression that is based on race or color. There could be no greater source of strength to this Nation both at home and abroad.

CHARLES & BARBARA WHALEN, *THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT* 75, 79 (Seven Locks Press 1985). In his Memorial Day address at Gettysburg National Cemetery, President Johnson stated the following: "Until justice is blind to color, until education is aware of race, until opportunity is unconcerned with the color of men's skins, emancipation will be a proclamation but not a fact." *Id.* at 76.

The passage of the Civil Rights Act marked the beginning of a fundamental change to the lives of all Americans. Title VII, found within such Act, established the Equal Employment Opportunity Commission ("EEOC") and marked its task: to ensure that all individuals are given an evenhanded opportunity for employment and promotion on the basis of ability and qualification, without regard to race, color, sex, religion or national origin.²⁵ Although its legislative history underscored the need to provide increased employment opportunity to minority persons,²⁶ the neutral language of the statute reveals that the scope of Title VII was intended to reach persons of all races, including non-minorities.²⁷

This principle is exemplified in *McDonald v. Santa Fe Trail Transportation Company* where the Supreme Court held that the protection of white persons against discriminatory practices was within the purview of the Civil Rights Act of 1866.²⁸ In its holding, the *McDonald* Court further provided that Title VII prohibits discrimination against majority citizens, as well as against minorities, and protects white persons from discrimination under the same standards employed to protect non-whites.²⁹

Also, particularly instructive as to the scope of Title VII protection is the Supreme Court's 1971 opinion in *Griggs v. Duke Power Company*³⁰ In *Griggs*, Chief Justice Burger wrote:

²⁵ See 42 U.S.C. § 2000e-2 (1988).

²⁶ In his second special message to the Eighty-eighth Congress on civil rights, President Kennedy "stress[ed] that the relief of [African American] unemployment required progress in three major areas, namely, creating more jobs through greater economic growth, raising the level of skills through more education and training and eliminating racial discrimination in employment." Vaas, *supra* note 23, at 432 (citing 109 CONG. REC. 3245, 11174 (1963)).

²⁷ See *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 278-80 (1976).

²⁸ *Id.* at 286-87.

²⁹ *Id.* at 280. The Court further provided that

[T]he EEOC, whose interpretations are entitled to great deference . . . has consistently interpreted Title VII to proscribe racial discrimination in private employment against whites on the same terms as racial discrimination against nonwhites, holding that to proceed otherwise would "constitute a derogation of the Commission's congressional mandate to eliminate all practices which operate to disadvantage the employment opportunities of any group protected by Title VII, including Caucasians." . . . This conclusion is in accord with uncontradicted legislative history to the effect that Title VII was intended to "cover white men and white women and all Americans," . . . and create an "obligation not to discriminate against whites;"

Id. at 279-80 (citations omitted).

³⁰ 401 U.S. 424 (1971).

[Title VII] does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed. What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.³¹

B. *The McDonnell Douglas Framework*

The plaintiff in *McDonnell Douglas* was a black citizen who worked for the defendant's aerospace and aircraft manufacturing operation as a mechanic and laboratory technician.³² His employment lasted approximately eight years, until he was laid off during the course of a reduction in the defendant's workforce.³³ As a long-time activist in the civil rights movement, the plaintiff protested that his discharge, as well as the defendant's general hiring practices, were racially motivated.³⁴ As part of his protest, the plaintiff and other members of the Congress on Racial Equality ("CORE")³⁵ illegally stalled their cars on the main roads leading to the defendant's manufacturing plant for the purpose of blocking access to and egress from the plant at the time of the morning shift change.³⁶ When asked by police to remove his car, the plaintiff refused.³⁷ His car was then towed away, and the plaintiff was arrested for obstructing traffic.³⁸ Following the "stall-in," a "lock-in" took place at the defendant's plant wherein a chain and padlock were placed on the front door of a building to prevent the occu-

³¹ *Id.* at 430-41.

³² *McDonnell Douglas*, 411 U.S. at 794.

³³ *Id.*

³⁴ *Id.*

³⁵ The Congress on Racial Equality is a civil rights organization formed in 1942 to desegregate public facilities. Of its most notable demonstrations was the "Freedom Ride," during which two interracial groups of students rode buses together across several southern states, in protest of the laws segregating public facilities in those states. See AUGUST MEIER & ELLIOT M. RUDWICK, CORE: A STUDY IN THE CIVIL RIGHTS MOVEMENT 1942-1968, 4, 135-145 (1973).

³⁶ 411 U.S. at 795.

³⁷ *Id.* at 795.

³⁸ *Id.*

pants, many of whom were the defendant's employees, from exiting.³⁹ The plaintiff apparently knew of the planned lock-in; however, the extent of his involvement was uncertain.⁴⁰

Approximately three weeks following this event, the defendant publicly advertised for qualified mechanics, at which point the plaintiff applied for re-employment.⁴¹ The defendant turned down the plaintiff, basing its rejection on the plaintiff's participation in the "stall-in" and "lock-in."⁴² The plaintiff then filed a formal complaint with the EEOC, claiming that the defendant's refusal to rehire him was motivated by both his race and his involvement in the civil rights movement.⁴³ The plaintiff subsequently brought suit alleging racial discrimination, despite the fact that the EEOC had made no finding validating the plaintiff's allegations with respect to racial bias.⁴⁴ The district court dismissed the plaintiff's claim of racial discrimination.⁴⁵

On appeal, the Eighth Circuit reversed the dismissal, noting that the plaintiff had established a prima facie case of racial discrimination.⁴⁶ In remanding the case to the district court, the court of appeals attempted to outline standards to govern the consideration of the plaintiff's claim.⁴⁷ The Supreme Court, recognizing the apparent "lack of harmony" among lower courts,⁴⁸ granted certiorari in order to clarify those standards which govern the disposition of an action alleging employment discrimination.⁴⁹

Although the *McDonnell Douglas* Court established a three-part paradigm for "traditional" employment discrimination,⁵⁰ it recognized that the elements of the prima facie case may not apply "in every respect to differing factual situations."⁵¹ As such, the Court implied that these criteria should be flexibly applied to accommo-

³⁹ *Id.*

⁴⁰ *Id.* at 795.

