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MOVING BEYOND *MCDONNELL DOUGLAS*: A SIMPLIFIED METHOD FOR ASSESSING EVIDENCE IN DISCRIMINATION CASES*

Denny Chin[†] & Jodi Golinsky^{††}

INTRODUCTION

In 1973, the Supreme Court established the *McDonnell Douglas* test, a three-stage, burden-shifting framework for analyzing employment discrimination cases.¹ The test proved difficult to apply and, twenty-five years later, courts are still struggling with it. Many lower courts have sought to simplify the analysis,² which has been heavily criticized by judges, practitioners, and academics alike.³ In the last year alone, the Second Circuit has compared the *McDonnell Douglas* burden-shifting analysis to a "ping-pong-like match"⁴ and district judges within the Circuit have described it as a "yo-yo rule,"⁵ "danc[ing] mechanistically through the . . . 'minuets,'"⁶ and a "thicket."⁷

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¹ We refer, of course, to the Supreme Court's decision in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1972) [hereinafter *McDonnell Douglas*]. The *McDonnell Douglas* framework applies in disparate treatment employment discrimination cases where a plaintiff does not have direct evidence of discrimination. Cf. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

² See *infra* notes 53 & 68.

³ Numerous law review articles as well as court decisions have addressed the weaknesses in the approach. See generally R. Alexander Acosta & Eric J. Von Vorys, *Bursting Bubbles and Burdens of Proof: The Deepening Disagreement on the Summary Judgment Standard in Disparate Treatment Employment Discrimination Cases*, 2 TEX. REV. L. & POL'Y 207 (1998) [hereinafter *Bursting Bubbles*]; Scott Black, *McDonnell Douglas' Prima Facie Case and the Non-Minority Plaintiff: Is Modification Required?*, 1994 ANNUAL SURVEY OF AM. LAW 309 (1995); Kenneth R. Davis, *The Stumbling Three-Step, Burden-Shifting Approach in Employment Discrimination Cases*, 61 BROOK. L. REV. 703 (1995) [hereinafter *Stumbling Three-Step*]; *Shifting Burdens of Proof in Employment Discrimination Litigation*, 109 HARV. L. REV. 1579 (1996) [hereinafter *Shifting Burdens*].

⁴ *Greenway v. Buffalo Hilton Hotel*, 143 F.3d 47, 53 (2d Cir. 1998).

⁵ *Bickerstaff v. Vassar College*, 992 F. Supp. 372, 373 (S.D.N.Y. 1998).

⁶ *Jalal v. Columbia Univ. in the City of N.Y.*, 4 F. Supp. 2d 224, 234 (S.D.N.Y.

Recent Second Circuit cases have emphasized that the "ultimate issue" in an employment discrimination case is whether the plaintiff has proven that it is more likely than not that the adverse employment decision was motivated at least in part by an "impermissible reason."⁸ The *McDonnell Douglas* test, however, actually invites juries and courts to lose sight of the ultimate issue by focusing their attention away from the existence or non-existence of evidence of discrimination.⁹ As the Second Circuit has cautioned, "[t]he thick accretion of cases interpreting this burden-shifting framework should not obscure the simple principle that lies at the core of anti-discrimination cases. In these, as in most other cases, the plaintiff has the ultimate burden of persuasion."¹⁰

Employment discrimination is a critical area of the law. From a purely statistical point of view, employment discrimination cases comprise a substantial part of our docket.¹¹ Beyond the numbers, however, employment discrimination law touches all aspects of our society, from the most powerful and influential to the everyday worker.¹² Recent high-profile cases remind us that we have not yet achieved the goal of the civil rights statutes to eradicate discrimi-

1998).

⁷ *Fesce v. Guardsman Elevator Co.*, No. 96 Civ. 6793, 1998 WL 142350, at *7 n.5 (S.D.N.Y. Mar. 26, 1998).

⁸ *Fields v. New York State Office of Mental Retardation & Developmental Disabilities*, 115 F.3d 116, 119 (2d Cir. 1997); accord *Greenway*, 143 F.3d at 47. A plaintiff can meet that burden by using a "mixed-motives analysis"—focusing proof directly at the question of discrimination and proving that an impermissible reason was the motivating factor in the employment decision at issue, see *Stratton v. Department for the Aging for the City of N.Y.*, 132 F.3d 869, 878 & n.4 (2d Cir. 1997), or by proving "pretext" under the *McDonnell Douglas* test by showing that a purportedly legitimate reason for an employment decision was really a cover-up for discrimination.

⁹ See *Greenway*, 143 F.3d at 53; *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1016 (1st Cir. 1979) ("to read [the *McDonnell Douglas* test's] technical aspects to a jury . . . will add little to the juror's understanding of the case and, even worse, may lead jurors to abandon their own judgment and to seize upon poorly understood legalisms to decide the ultimate question of discrimination.").

¹⁰ *Norton v. Sam's Club*, 145 F.3d 114, 118 (2d Cir. 1998).

¹¹ The most recent statistics show that for the fiscal year ending September 30, 1997, almost 9% of new cases filed in the federal district courts nationwide were employment civil rights cases. Leonidas Ralph Mecham, *Annual Report of the Director: Judicial Business of the United States Courts*, Table C-2 at 128-30 (1997). The employment civil rights category surpassed all categories except two: prisoner civil rights cases and "Other" personal injury/products liability cases. *Id.*

¹² See, e.g., *Oncale v. Sundowner Offshore Servs., Inc.*, 118 S. Ct. 998 (1998) (involving a claim of sexual harassment by an oil platform crew worker); *Jones v. Clinton*, 990 F. Supp. 657 (E.D. Ark. 1998) (involving a claim against the President of the United States for sexual harassment).

nation from the workplace.¹³ In this complex, evolving area of the law,¹⁴ the principal tool for evaluating a claim of discrimination is a twenty-five year old rule that has long outlived its usefulness. The time has come for a change.