⁴¹ *McDonnell Douglas*, 411 U.S. at 796.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* at 796-97.

⁴⁵ *Id.* at 797.

⁴⁶ 411 U.S. at 797.

⁴⁷ *Id.* The court of appeals held that the defendant's refusal to rehire the plaintiff rested on "subjective" criteria, which did not make a strong case for rebutting the plaintiff's presumption of discrimination. *Id.* at 798.

⁴⁸ *Id.* at 801.

⁴⁹ *Id.* at 798.

⁵⁰ See *supra* notes 4-7 and accompanying text.

⁵¹ 411 U.S. at 802 n.13.

date the facts of the case at hand.⁵² For example, in *Texas Department of Community Affairs v. Burdine*,⁵³ the Supreme Court modified the first element of the prima facie case to accommodate sexual discrimination claims, requiring that a female plaintiff demonstrate only that she is a qualified woman.⁵⁴ Similarly, in *Bundy v. Jackson*,⁵⁵ the D.C. Circuit modified the *McDonnell Douglas* test for claims raised in the context of discrimination in competitive promotion decisions.⁵⁶ The new test resembled the same first three prongs as the *McDonnell Douglas* test,⁵⁷ while the fourth prong was replaced with the requirement that "other employees of similar qualifications who were not members of the protected group were indeed promoted at the time the plaintiff's request for promotion was denied."⁵⁸ Thus, although neither *Burdine* nor *Bundy* relate to reverse discrimination, each serves to illustrate that the *McDonnell Douglas* criterion may be properly applied to all types of discrimination.

Further, in *Furnco Construction Corp. v. Waters*,⁵⁹ the Supreme Court clarified the underlying purpose of the prima facie test. Writing for the Court, Justice Rehnquist explained that the role of the prima facie case was to permit investigation into the inquiry of whether the employer is "treating some people less favorably than others because of their race, color, religion, sex, or national origin."⁶⁰ Justice Rehnquist further provided that the method for doing so, the *McDonnell Douglas* prima facie test, "was never intended to be rigid, mechanized, or ritualistic."⁶¹ Accordingly, although the *Furnco* Court did not reach the issue of reverse discrimination, it nevertheless implied that the prima facie test could be applied in order to permit an inquiry into all types of race-based employment discrimination.⁶²

⁵² *Id.* at 802; see also *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253 n.6 (1981).

⁵³ 450 U.S. 248, 252-54 & n.6 (1981).

⁵⁴ *Id.*

⁵⁵ 641 F.2d 934, 951 (D.C. Cir. 1981).

⁵⁶ *Id.*

⁵⁷ See *supra* note 7 and accompanying text.

⁵⁸ 641 F.2d at 951.

⁵⁹ 438 U.S. 567 (1978).

⁶⁰ *Id.* at 577 (citing *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977)).

⁶¹ *Id.*

⁶² *Id.*

II. THE CIRCUIT COURT APPROACHES TO REVERSE DISCRIMINATION

The decision of the D.C. Circuit in *Parker v. Baltimore & Ohio R.R. Co.*⁶³ has proven extremely influential in the sphere of reverse discrimination cases. The plaintiff in *Parker* was a white male who was employed by the B&O Railroad for approximately four years.⁶⁴ For three years (1975-78), he actively sought transfer or promotion to the job of locomotive fireman.⁶⁵ His requests, however, went unfulfilled.⁶⁶ The plaintiff charged B&O with race and gender discrimination in violation of Title VII, alleging that his employer gave "illegal preferences" to minority and female applicants.⁶⁷

In addressing the plaintiff's claim, the court drew heavily upon *McDonnell Douglas*, recognizing, however, that the prima facie standard would necessarily require modification in its applicability to reverse discrimination claims.⁶⁸ The court noted that although the standard was developed to establish a prima facie case for any member of a protected group under Title VII, including white males, it would nevertheless be illogical "to suggest that the promotion of a black employee justifies an inference of prejudice against white co-workers in our present society."⁶⁹

In developing a standard appropriate for reverse discrimination cases, the court⁷⁰ drew upon its 1981 opinion in *Daye v. Harris*.⁷¹ In *Daye*, the court analyzed a challenged promotion within a hospital's nursing staff, finding that a majority of the nurses on the staff were black, and they received a disproportionately large number of the promotions awarded.⁷² This finding, in addition to other inconsistent practices, led the court to conclude that the plaintiff was entitled to use the *McDonnell Douglas* framework for the prima facie case.⁷³ Accordingly, evidence of a racially discriminatory

⁶³ 652 F.2d 1012 (D.C. Cir. 1981).

⁶⁴ *Id.* at 1013.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* at 1014-15.

⁶⁸ 652 F.2d at 1017.

⁶⁹ *Id.*

⁷⁰ *Id.* at 1017-18.

⁷¹ 655 F.2d 258 (D.C. Cir. 1981).

⁷² *Id.* at 260.