In this Article, we examine the criticisms of the *McDonnell Douglas* test and suggest a different, simplified approach to weighing and evaluating evidence of discrimination, one that more sharply focuses on the "ultimate issue." Part I discusses *McDonnell Douglas* and its progeny. Part II discusses the criticisms of the *McDonnell Douglas* approach in the context of the Second Circuit's latest decisions on the assessment of evidence and burdens of proof in discrimination cases. Finally, Part III advances a simplified but more focused approach for evaluating and weighing evidence of discrimination.

¹³ See, e.g., Michele Himmelberg, *Workplace Bias, Discrimination: The Texaco, Mitsubishi and U.S. Army scandals have opened the door to new employee allegations, lawsuits and renewed union efforts*, ORANGE COUNTY REG., Jan. 13, 1997, at D06; Thomas S. Mulligan, *Texaco Bias Case Decision Has Glass Ceilings Rattling; Workplace: Employees claiming discrimination get more attention*, LOS ANGELES TIMES, Dec. 8, 1996, at D1 ("The impact of the Texaco case is rippling through courtrooms and workplaces across the country . . ."); Clarence Page, *Texaco tapes prove that job discrimination still goes on*, DALLAS MORNING NEWS, Nov. 10, 1996, at 5J; Smith Barney, *female brokers reach agreement, Settlement in discrimination, harassment case may surpass Texaco's \$115 million payout*, DALLAS MORNING NEWS, Nov. 18, 1997, at 4D; Texaco *leads parade of eye-opening discrimination cases in the workplace*, SAN ANTONIO EXPRESS-NEWS, Dec. 29, 1996, at 3G; see also *Holder v. Hall*, 512 U.S. 874, 955 (1994) ("[n]early thirty years after the passage of this landmark civil rights legislation [the Voting Rights Act of 1965, designed to eradicate discrimination against minorities], its goals remain unfulfilled.") (Blackmun, J., dissenting).

¹⁴ Significant changes continue to be made in the law of employment discrimination as courts grapple with the difficult task of evaluating discrimination. In its October 1997 term alone, the Supreme Court heard a number of first impression discrimination cases. See, e.g., *Oncale*, 118 S. Ct. at 998 (concerning whether same-sex harassment is actionable under Title VII); *Gebser v. Lago Vista Indep. Sch. Dist.*, 118 S. Ct. 1989 (1998) (concerning liability under Title IX for harassment of a student by a teacher); *Burlington Indus. Inc. v. Ellerth*, 118 S. Ct. 2257 (1998) (concerning liability for discrimination where an employee suffers no tangible economic damages); *Faragher v. City of Boca Raton*, 118 S. Ct. 2275 (1998) (concerning vicarious liability of an employer for its supervisor's actionable discrimination against an employee).

I. THE *McDONNELL DOUGLAS* TEST AND ITS EVOLUTION

As the Supreme Court reminded us in *McDonnell Douglas*, "Title VII tolerates no racial discrimination *subtle or otherwise*."¹⁵ Yet, direct proof of discrimination in employment cases is rare, and subtle discrimination, in particular, is difficult to prove. Consequently, the Supreme Court recognized in *McDonnell Douglas* that a plaintiff in a discrimination case may defeat a motion for summary judgment and ultimately prevail at trial by proving discrimination indirectly. To determine whether a plaintiff has met the burden of proving discrimination indirectly, the Supreme Court laid out a three-step, burden-shifting test that purported to resolve the "critical issue . . . concern[ing] the order and allocation of proof in a private, non-class action challenging employment discrimination."¹⁶

As originally articulated by the Court in *McDonnell Douglas*, the three-pronged, burden-shifting test was to operate as follows: the first prong requires the plaintiff to establish a "prima facie" case of discrimination.¹⁷ The plaintiff satisfies this burden by showing that: (1) the plaintiff belonged to a "racial minority"; (2) the plaintiff applied for a job for which the plaintiff was qualified, and the employer was seeking applicants; (3) the plaintiff was rejected; and (4) the position remained open, and the employer continued to seek applications from persons with plaintiff's qualifications.¹⁸ Acknowledging the extent to which the facts in discrimination cases will vary, the Court noted that its articulation of the prima facie proof required of plaintiff is "not necessarily applicable in every respect to differing factual situations."¹⁹

Once the plaintiff makes a showing of a prima facie case, the burden "then must shift [in the second prong of the test] to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection."²⁰ If the employer articulates some legiti-

¹⁵ *McDonnell Douglas v. Green*, 411 U.S. 792, 801 (1972) (emphasis added).

¹⁶ *Id.* at 800. The Court acknowledged there was a "notable lack of harmony" in the way courts stated the applicable rules as to burden of proof and claimed to "now address the problem." *Id.* at 801.

¹⁷ *Id.* at 802.

¹⁸ *Id.* at 802.

¹⁹ *Id.* at n.13.

²⁰ *McDonnell Douglas*, 411 U.S. at 802. The Court did not attempt to "detail every matter which fairly could be recognized" as a legitimate, nondiscriminatory reason. *Id.* at 802-03. Instead, the Court accepted the employer's articulated reason, namely that the employee in question participated in unlawful conduct. *Id.* at 803.

mate, nondiscriminatory reason for its action, it will suffice to "meet the prima facie case, but the inquiry must not end here."²¹ Rather, the burden shifts back to the plaintiff in the third prong of the test to prove that the employer's stated reason "was in fact pretext."²² The third prong requires plaintiff to prove, in effect, that the "presumptively valid reasons for [the employment decision at issue] were in fact a coverup" for discrimination.²³

The three-pronged test articulated in *McDonnell Douglas* has evolved over the years. What follows is a brief discussion of each prong of the test as applied today as well as a summary of the current application of the test in the Second Circuit.

A. Plaintiff's Prima Facie Case

The elements of a prima facie case have transformed in the years since *McDonnell Douglas* was decided. The Second Circuit requires a plaintiff to show that she or he (1) is a member of a protected class; (2) who is qualified for the position; (3) who suffered an adverse employment action; (4) under circumstances giving rise to an inference of discrimination.²⁴ In at least one recent high-profile decision, however, the Second Circuit used an earlier version of the fourth element: "the ultimate filling of the position by a person not of the protected class."²⁵

The fourth element is the most important to note because it has gone through various iterations in the years since *McDonnell Douglas* was decided. The *McDonnell Douglas* court framed the element in terms of a position remaining unfilled. In subsequent years, the fourth element was articulated in terms of a position being filled by a person who was outside the protected class. Today, most Second Circuit decisions²⁶ frame the fourth element as requiring the plaintiff to have suffered the adverse employment action under circumstances giving rise to an inference of discrimination.²⁷ The subtle

²¹ *Id.* at 804.

²² *Id.*

²³ *Id.* at 805.

²⁴ See, e.g., *Shumway v. United Parcel Serv., Inc.*, 118 F.3d 60, 63 (2d Cir. 1997).

²⁵ *Fisher v. Vassar College*, 114 F.3d 1332, 1335 (2d Cir. 1997) (en banc), cert. denied, 118 S. Ct. 851 (1998).

²⁶ See *Fesce v. Guardsman Elevator Co.*, No. 96 Civ. 6793, 1998 WL 142350, at *7 n.5 and accompanying text (S.D.N.Y. Mar. 26, 1998) (discussing the inconsistency of the fourth element of the prima facie case); *Jalal v. Columbia Univ. in the City of N.Y.*, 4 F. Supp. 2d 224, 232-33 & n.11 (S.D.N.Y. 1998).

²⁷ See generally *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308 (1996)

yet important changes as to what constitutes a prima facie case are confusing.²⁸ In fact, the way this fourth element has evolved, it is essentially the same inquiry as the third prong of the *McDonnell Douglas* test discussed below.

Despite any confusion over the elements, the showing that the plaintiff must make to establish a prima facie case is "*de minimis*";²⁹ only "minimal" proof of discrimination is necessary.³⁰ The Supreme Court described the prima facie case a decade after *McDonnell Douglas* in the following manner: "The prima facie case method established in *McDonnell Douglas* was 'never intended to be rigid, mechanized, or ritualistic.'"³¹ Not only is the prima facie case not "rigid or mechanized," but the Second Circuit remarked in *Fisher v. Vassar College*³² that "[i]n our diverse workplace, virtually any [employment] decision . . . will support a slew of prima facie cases of discrimination."³³

B. Defendant's Burden to Explain its Actions

If the plaintiff establishes a prima facie case, the burden shifts under *McDonnell Douglas* to the defendant employer to articulate a nondiscriminatory reason for its actions. Since the ultimate burden of persuasion remains with the plaintiff, however, confusion cropped up in the courts concerning what the defendant had to prove at this stage. In *Texas Community Affairs v. Burdine*,³⁴ the Court ex-

(holding that replacement of person by another person in same protected class does not defeat age discrimination claim); *Bratek v. Merck & Co., Inc.*, 91 Civ. 0252, 1993 WL 124747, at *5 (W.D.N.Y. 1993) (hiring a woman to replace a woman alleging gender discrimination does not necessarily disprove discrimination).

²⁸ See *Bickerstaff v. Vassar College*, 992 F. Supp. 372, 373-74 (S.D.N.Y. 1998) (noting that "[t]his Cheshire Cat type prima facie case can only bring confusion to our craft.>").

²⁹ *Cronin v. Aetna Life Ins. Co.*, 46 F.3d 196, 203-04 (2d Cir. 1995).

³⁰ See *Fisher*, 114 F.3d at 1335; *Quaratino v. Tiffany & Co.*, 71 F.3d 58, 65 (2d Cir. 1995) (all that is required at the first stage is a "*de minimis*" showing); see also *Austin v. Ford Models*, 149 F.3d 148, 152-53 (2d Cir. 1998) ("The requirements for establishing a prima facie case are 'minimal'"); *Stern v. Trustees of Columbia Univ. in the City of N.Y.*, 131 F.3d 305, 314 (2d Cir. 1997) (Calabresi, J., dissenting) ("I believe that [the plaintiff's] prima facie case is precisely the kind of *minimal one* discussed in this court's in banc decision in *Fisher*."). (citations omitted) (emphasis added).

³¹ *United States Postal Serv. Bd. v. Aikens*, 460 U.S. 711, 715 (1983) (quoting *Fumco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978)).

³² 114 F.3d 1332 (2d Cir. 1997) (en banc), cert. denied, 118 S. Ct. 851 (1998).

³³ 114 F.3d at 1337.

³⁴ 450 U.S. 248 (1981).

plained the defendant's burden in the second stage of the analysis by addressing the narrow question whether, "after the plaintiff has proved a prima facie case of discriminatory treatment, the burden shifts to the defendant to persuade the court by a preponderance of the evidence that legitimate, nondiscriminatory reasons for the challenged employment action existed."³⁵ The Court made clear in *Burdine* that defendant's burden is merely one of production, requiring the defendant to articulate a nondiscriminatory reason for an adverse employment action.³⁶

The defendant's burden, therefore, in the *McDonnell Douglas* three-part scheme is not onerous.³⁷ A defendant literally "need only articulate—but need not prove" a nondiscriminatory reason for its action.³⁸ An employer will always articulate a nondiscriminatory reason for its action. After all, "[a]ny such stated purpose is sufficient to satisfy the defendant's burden of production; the employer does not have to persuade the court that the stated purpose was the actual reason for its decision."³⁹ Indeed, there is not a single reported case in which a plaintiff prevails at the second step in a discrimination lawsuit because a defendant employer is unwilling or unable to articulate a legitimate, nondiscriminatory reason for its employment action. Thus, this step in the *McDonnell Douglas* framework, like the plaintiff's prima facie case, has become nothing more than a "mechanical formality."⁴⁰

³⁵ *Id.* at 250.