⁷³ *Id.* The inconsistent practices noted in *Daye* included granting black employees certain awards to increase their qualifications and temporarily "downgrading" the performance evaluations of white employees pending promotion decisions. *Id.* at 260-61.

working environment served as a "functional equivalent" of the first prong of the *McDonnell Douglas* criteria, membership in a racial minority.⁷⁴

The *Parker* court further developed the *Daye* court's holding in order to formulate what is commonly referred to today as the "background circumstances" test.⁷⁵ This standard requires the reverse discrimination plaintiff who wishes to use the *McDonnell Douglas* framework to demonstrate that "background circumstances support the suspicion that the defendant is that unusual employer who discriminates against the majority."⁷⁶

Following the *Parker* decision, *Harding v. Gray* emerged from the D.C. Circuit.⁷⁷ In *Harding*, Chief Judge Mikva elaborated upon the "background circumstances" test he created some twelve years earlier in *Parker*.⁷⁸ The opinion clarified the purpose behind creating an elevated standard for the reverse discrimination plaintiff.⁷⁹ In relevant part, Judge Mikva explained that

in an ordinary discrimination case, in which the plaintiff is a member of a minority group, an inference of discrimination arises when the employer simply passes over the plaintiff for a promotion to a position for which he is qualified. No such inference arises when, as in this case, the plaintiff is a white man. Invidious racial discrimination against whites is relatively uncommon in our society, and so there is nothing inherently suspicious in an employer's decision to promote a qualified minority applicant instead of a qualified white applicant.⁸⁰

Harding worked as a carpenter at a hospital operated first by the United States Government, and then by the District of Columbia.⁸¹ After ten years of employment, he was promoted to "carpenter leader."⁸² Although the position was designated as "non-supervisory," Harding was in fact responsible for overseeing a group of three or more carpenters.⁸³ He subsequently applied for the position of "carpentry/upholstery shop foreman," a position which re-

⁷⁴ 652 F.2d at 1018.

⁷⁵ *Id.* at 1017. See *Harding v. Gray*, 9 F.3d 150 (D.C. Cir. 1993).

⁷⁶ *Parker v. Baltimore and Ohio R.R. Co.*, 652 F.2d 1012, 1017 (D.C. Cir. 1981).

⁷⁷ 9 F.3d 150 (D.C. Cir. 1993).

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.* at 153 (citations and internal quotations omitted).

⁸¹ *Id.* at 151.

⁸² 9 F.3d at 151.

⁸³ *Id.*

quired, among other things, the "ability to supervise."⁸⁴ In making its decision, the defendants passed over Harding for a black woman holding a "supervisory" position.⁸⁵ Harding brought suit, alleging that the defendants had denied him the position because of his race, in violation of Title VII.⁸⁶ In addition, he asserted that his qualifications were superior to those of the individual selected for the position and "that a claim of superior qualifications raises an inference of discrimination sufficient to state a prima facie case."⁸⁷

The *Harding* court provided two general categories of evidence which may be found to constitute "background circumstances." The first is evidence indicating that the particular employer at issue has some reason or inclination to discriminate invidiously against whites.⁸⁸ The second is evidence indicating that there is something suspect about the facts of the case at hand that raises an inference of discrimination.⁸⁹

In addressing Harding's claim, the court focused on the latter category, holding that if supported by the facts of the case, a plaintiff's superior qualifications can constitute sufficient background circumstances to establish a prima facie case.⁹⁰ As such, the court held that an inference of discrimination will arise if evidence is offered of a more qualified white applicant being denied a promotion in favor of a minority applicant with lesser qualifications.⁹¹

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.* at 152.

⁸⁷ 9 F.3d at 152.

⁸⁸ *Id.* at 153. The court reviewed several of its prior decisions to find evidence falling into this category. See, e.g., *Bishop v. District of Columbia*, 788 F.2d 781, 786-87 (D.C. Cir. 1986) (among other factors, minority supervisors and proposed affirmative action plan); *Lanphear v. Prokop*, 703 F.2d 1311, 1315 (D.C. Cir. 1983) (pressure on hiring authority to hire minorities and proposed affirmative action plan); *Daye v. Harris*, 655 F.2d 258, 261 (D.D.C. 1981) (minority nurses over-represented among promotees).

⁸⁹ 9 F.3d at 151. The court indicated a number of situations which have arisen to demonstrate this general category. See *Bishop*, 788 F.2d at 786-87 (promotee was less qualified than four white plaintiffs and was promoted "over the[ir] heads . . . in an unprecedented fashion"); *Lanphear*, 703 F.2d at 1315 (plaintiff was given "little or no consideration" for the promotion, and supervisor never fully reviewed qualifications of minority promotee); *Daye*, 655 F.2d at 260-61 (plaintiff alleged "scheme" to fix performance ratings).

⁹⁰ 9 F.3d at 151. The court noted that "[b]ackground circumstances need not mean 'some circumstance in the employer's background,'" but rather, evidence about the "background" of the case. *Id.*

⁹¹ *Id.*

In what appears to be an effort to thwart criticism of the "background circumstances" test, Chief Judge Mikva attempted to downplay the disproportionate effects cast upon the reverse discrimination plaintiff by imposing an elevated standard. Judge Mikva explained that

[t]his requirement is not designed to disadvantage the white plaintiff, who is entitled to the same Title VII protection as a minority plaintiff. Instead the background circumstances requirement merely substitutes for the minority plaintiff's burden to show that he is a member of a racial minority; both are criteria for determining when the employer's conduct raises an inference of discrimination.⁹²

Although the opinion purports to illuminate the underlying purpose of imposing the "background circumstances" test, it manifests itself as an attempt to gloss over the inescapable reality of the impact of such a test—that the non-minority plaintiff will find himself faced with a higher, more onerous burden of proof than that of his minority counterpart.⁹³

Despite its shortcomings, however, the "background circumstances" approach has been followed by a number of district and circuit courts.⁹⁴ In its 1985 decision in *Murray v. Thistledown Racing Club, Inc.*, the Sixth Circuit noted that the first prong of the prima facie test⁹⁵ should be replaced with the "background circumstances" test set forth by the D.C. Circuit, and the remaining three prongs⁹⁶ be replaced by the requirement "that the employer treated differently employees who were similarly situated but not members of the protected group."⁹⁷ The court reasoned that such approach

⁹² *Id.* (citations omitted).

⁹³ *Harding v. Gray*, 9 F.3d 150 (D.C. Cir. 1993).

⁹⁴ See, e.g., *Pierce v. Commonwealth Life Ins. Co.*, 40 F.3d 796 (6th Cir. 1994); *Murray v. Thistledown Racing Club, Inc.*, 770 F.2d 63 (6th Cir. 1985); *Davis v. Sheraton Soc'y Hill Hotel*, 907 F. Supp. 896, 902 (E.D. Pa. 1995).

⁹⁵ See *supra* note 7 and accompanying text.

⁹⁶ *Id.*

⁹⁷ 770 F.2d 63, 67 (6th Cir. 1985). In justifying a modification of the traditional *McDonnell Douglas* scheme, Judge Keith further stated that

[t]he premise underlying the varied *McDonnell Douglas* standards remains unchanged. It stems from Congressional efforts to address this nation's history of discrimination against racial minorities, a legacy of racism so entrenched that we presume acts, otherwise unexplained, embody its effect. As stated by the *McDonnell Douglas* Court, the primary purpose of Title VII is 'to assure equality of employment opportunities and to eliminate those discriminating practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens.'

Id. (citations omitted).

would be consistent with the Supreme Court's mandate that the *McDonnell Douglas* test be modified to accommodate different employment discrimination contexts.⁹⁸ Nine years later, the Sixth Circuit applied the same test in *Pierce v. Commonwealth Life Ins. Co.*⁹⁹ However, in applying the "background circumstances" portion of this test, Judge Cleland conceded that the court had "serious misgivings about the soundness of a test which imposes a more onerous standard for plaintiffs who are white or male than for their non-white or female counterparts."¹⁰⁰

The "background circumstances" test, although perhaps the most widely accepted approach to reverse discrimination cases, has, in fact, been staunchly opposed by many courts, particularly the Eleventh Circuit. In *Wilson v. Bailey*,¹⁰¹ the Eleventh Circuit modified the first prong of the *McDonnell Douglas* test as applied to reverse discrimination suits, requiring the plaintiff to prove only that he is a "member of a class."¹⁰² This test substantially lowered the hurdle for the reverse discrimination plaintiff, evincing a wholesale rejection of the "background circumstances" test.

Wilson involved two white male deputy sheriffs, each seeking a position as "sheriff's sergeant."¹⁰³ Although both of these men were twice certified as candidates for the position, they were twice denied promotions.¹⁰⁴ In the two certifications, the sheriff interviewed eight minority or women candidates, offering six candidates promotions.¹⁰⁵ Plaintiffs brought an action in the Northern District of Alabama alleging discrimination by the City of Birmingham in its employment practices.¹⁰⁶ An appeal to the Eleventh Circuit ensued following the district court's grant of summary judgment in favor of defendant.¹⁰⁷

⁹⁸ *Id.*

⁹⁹ *Pierce*, 40 F.3d at 801.

¹⁰⁰ *Id.* at 801 n.7. Judge Cleland also noted that the "background circumstances" test has been criticized by other courts as "impermissibly imposing a 'heightened standard' upon reverse discrimination plaintiffs." *Id.* (citing *Ulrich v. Exxon Co.*, 824 F. Supp. 677, 683-84 (S.D. Tex. 1993)).

¹⁰¹ 934 F.2d 301 (11th Cir. 1991).

¹⁰² *Id.* at 304.

¹⁰³ *Id.* at 302-03.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 303.

¹⁰⁶ 934 F.2d at 302.

¹⁰⁷ *Id.* at 303.

In addressing the reverse discrimination claims on appeal, the *Wilson* court applied the traditional *prima facie* test, replacing the first prong¹⁰⁸ of the *McDonnell Douglas* framework with the requirement that the plaintiff prove that he "belongs to a class."¹⁰⁹ However, this opinion, although followed by many courts, failed to offer sufficient justification for creating a standard which allows the reverse discrimination plaintiff to automatically satisfy the first prong of the *McDonnell Douglas* test solely by virtue of his status as a "member of a class."¹¹⁰

IV. ANALYSIS

A. *The Eleventh Circuit Approach*

As noted by the Seventh Circuit, "racial discrimination against whites is forbidden . . . but no presumption of discrimination can be based on the mere fact that a white is passed over in favor of a black."¹¹¹ As such, a modification of the *McDonnell Douglas* test must be properly contrived in order to establish some form of tangible proof, whether direct or indirect, of race-based discrimination in violation of Title VII. Otherwise, the application of a standard such as that articulated by the Eleventh Circuit is likely to lead to some incongruous results in cases involving affirmative action.¹¹²

The Supreme Court, in its 1979 decision in *United Steelworkers of America v. Weber*, held that the plain language of Title VII does not prohibit the adoption of "race-conscious affirmative action plans."¹¹³ The *Weber* Court focused on the legislative history of Title VII, which reflects a congressional purpose to re-

¹⁰⁸ See *supra* note 7 and accompanying text.