³⁶ The employer "need not persuade the court that it was actually motivated by the proffered reasons"; it need only "raise a genuine issue of fact as to whether it discriminated against the plaintiff" by introducing some evidence of legitimate, nondiscriminatory reasons for its decision. *Id.* at 254-55, 257.

³⁷ "Indeed, this second stage is little more than a mechanical formality; a defendant, unless silent, will almost always [be able to discharge its burden]." *Shifting Burdens*, *supra* note 3, at 1590. In addition to explaining the defendant's burden, the *Burdine* Court also attempted to explain why it established the burden-shifting scheme in the first instance. The Court stated that the burden-shifting scheme "is intended progressively to sharpen the inquiry into the elusive factual question of intentional discrimination." *Id.* at 256 n.8.

³⁸ *Fisher v. Vassar College*, 70 F.3d 1420, 1433 (2d Cir. 1995), *aff'd en banc*, 114 F.3d 1332 (1997), *cert. denied*, 118 S. Ct. 851 (1998).

³⁹ *Austin v. Ford Models*, 149 F.3d 148, 153 (2d Cir. 1998) (citing *Fisher*, 114 F.3d at 1335-36).

⁴⁰ *Shifting Burdens*, cited *supra* note 3, at 1590.

C. Pretext

Of the three prongs of the *McDonnell Douglas* test, the pretext prong is perhaps the most confusing. While the Supreme Court clarified the second prong of the analysis in *Burdine*, courts continued to struggle with the third prong of the analysis. One question that confounded courts was whether the plaintiff at this stage in the analysis simply needed to prove that the defendant's articulated justification was pretextual or if the plaintiff was required to offer additional proof of discriminatory intent.

The Supreme Court attempted to resolve this question in *St. Mary's Honor Center v. Hicks*.⁴¹ The Court held there that proof of pretext alone does not compel a finding in favor of the plaintiff. Rather, the fact-finder's disbelief of the reasons claimed by the defendant for the challenged action "may, together with elements of the prima facie case, suffice to show intentional discrimination."⁴² The *Hicks* decision sparked a great deal of scholarly debate and criticism⁴³ as well as disagreement among the circuits as to what the Court meant in *Hicks* when it said that disbelief of the employer's reasons may suffice to show intentional discrimination.

The Second Circuit complicated the *McDonnell Douglas* pretext analysis in *Fisher v. Vassar College*.⁴⁴ It held in *Fisher* that once the defendant employer proffers legitimate, nondiscriminatory reasons for a challenged employment action, to defeat a motion for summary judgment, the plaintiff is then "obliged to produce not

⁴¹ 509 U.S. 502 (1993).

⁴² *Id.* at 510-11 (emphasis added).

⁴³ See, e.g., Deborah A. Calloway, *St. Mary's Honor Center v. Hicks: Questioning the Basic Assumption*, 26 CONN. L. REV. 997 (1994); William R. Corbett, *The "Fall" of Summers, the Rise of "Pretext Plus," and the Escalating Subordination of Federal Employment Discrimination Law to Employment at Will: Lessons from McKennon and Hicks*, 30 GA. L. REV. 305, 342-58 (1996); Deborah C. Malamud, *The Last Minuet: Disparate Treatment After Hicks*, 93 MICH. L. REV. 2229, 2237 (1995) (arguing that in the aftermath of *Hicks*, the *McDonnell Douglas* scheme ought to be abandoned); Mark A. Schuman, *The Politics of Presumption: St. Mary's Honor Center v. Hicks and the Burdens of Proof in Employment Discrimination Cases*, 9 ST. JOHN'S J. LEGAL COMMENTARY 67, 84-95 (1993); Michael Selmi, *Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric*, 86 GEO. L.J. 279, 328-34 (1997); see *Bursting Bubbles*, *supra* note 3, at 217-29, for a complete discussion and analysis of the varying interpretations of *Hicks*. See also Edward T. Ellis, *Employment Discrimination Litigation in the Federal Courts of Appeals After St. Mary's Honor Center v. Hicks*, SC08 ALI-ABA 663, 667-68, 674-79 (1997).

⁴⁴ 114 F.3d 1332 (2d Cir. 1997) (en banc), cert. denied, 118 S. Ct. 851 (1998).

simply 'some' evidence, but 'sufficient' evidence to support a rational finding that the . . . proffered reasons by the employer were false, and that more likely than not discrimination was the real reason for the discharge."⁴⁵ The plaintiff may not prevail without evidence that, "on its own, unaided by any artificially prescribed presumption, reasonably supports the inference of discrimination."⁴⁶

Thus, under *Fisher*, a plaintiff in the Second Circuit must prove discrimination without the benefit of the presumption of discrimination that the *McDonnell Douglas* test originally contemplated.⁴⁷ Practically, what this means is that a court must address two separate questions at this stage in the *McDonnell Douglas* analysis.