¹⁰⁹ 934 F.2d at 304.

¹¹⁰ Although the *Wilson* court did not expressly define membership in "a class," other courts declining to apply the "background circumstances" test have held that membership in a protected group specifically enumerated in Title VII suffices to meet the first prong of the *McDonnell Douglas* criteria. See, e.g., *Ulrich*, 824 F. Supp at 683 n.3; *Collins v. School District of Kansas City, Mo.*, 727 F. Supp. 1318, 1322 (W.D. Mo. 1990).

¹¹¹ *Ustrak v. Fairman*, 781 F.2d 573, 577 (7th Cir. 1986).

¹¹² The term "affirmative action" originated pursuant to an executive order by President Kennedy, the goal of which was to: 1) remedy discrimination against traditionally disfavored minorities; 2) create a program requiring employers to advertise as "equal opportunity employer[s]"; and 3) to provide incentives for employers to recruit qualified minority persons for admission or training programs. Steven J. Wisotsky, *Beyond Reverse Discrimination: The Quest for a Legitimizing Principle*, 4 NOVA L.J. 63 (1980).

¹¹³ 443 U.S. 193, 197 (1979).

verse an increasing trend toward invidious discrimination in the workplace.¹¹⁴ Because Congress' primary objective in enacting the prohibition against racial discrimination in Title VII was with "the plight of the [African-American] in our economy," the Court reasoned that any reading of Title VII that suggested the prohibition of affirmative action plans designed to eradicate "traditional patterns" of racial discrimination "would bring about an end completely at variance with the purpose of the statute"¹¹⁵ Following an extensive review of the legislative history in support of this proposition, the Court concluded that

[i]t would be ironic indeed if a law triggered by a Nation's concern over centuries of racial injustice and intended to improve the lot of those who had "been excluded from the American dream for so long," constituted the first legislative prohibition of all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy.¹¹⁶

Arguably, however, the same affirmative action plans which have been enforced in order to erode past invidious discrimination in the workplace may bear the unfortunate result of muddying the waters in the reverse discrimination context. In *Parker*, the D.C. Circuit noted that "a lawful affirmative action program [cannot] in itself constitute suspicious circumstances sufficient to justify an inference of discriminatory intent."¹¹⁷ If such an inference were permitted, this would pose a real risk of discouraging the consideration or adoption of lawful affirmative action plans. Similarly, the Seventh Circuit explained in adopting *Parker's* reasoning that "[n]ational policy permits the use of voluntary affirmative action programs to remedy the legacy of discrimination. For the courts to discourage the use of such programs by treating them as evidence in themselves of the very discrimination they are designed to eradicate would be improper."¹¹⁸ Despite the observations of both the D.C. and Seventh Circuits, the presence of affirmative action plans

¹¹⁴ *Id.* at 201-02.

¹¹⁵ *Id.* (citations and internal quotations omitted).

¹¹⁶ *Id.* at 204.

¹¹⁷ *Parker v. Baltimore and Ohio R.R. Co.*, 652 F.2d 1012, 1017 n.9 (D.C. Cir. 1981).

¹¹⁸ *Christensen v. Equitable Life Ins. Soc'y of the United States*, 767 F.2d 340, 343 (7th Cir. 1985).

in the workplace remains a source of confusion and has elicited much debate among the circuits in devising an appropriate *prima facie* standard.

Pursuant to the Supreme Court's affirmation of the legality of affirmative action plans, the application of the *McDonnell Douglas* criteria necessitates a modification to differentiate between actual invidious discrimination against non-minorities and the residual effects of a plan enacted to ameliorate past discrimination against their minority counterparts.¹¹⁹ Accordingly, it is necessary to apply a test which will serve to disentangle the effects of affirmative action in order to identify those circumstances where actual invidious discrimination operates in such a way to disadvantage certain individuals who are not members of historically or socially disfavored groups. Under the Eleventh Circuit's version of the *McDonnell Douglas* test, this will be an extremely difficult, if not impossible, task.

Adherence to the Eleventh Circuit standard may itself lead to the premature demise of one of the most important remedial measures in the history of our country—the affirmative action program. In fact, the application of the unmodified *McDonnell Douglas* criteria as it applies to traditional discrimination claims will entitle the reverse discrimination plaintiff to automatically state a *prima facie* case in the presence of any affirmative action plan, regardless of its validity.

For example, a majority plaintiff who is rejected pursuant to a legitimate affirmative action plan will be permitted to satisfy the first prong¹²⁰ of the *McDonnell Douglas* scheme by virtue of his membership in a class—Caucasian. The next three prongs¹²¹ will be satisfied as well, solely due to the presence of the affirmative action plan. Thus, employers contemplating the enforcement of legitimate affirmative action plans will be discouraged from doing so simply because they will be aware that their actions alone will be enough to enable a reverse discrimination plaintiff to state a *prima facie* case of discrimination.

¹¹⁹ The Supreme Court has determined that close judicial scrutiny should be exercised in evaluating the legitimacy of affirmative action plans. See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

¹²⁰ See *supra* note 7 and accompanying text.

¹²¹ *Id.*

The *Wilson* opinion and its progeny perpetrate the myth that all disparate treatment cases are created equally under Title VII, and that the *McDonnell Douglas* scheme must be formally adhered to in all such cases, regardless of whether they deal with traditional or reverse discrimination. Such reasoning is flawed because it runs counter to both the Supreme Court's mandate that the *McDonnell Douglas* criteria be flexibly applied¹²² and the background history of Title VII. The line of cases following the *Wilson* approach take advantage of the statute's neutral language, using it to erect an arbitrary barrier for courts attempting to develop standards appropriate for reverse discrimination cases. The simple fact is that although the statute was intended to read neutrally, the standards used in enforcing it cannot be, themselves, neutral if the results are to fall evenhandedly upon Americans of all races, genders, religions and the like. By permitting an "inference of discrimination" in the case of a majority plaintiff, the *Wilson* approach creates an unilateral advantage for this plaintiff over his minority counterparts. This prospect is inconsistent with the objectives of Title VII and ignores the deep-seated problem of discrimination in this Nation's history, a problem mandating such an "inference of discrimination." As such, the color-blind and seemingly empty standard applied by the Eleventh Circuit undermines the ultimate goal of the *McDonnell Douglas* test—to establish some proof of discriminatory intent.

B. *Why the "Background Circumstances" Test is Insufficient*

The meaning of "traditional" race-based discrimination is rooted in American history. Following the Civil War and the enactment of the Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution, the legal status of former American slaves was redefined. However, due to their minority status, blacks in the United States continued to be encumbered by invidious racial discrimination, resulting in a marked difficulty in procuring employment. The Civil Rights Act of 1964 represented the most significant legislation affecting black Americans; its enforcement would afford all minorities in the United States an equal opportunity to obtain employment and to secure promotions.

¹²² See *supra* note 52 and accompanying text.

In light of historical practice in the workplace, and hostility toward such socially disfavored groups, a plaintiff's minority status is, in and of itself, sufficient to give rise to an inference of discriminatory motivation.¹²³ In the case of the majority plaintiff, however, such individual's status will not give rise to an inference of discrimination, absent proof of disparate treatment.¹²⁴ This reasoning was the *Parker* court's primary motivation in adopting the "background circumstances" test, and is supported by the background history of Title VII.¹²⁵

Although the "background circumstances" test has been rejected by some circuit courts, the only explicit criticism of this test comes from a district court decision, *Collins v. School District of Kansas City, Missouri*.¹²⁶ The *Collins* court criticized the *Parker* requirement as, among other things, "effectively eliminat[ing]" the *McDonnell Douglas* framework.¹²⁷

Although the "background circumstances" test summons a much higher level of proof than does the traditional *McDonnell Douglas* presumption, the *Collins* court is misguided in concluding that its application altogether eliminates the prima facie test. Rather, a plaintiff offering proof of background circumstances will be entitled to use the *McDonnell Douglas* framework, as this proof will give rise to an inference of discrimination.

The fact that the *McDonnell Douglas* criteria takes a different form when applied to reverse discrimination cases is inevitable. In devising the prima facie test in 1973, the Supreme Court made no reference to reverse discrimination, nor did it have reason to contemplate that this test would be applied to such cases. In fact, the first use of the term "reverse discrimination" was not until 1974 in media commentary¹²⁸ following the Supreme Court decision in *DeFunis v. Odegaard*.¹²⁹ In response to the Supreme Court's si-

¹²³ *Parker v. Baltimore and Ohio R.R. Co.*, 652 F.2d 1012, 1017 (D.C. Cir. 1981).

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ 727 F. Supp. 1318 (W.D. Mo. 1990).

¹²⁷ *Id.* at 1321.

¹²⁸ Kilpatrick, *The Defunis Syndrome*, NATION'S BUSINESS, June, Vol. 62 at 13 (1974). The article read, "A more formal name for [the] abnormality [of racial discrimination of non-minority group members] is 'reverse discrimination.' The short and ugly word is racism." *Id.*

¹²⁹ 416 U.S. 312 (1974). *DeFunis* involved a challenge of the procedures and criteria of a law school's admissions committee. The plaintiff, who had been denied admission, had received a higher "composite" score than his minority counterparts who were admit-

lence on the issue, the *Parker* and *Harding* courts interpreted *McDonnell Douglas* and its progeny¹³⁰ as allowing for the use of the prima facie standard, but requiring a modification to accommodate reverse discrimination claims.¹³¹ The fact that the prima facie tests used in the traditional discrimination and reverse discrimination contexts bear different forms should thus be inconsequential, since the underlying objective is the same—each test is formulated to identify the existence of intentional disparate treatment in violation of Title VII.

The *Collins* court further asserted that the application of the "background circumstances" test would necessarily require the courts "to take on the unseemly task of deciding which groups are 'socially favored' and which ones are 'socially disfavored.'"¹³² It is unlikely, however, that a court would be compelled to make a determination of which groups are socially favored or disfavored in today's society. The *McDonnell Douglas* test is unambiguous in the context of traditional discrimination; it is a vehicle for persons of minority status to establish a prima facie case of disparate treatment. The test was premised not on the fact that minorities are discriminated against in modern society, but rather on the fact that they were "traditionally disfavored" as opposed to their non-minority counterparts.¹³³ Thus, the issue of which groups in today's society experience unfavorable treatment is irrelevant.¹³⁴

The premise upon which the *Parker* standard is grounded is legally sound because the application of a modified prima facie standard puts the traditional discrimination plaintiff and the reverse discrimination plaintiff on an equal footing. The inquiry of discrimination may begin in the same place, once the reverse discrimination plaintiff demonstrates that he, similar to his minority counterpart, is

ted to the law school. As such, plaintiff alleged invidious racial discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment. *Id.*

¹³⁰ See generally *Furnco Const. Corp. v. Waters*, 438 U.S. 567 (1978); see also *Bundy v. Jackson*, 641 F.2d 934 (D.C. Cir. 1981).