The first question is whether there was pretext. Because the employer at this point has offered a purported, nondiscriminatory explanation for its actions, the plaintiff must prove that the offered explanation is not true. The second question the court must then address is, assuming there was pretext, what the pretext was for—that is, whether the pretext was intended to mask an illegal or discriminatory motive.⁴⁸

Hence, once the defendant employer discharges its burden in prong two, the initial presumption of unlawful discrimination "simply drops out of the picture"⁴⁹ and the question becomes the "same question asked in any other civil case: Has the plaintiff shown, by a preponderance of the evidence, that the defendant is liable for the alleged conduct?"⁵⁰ Thus, after initially analyzing all of the evidence for the first and second prongs and analyzing all of the evidence a second time to answer the two questions that make

⁴⁵ Van Zant v. KLM Royal Dutch Airlines, 80 F.3d 708, 714 (2d Cir. 1996).

⁴⁶ *Fisher*, 114 F.3d at 1334.

⁴⁷ Critics of the *Fisher* decision argue that it further burdens plaintiffs "who face the already difficult task of indirectly proving discriminatory motive." Scott A. Moss & Daniel A. Malin, Note, *Public Funding for Disability Accommodations: A Rational Solution to Rational Discrimination and the Disabilities of the ADA*, 33 HARV. C.R.-C.L. L. REV. 197, 236 n.85 (1998); Arthur D. Rutkowski & Barbara Lang Rutkowski, 12 NO. 8 EMPLOYMENT L. UPDATE 6 (1997).

⁴⁸ A finding of pretext does "not necessarily mean that the true motive was the illegal one argued by plaintiff." *Fisher*, 114 F.3d at 1338 (citation omitted). "[D]iscrimination does not lurk behind every inaccurate statement." *Id.* at 1337. Rather, the pretext may mask some other motivation such as "back-scratching, log-rolling, horse-trading, institutional politics, envy, nepotism, spite, or personal hostility." *Id.*

⁴⁹ *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 510-11 (1993).

⁵⁰ *Fisher*, 114 F.3d at 1336.

up the third prong, the court must confront the evidence a third time to answer the ultimate question of whether the plaintiff has carried the burden of proof.

II. THE NEED FOR A CHANGE

In *Burdine*, the Supreme Court declared that the purpose of the *McDonnell Douglas* test was "to sharpen the inquiry into the elusive factual question of intentional discrimination."⁵¹ It also described the test as "merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination."⁵² Time and experience tell a different story.

First, the prima facie case has evolved into something of a formality. In fact, many courts simply presume that the plaintiff has made out a prima facie case.⁵³ Nonetheless, for those courts that do analyze the prima facie showing, the fourth element of the prima facie case overlaps, and is duplicative of, the pretext prong of the *McDonnell Douglas* test.

Second, the articulation of a legitimate nondiscriminatory reason for an employer's action has also evolved into a meaningless formality. It defies logic that any employer would not be able to satisfy its burden given the lenient standard under which the defendant employer's burden of production is judged.

Finally, the pretext prong of the test continues to divide courts and engender confusion. Not only is this prong seemingly identical to the fourth element of the prima facie case, but what the plaintiff

⁵¹ *Texas Community Aff. v. Burdine*, 450 U.S. 248, 255 n.8 (1981).

⁵² *Fumco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978).

⁵³ An increasing number of district courts in the Second Circuit presume that a prima facie case of discrimination has been established. See, e.g., *Bickerstaff v. Vassar College*, 992 F. Supp. 372, 374 (S.D.N.Y. 1998) (Brieant, J.); *Jugueta v. Perry*, No. 95 Civ. 10303, 1997 WL 742535, at *4 (S.D.N.Y. Dec. 1, 1997) (Chin, J.); *Lacoparra v. Pergament Home Ctrs., Inc.*, 982 F. Supp. 213, 223 (S.D.N.Y. 1997) (Conner, J.); *Bumpus v. Runyon*, No. 93 Civ. 3264, 1997 WL 539924, at *9 (S.D.N.Y. June 9, 1997) (Preska, J.); *Owens v. Waldorf-Astoria Corp.*, No. 92 Civ. 4561, 1997 WL 251556, at *3 (S.D.N.Y. May 13, 1997) (Griesa, J.); *Santiago v. Greyhound Lines, Inc.*, 956 F. Supp. 144, 155 (N.D.N.Y. 1997) (Munson, J.); *Holmes v. United Airlines, Inc.*, No. 94 Civ. 3564, 1996 WL 560193, at *6 (S.D.N.Y. Jan. 2, 1996) (Caden, J.); *Coleman v. Runyon*, 898 F. Supp. 223, 226 (S.D.N.Y. 1996) (Knapp, J.). Even the Second Circuit agrees that courts should not be "preoccupied with" whether a prima facie case has been proved by the plaintiff. See *Sweeney v. Research Found. of State Univ. of N.Y.*, 711 F.2d 1179, 1184 (2d Cir. 1983).

must prove at this stage in the analysis is confusing. Indeed, courts have adopted inconsistent theories as to the plaintiff's burden. In the Second Circuit, analysis of this prong requires an assessment of two separate questions.

Clearly, then, the inquiry into elusive factual questions is not being "sharpened." Moreover, the "sensible, orderly" three-pronged approach now requires a court to engage in a cumbersome seven-step analysis—four elements for prong one, one element for prong two, and two elements for prong three. Successful application of the prongs not only requires the court to navigate through seven distinct steps of inquiry, but it requires the court to assess the evidence in the case three separate times. Given this labyrinth, it is not surprising that criticism of the *McDonnell Douglas* test continues to mount.

The evolution of the test, including the Supreme Court's "clarifications" in cases like *Burdine* and *Hicks*, has only exacerbated matters. Confusion and conflict persist and disagreement over the usefulness of the approach continues.⁵⁴ Indeed, courts continue to struggle with unanswered questions as to the quantum of evidence necessary to survive dispositive motions or to support jury findings of intentional discrimination based on indirect evidence. Recent Second Circuit cases demonstrate this point vividly.

For instance, in *Greenway v. Buffalo Hilton Hotel*,⁵⁵ the Second Circuit held that only courts, not juries, "should determine whether the initial *McDonnell Douglas* burdens of production have been met[] [because r]equiring the jury to play the ping-pong-like match of shifting burdens is confusing and entirely unnecessary."⁵⁶ *Greenway* leads to the anomalous situation in which one set of rules applies for the court, and a different set of instructions, pre-

⁵⁴ See Judith Olans Brown et al., *Some Thoughts about Social Perception and Employment Discrimination Law: A Modest Proposal for Reopening the Judicial Dialogue*, 46 EMORY L.J. 1487, 1517-28 (1997); see also Julie S. Northup, Note & Comment, *The "Same Actor Inference" in Employment Discrimination: Cheap Justice?*, 73 WASH. L. REV. 193, 193 (1998) ("Procedure by presumption is always cheaper and easier than individualized determination . . .") (citing *Stanley v. Illinois*, 405 U.S. 645, 656-57 (1972)).

⁵⁵ 143 F.3d 47 (2d Cir. 1998).

⁵⁶ *Id.* at 53; see also William D. Frumkin & Louis G. Santangelo, *Second Circuit Examines the Jury's Role in Burden Shifting Analysis in Job Bias Cases*, N.Y.L.J., June 8, 1998, at 1.

sumably clearer, simpler, and better, applies for the jury. If the test is too confusing and unhelpful for the jury,⁵⁷ one wonders how it can be useful to the court.⁵⁸

Other recent Second Circuit cases demonstrate the extent to which courts and juries are struggling with the difficulties of proof of discrimination. In the 1997-98 term, the Second Circuit reversed grants of summary judgment in employment discrimination cases at least three times,⁵⁹ reversed jury verdicts finding discrimination at least two times,⁶⁰ and affirmed a district court's setting aside of a jury verdict at least once⁶¹ because of issues concerning the sufficiency of evidence.

The critical inquiry in a discrimination case is how to weigh the evidence presented by the parties. The only direct evidence generally available usually "centers on what the defendant allegedly said or did [and because] the defendant will rarely admit to having said or done what is alleged . . . the issue frequently becomes one of assessing the credibility of the parties."⁶² *McDonnell Douglas* provides no guidance on this issue.

⁵⁷ The Eighth Circuit's Manual of Model Civil Jury Instruction specifically advises against instructing the jury on the *McDonnell Douglas* test. See MANUAL OF MODEL CIVIL JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE EIGHTH CIRCUIT § 5.01 (1998) ("It is unnecessary and inadvisable to instruct the jury regarding the three-step analysis . . . [so] this instruction is focused on the ultimate issue of whether the plaintiff's protected characteristic was a 'motivating factor' in the defendant's employment decision."). Other circuit courts intone similar sentiments. See, e.g., *Mullen v. Princess Anne Volunteer Fire Co.*, 853 F.2d 1130, 1137 (4th Cir. 1988) ("overly complex" instructions that include burden-shifting require comprehension "beyond the function and expertise of the jury."); *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1016 (1st Cir. 1979) ("to read its technical aspects to a jury . . . will add little to the juror's understanding of the case").

⁵⁸ The court may not be the best arbiter of discriminatory practices either. In a recent Second Circuit opinion, Judge Weinstein, sitting by designation, asserted that "[a] federal judge is not in the best position to define the current sexual tenor of American cultures in their many manifestations." *Gallagher v. Delaney*, 139 F.3d 338, 342 (2d Cir. 1998).

⁵⁹ *Danzer v. Norden Sys., Inc.*, 151 F.3d 50 (2d Cir. 1998); *Gallagher*, 139 F.3d at 338; *Stern v. Trustees of Columbia Univ.*, 131 F.3d 305 (2d Cir. 1997).

⁶⁰ See *Norton v. Sam's Club*, 145 F.3d 114, 120 (2d Cir. 1998); *Pollis v. New School for Soc. Research*, 132 F.3d 115, 123-24 (2d Cir. 1997).

⁶¹ See *Galdieri-Ambrosini v. National Realty & Dev. Corp.*, 136 F.3d 276, 292 (2d Cir. 1998).

⁶² *Danzer*, 151 F.3d at 57. Plaintiffs are not required to produce direct evidence of discrimination. In fact, "a case may be built entirely out of circumstantial evidence." *Norton*, 145 F.3d at 119.

More troubling, however, is the fact that the *McDonnell Douglas* test "actually invites juries and courts to lose sight of" the ultimate issue in an employment discrimination case.⁶³ The test simply does not address or help resolve the question of whether the plaintiff has met her or his burden of proving that the adverse employment decision was motivated, at least in part, by an "impermissible reason."⁶⁴ The test compounds the problem by forcing the court to engage in a cumbersome analysis that, as discussed above, really entails a seven-step inquiry. *McDonnell Douglas* is "unduly burdensome" when the court has to assess a single allegation of discrimination; the burden increases dramatically when a plaintiff alleges multiple claims.⁶⁵ The image of neatly shifting burdens is largely illusory; the *McDonnell Douglas* is no longer a useful way of assessing the sufficiency of discrimination allegations.

While the Second Circuit has danced around criticism of the *McDonnell Douglas* test, district courts in the Second Circuit have explicitly voiced criticism of the burden-shifting scheme. For instance, one court recently commented that "in this case (as in so many others), the various burden shifts . . . shed little, if any, light on the question to be decided."⁶⁶ Another court openly observed that the test does not "promote an expeditious resolution" of a discrimination case.⁶⁷

As a consequence, several district court judges now dispense with the first two prongs of the *McDonnell Douglas* analysis, by assuming the plaintiff has made out a prima facie case and noting the defendant's articulated business justifications for its actions, and proceed directly to determining whether the plaintiff in a discrimination case has proven that it is more likely than not that the employer's decision was motivated at least in part by an impermissible or discriminatory reason.⁶⁸ District courts in the Second Circuit

⁶³ *Lapsley v. Columbia Univ.-College of Physicians and Surgeons*, 999 F. Supp. 506, 514 (S.D.N.Y. 1998).