¹³¹ See *Harding v. Gray*, 9 F.3d 150, 153 (D.C. Cir. 1993); *Parker v. Baltimore and Ohio R.R. Co.*, 652 F.2d 1012, 1017 (D.C. Cir. 1981).

¹³² *Collins v. School District of Kansas City, Mo.*, 727 F. Supp. 1318, 1322 (W.D. Mo. 1990).

¹³³ See *Harding*, 9 F.3d at 153; See also *Parker*, 652 F.2d at 1017.

¹³⁴ The D.C. Circuit has declined to address the issue of whether minority status for purposes of the prima facie test could have a regional or local meaning. See *Bishopp v. District of Columbia*, 788 F.2d 781, 786 n.5 (acknowledging that although whites are in the minority in the District of Columbia, the Supreme Court has never intimated whether or not minority status could be determined on a "local" basis).

entitled to an "inference of discrimination." However, despite the soundness of *Parker's* reasoning, it suffers from two major flaws. First, a closer look at the *Parker* standard reveals that this standard does not contemplate the existence of employers who discriminate against members of their own class. The plaintiff who suspects intentional racial discrimination may find it increasingly difficult to offer direct evidence of background circumstances supporting the suspicion that his employer is the type of employer who, despite his own majority status, discriminates against the majority. The lack of an available alternative circumscribes the reverse discrimination plaintiff's ability to vindicate his rights under Title VII, simply because he and his employer share the same race.

A second flaw of the "background circumstances" test stems largely from the *Parker* court's failure to adhere to Supreme Court precedent. The Supreme Court established the *prima facie* standard because it recognized that Title VII plaintiffs often will have to rely on indirect evidence of discrimination to establish their claims.¹³⁵

Under the "background circumstances" test, a non-minority plaintiff may rely on the *McDonnell Douglas* criteria to prove a *prima facie* case of intentional disparate treatment only when background circumstances support the suspicion that the defendant is that unusual employer who discriminates against the majority. Without more, a majority plaintiff possessing a legitimate claim of disparate treatment, but lacking direct evidence of such discrimination, will find himself foreclosed from seeking redress in federal court. This is true even though his minority counterpart will be permitted to use indirect evidence to establish a *prima facie* case. As such, persons of non-minority status may eventually become discouraged from asserting their rights under Title VII. This prospect is contrary to both the fundamental principles of justice and to the underlying objectives of Title VII.

C. *The Better Approach to Reverse Discrimination*

In *Holmes v. Bevilacqua*,¹³⁶ the Fourth Circuit created an alternative to the four elements of a *prima facie* case articulated in *McDonnell Douglas*. The plaintiff, a black male, alleged racial discrimination in the defendant's failure to promote him. The court

¹³⁵ See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801-02 (1973).

¹³⁶ 794 F.2d 142, 146 (4th Cir. 1986).

held that a plaintiff may establish a prima facie case of disparate treatment under Title VII either by direct evidence of discrimination or by indirect evidence whose "cumulative probative force, apart from the presumption's operation, would suffice under the controlling standard to support as a reasonable probability the inference that but for the plaintiff's race he would have been promoted."¹³⁷ A plaintiff lacking such direct or indirect evidence, would be required to establish a prima facie case under the traditional *McDonnell Douglas* framework.¹³⁸

The Tenth Circuit in *Notari v. Denver Water Dep't* extended such alternative test to the reverse discrimination context.¹³⁹ The plaintiff in *Notari* was a white male who held various positions with defendant Denver Water Department.¹⁴⁰ On five different occasions, he applied for the position of Safety and Security Coordinator.¹⁴¹ However, in June 1988, the position was filled by a female applicant, despite the fact that both of his superiors had determined that Notari was the best qualified candidate for the position.¹⁴² Notari filed a charge with the EEOC alleging sex discrimination.¹⁴³ He subsequently brought suit in the Colorado District Court but lost on a motion for summary judgment.¹⁴⁴ His appeal to the Tenth Circuit followed.¹⁴⁵

In considering Notari's claim on appeal, Judge Tacha adopted the "background circumstances" approach articulated in *Parker*.¹⁴⁶ He recalled the Tenth Circuit's decision just six years prior in *Livingston v. Roadway Express*,¹⁴⁷ where the court held that

[i]t is appropriate "to adjust the prima facie case to reflect" the reverse discrimination context of a lawsuit because the presumptions in Title VII analysis that are valid when a plaintiff belongs to a disfavored group are not necessarily justified when the plaintiff is a member of an historically favored group.¹⁴⁸

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ 971 F.2d 585, 590 (10th Cir. 1992).

¹⁴⁰ *Id.* at 586.

¹⁴¹ *Id.*

¹⁴² *Id.* at 586-87.

¹⁴³ *Id.* at 587.

¹⁴⁴ 971 F.2d at 587.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 589-90.

¹⁴⁷ 802 F.2d 1250 (10th Cir. 1986).

¹⁴⁸ *Notari*, 971 F.2d at 589 (citing *Livingston*, 802 F.2d at 1252).