⁶⁴ *Stratton v. Dep't for the Aging*, 132 F.3d 869, 878-81 (2d Cir. 1997); *Fields v. New York State Office of Mental Retardation and Developmental Disabilities*, 115 F.3d 116, 119 (2d Cir. 1997).

⁶⁵ *Lapsley*, 999 F. Supp. at 514.

⁶⁶ *Jalal v. Columbia Univ. in the City of N.Y.*, 4 F. Supp. 2d 224, 233 (S.D.N.Y. 1998) (emphasis added).

⁶⁷ *Fierro v. Saks Fifth Ave.*, 13 F. Supp. 2d 481, 488 (S.D.N.Y. 1998); see also *Cully v. Milliman & Robertson, Inc.*, No. 97 Civ. 4346, 1998 WL 651057, at *5 (S.D.N.Y. Sept. 22, 1998) ("it is becoming increasingly apparent that discrimination cases would progress more sensibly without [the *McDonnell Douglas* framework].") (Motley, J.).

⁶⁸ These courts "proceed to the ultimate issue" by examining a party's evidence of

do this because "it is simpler and more straightforward to move directly to the ultimate question" in a discrimination case.⁶⁹

Criticizing *McDonnell Douglas* or presuming away its superfluous prongs, however, is not enough. A different approach is necessary. What follows, therefore, is a more thorough examination of how a court should analyze evidence to decide the "ultimate question." We propose that the suggested approach discussed in the next section replace the *McDonnell Douglas* scheme.⁷⁰

III. PROPOSAL: A MORE DIRECT APPROACH

In view of the well-founded and extensive criticisms of the *McDonnell Douglas* test, it is clear that the framework should be discarded. The more difficult question, of course, is what is a better alternative.

discrimination. See *Hutcherson v. City of New York*, No. 95 Civ. 10074, 1998 WL 661490, at *3 n.3 (S.D.N.Y. Sept. 25, 1998) (Cedarbaum, J.); *Lanahan v. Mutual Life Ins. Co. of N.Y.*, 15 F. Supp. 2d 381, 382-84 (S.D.N.Y. 1998) (Sotomayor, J.); *Fierro*, 13 F. Supp. 2d at 488 (Brieant, J.); *Harris v. New York City Dep't of Homeless Servs. Eligibility Investigation Unit*, No. 97 Civ. 432, 1998 WL 205334, at *5 (S.D.N.Y. Apr. 28, 1998) (Scheindlin, J.); *Jalal*, 4 F. Supp. 2d at 232-33; *Lapsley*, 999 F. Supp. at 515; *Shafir v. Ass'n of Reform Zionists*, 998 F. Supp. 355 (S.D.N.Y. 1998) (Chin, J.); *Miles v. North General Hosp.*, 998 F. Supp. 377 (S.D.N.Y. 1998) (Chin, J.); *Padob v. Extex Info. Serv.*, 960 F. Supp. 806, 812 (S.D.N.Y. 1997) (Scheindlin, J.); see also *supra* note 53 (citing Second Circuit district court cases in which courts presumed prima facie case was met by plaintiff); *Ruane v. Continental Cas. Co.*, No. 96 Civ. 7153, 1998 WL 292103, at *8 & n.3 (S.D.N.Y. June 3, 1998) (acknowledging the "heavy criticism" of the *McDonnell Douglas* test).

⁶⁹ *Lanahan*, 15 F. Supp. 2d at 384.

⁷⁰ The *McDonnell Douglas* test is being applied to an ever-increasing number of discrimination cases brought pursuant to laws other than Title VII. See Melissa A. Essary & Terence D. Friedman, *Retaliation Claims Under Title VII, the ADEA, and the ADA: Untouchable Employees, Uncertain Employers, Unresolved Courts*, 63 MO. L. REV. 115 (1998); Lianne C. Knych, Note, *Assessing the Application of McDonnell Douglas to Employment Discrimination Claims Brought Under the Americans with Disabilities Act*, 79 MINN. L. REV. 1515 (1995); Timothy A. Ogden, Note, *Shifting Burdens and the Americans with Disabilities Act: Why McDonnell Douglas Should Apply to the ADA*, 29 IND. L. REV. 179 (1995); Kevin W. Williams, Note, *The Reasonable Accommodation Difference: The Effect of Applying the Burden Shifting Frameworks Developed Under Title VII in Disparate Treatment Cases to Claims Brought Under Title I of the Americans With Disabilities Act*, 18 BERKELEY J. OF EMP. & LAB. L. 98 (1997); *Family and Medical Leave Act-Burden of Proof-McDonnell Douglas Approach*, 13 NO. 3 FED. LITIGATOR 70 (March 1998); see also *Annis v. County of Westchester*, 136 F.3d 239, 245 (2d Cir. 1998) (borrowing the burden-shifting framework of Title VII claims to analyze whether conduct was unlawfully discriminatory for purposes of 42 U.S.C. § 1983). The need to abandon the test, therefore, becomes more urgent as time goes by.