In determining that Notari had failed to establish the requisite background circumstances, the court held that Notari would not be permitted to rely upon the *McDonnell Douglas* framework to establish a prima facie case.¹⁴⁹ However, the court held that a reverse discrimination plaintiff's failure to allege background circumstances would not necessarily compel a conclusion that he has failed to state a prima facie case.¹⁵⁰ Rather, the alternative test articulated in *Holmes* could be used as an additional means for the reverse discrimination plaintiff to establish a prima facie case.¹⁵¹

In adopting the *Holmes* alternative, the court considered the existence of two similarly situated employees, one black and one white. It examined the fates of their respective disparate treatment claims and recognized that some additional alternative must be available for plaintiffs pursuing reverse discrimination claims.¹⁵² Under such an analysis, the black employee who lacks direct evidence but possesses significant indirect evidence to support his claim will proceed to state a prima facie case, since the *McDonnell Douglas* presumption will be triggered with evidence of his status as a minority.¹⁵³ His white counterpart, however, will be precluded from establishing a prima facie case without direct evidence supporting the inference that his employer is that unusual employer who discriminates against the minority.¹⁵⁴ In light of this analysis, the court found such result to be "untenable and inconsistent with the goals of Title VII," as two similarly situated plaintiffs "should not be subjected to such dissimilar dispositions."¹⁵⁵ Consequently, the court held that the reverse discrimination plaintiff may, in the absence of direct evidence, establish a prima facie case by offering indirect evidence "sufficient to support a reasonable probability, that but for the plaintiff's status, the challenged employment would have favored the plaintiff."¹⁵⁶

On remand, the district court found that the evidence presented at trial was sufficient to state a prima facie case of reverse gender discrimination.¹⁵⁷ The court noted, however, that the plaintiff had

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 590.

¹⁵² *Id.*

¹⁵³ *Notari*, 971 F.2d at 590.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 590.

¹⁵⁷ *Notari v. Denver Water Dep't*, No. 89-C-2117, 1993 WL 557848, at *2 (D. Colo.

established direct evidence of discrimination, capable of surviving either the "background circumstances" or the alternative test set forth initially by the Fourth Circuit in *Holmes* and adopted by the Tenth Circuit.¹⁵⁸

Under the *Notari* alternative, allegations that a person of similar qualifications was the beneficiary of the challenged employment decision are insufficient to establish a *prima facie* case.¹⁵⁹ Rather, the plaintiff must proffer evidence supporting a reasonable inference that the defendant's discrimination was the actual reason for the challenged decision, that but for the plaintiff's status the decision would not have occurred.¹⁶⁰

Although the *Notari* court did not reach the issue of what would suffice under the alternative method of establishing a *prima facie* case,¹⁶¹ the Tenth Circuit in *Cone v. Longmont United Hospital Association* noted that the use of discriminatory statements of an employer may suffice as circumstantial evidence of employment discrimination.¹⁶² The *Cone* court held, however, that such statements, without more, would not suffice to establish a discriminatory animus in employment decisions.¹⁶³ Rather, a plaintiff must establish a nexus "between the[] allegedly discriminatory statements and the [employer's] decision" ¹⁶⁴ To establish the requisite nexus, the comments must be made directly at the plaintiff or the position, must be made by a decision maker, and must be made in a context related to the decision at issue.¹⁶⁵

The *Notari* standard, which has received acceptance at the district court level,¹⁶⁶ provides a reasonable alternative to the reverse discrimination plaintiff who lacks sufficient evidence to establish a *prima facie* case under the *Parker* approach. Like the *Parker* standard, this test is higher than that applied in traditional discrimination cases, since reverse discrimination plaintiffs are not entitled

1993).

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Notari*, 971 F.2d at 590.

¹⁶² 14 F.3d 526, 531 (10th Cir. 1994) (citations omitted).

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ See, e.g., *Schraeder v. E.G. & G., Inc.*, 953 F. Supp. 1160 (D. Colo. 1997); *Taken v. Oklahoma Corp. Comm.*, 934 F. Supp. 1294 (W.D. Okla. 1996); *Castleberry v. Boeing Co.*, 880 F. Supp. 1435 (D. Kan. 1995).

to the same inference of discrimination as a member of a traditionally disfavored group. However, the availability of an alternative means of proof serves to rectify some of the infirmities created by the imposition of an elevated standard.

Recognizing the need for a modification to a paradigm originally drafted to address traditional discrimination concerns, the *Parker* decision undoubtedly changed the landscape of Title VII jurisprudence. The *Notari* alternative contemplates the logical underpinnings of *Parker* in modifying the *McDonnell Douglas* standard and respects the intentions of the framers of Title VII in creating a comprehensive scheme, providing evenhanded protection to all Americans. By easing the burden on reverse discrimination plaintiffs and allowing for the use of indirect evidence, the *Notari* alternative is consistent with the spirit of Title VII and remains true to its purpose of enforcing the provisions embodied in the statute.

CONCLUSION

The most logical method by which a reverse discrimination plaintiff may state a prima facie case under Title VII is that offered by the Tenth Circuit in *Notari*. First, majority plaintiffs may take advantage of the *McDonnell Douglas* inference of discrimination if they can show the requisite background circumstances to support a suspicion that the defendant is that unusual employer who discriminates against historically favored groups. A majority plaintiff who is unable to make this showing, however, will be offered an alternative means by which to state a prima facie case—that which was first articulated by the Fourth Circuit in *Holmes*. Under this test, the plaintiff may establish a prima facie case by presenting direct evidence of discrimination or indirect evidence sufficient to support a reasonable probability that but for his majority status the employment decision would have favored him. This alternative, while enabling majority plaintiffs to assert the same Title VII rights as similarly situated minority plaintiffs, contemplates both the background history of Title VII and the historical context within which the *McDonnell Douglas* framework was contrived.

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