The best approach is perhaps the most basic one: first, evaluating plaintiff's proof, direct or otherwise, of discrimination; second, evaluating defendant's proof that it did not discriminate, including evidence of defendant's explanation for its employment decision; and third, evaluating the evidence as a whole. Courts should focus on the "ultimate issue" of whether the plaintiff has proven that it is more likely than not that the employer's decision was motivated at least in part by an impermissible or discriminatory reason. In a summary judgment context or on a motion for judgment as a matter of law following a verdict for the plaintiff, the court must evaluate the evidence as a whole resolving all conflicts in the proof and drawing all reasonable inferences in favor of the plaintiff.⁷¹

In evaluating the evidence, courts must keep two concepts in mind. First, the issue is intentional discrimination; the plaintiff has the burden at all times of proving, by a preponderance of the evidence, that she or he was the victim of intentional discrimination.⁷² It is not enough simply to prove unfair, irrational, or even "stupid" or "wicked" treatment,⁷³ nor are a plaintiff's subjective or conclusory beliefs of discrimination sufficient by themselves to generate a genuine issue for trial. As the Second Circuit recently noted, "a jury cannot infer discrimination from thin air."⁷⁴ Likewise, proof of pretext, that a defendant's stated reasons for its employment decision are not genuine, may not be sufficient, by itself, to prove discrimination; the jury must be able to ultimately determine that the pretext was intended to mask discrimination.⁷⁵

⁷¹ *Galdieri-Ambrosini v. National Realty & Dev. Corp.*, 136 F.3d 276, 289 (2d Cir. 1998) (motion for judgment as a matter of law); *Gallagher v. Delaney*, 139 F.3d 338, 345 (2d Cir. 1998) (summary judgment motion).

⁷² See *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 507 (1993) (stating that the "ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.") (quoting *Texas Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981)).

⁷³ *Norton v. Sam's Club*, 145 F.3d 114, 120 (2d Cir. 1998) ("[T]he ADEA does not make employers liable for doing stupid or even wicked things; it makes them liable for discriminating, for firing people on account of their age."); *Pollis v. New School for Soc. Research*, 132 F.3d 115, 124 (2d Cir. 1997) ("Absent some evidence that it was motivated by discriminatory intent, . . . bad treatment does not establish a violation of Title VII.").

⁷⁴ *Norton*, 145 F.3d at 119.

⁷⁵ *Greenway v. Buffalo Hilton Hotel*, 143 F.3d 47, 52 (2d Cir. 1998); *Fisher v. Vassar College*, 114 F.3d 1332, 1338-39 (2d Cir. 1997) (en banc), cert. denied, 118 S. Ct. 851 (1998).

The second concept to keep in mind at the same time is that proof of discrimination is often elusive. Because an employer's "intent and state of mind are implicated,"⁷⁶ rarely is there "direct, smoking gun, evidence of discrimination."⁷⁷ Consequently, plaintiffs usually must prove their claims of discrimination through indirect and circumstantial proof.⁷⁸ Courts must continue to be mindful that "clever men may easily conceal their motivations."⁷⁹ All a plaintiff need do is persuade a finder of fact that it is more likely than not that the adverse employment decision was motivated at least in part by a discriminatory reason.

We discuss in more detail below the three steps of the proposed analysis.

A. *Plaintiff's Proof*

The first step is to evaluate the plaintiff's proof. As a threshold matter, the individual pieces of evidence presented by the plaintiff to prove discrimination should be identified.⁸⁰ The court should then consider whether this evidence, taken as a whole and accepted

⁷⁶ *Meiri v. Dacon*, 759 F.2d 989, 998 (2d Cir.).

⁷⁷ *Richards v. New York City Bd. of Educ.*, 668 F. Supp. 259, 265 (S.D.N.Y. 1987), *aff'd*, 842 F.2d 1288 (2d Cir. 1988); see *Danzer v. Norden Sys., Inc.*, 151 F.3d 50, 57 (2d Cir. 1998) ("In discrimination cases, the only direct evidence available very often centers on what the defendant allegedly said or did."); *Thombrough v. Columbus and Greenville R.R. Co.*, 760 F.2d 633, 638 (5th Cir. 1985) ("Employers are rarely so cooperative as to include a notation in the personnel file, 'fired due to age,' or to inform a dismissed employee candidly that he is too old for the job." (citation omitted)); see also *Chipollini v. Spencer Gifts, Inc.*, 814 F.2d 893, 899 (3d Cir. 1987) (noting that direct proof of improper bias is "often unavailable or difficult to find").

⁷⁸ See *Norton*, 145 F.3d at 119 ("a case may be built entirely out of circumstantial evidence"); *Luciano v. Olsten Corp.*, 110 F.3d 210, 215 (2d Cir. 1997) (plaintiff is not required to produce direct evidence of discrimination).

⁷⁹ *Robinson v. 12 Lofts Realty, Inc.*, 610 F.2d 1032, 1043 (2d Cir. 1979) (quoting *United States v. City of Black Jack*, 508 F.2d 1179, 1185 (8th Cir. 1974)); accord *Ramseur v. Chase Manhattan Bank*, 865 F.2d 460, 465 (2d Cir. 1989); see also *Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176, 1187 (2d Cir. 1992) ("[I]f there is at the very least a thick cloud of smoke," an employer must "convince the factfinder that, despite the smoke, there is no fire.") (quoting *Price Waterhouse v. Hopkins*, 490 U.S. 228, 266 (1989) (O'Connor, J., concurring)).

⁸⁰ See, e.g., *Danzer* 151 F.3d at 57 (identifying five pieces of evidence that taken together as true were sufficient to support a jury finding of discrimination); *Norton*, 145 F.3d at 119 (identifying three facts proved by plaintiff to support inference of discrimination and holding that these facts, together with plaintiff's "highly dubious showing of pretext," was not sufficient to support inference of discrimination); *Lapsley v. Columbia Univ.-College of Physicians and Surgeons*, 999 F. Supp. 506, 516 (S.D.N.Y. 1998) (identifying and evaluating four categories of evidence relied on by plaintiff).

at face value, would be sufficient to support a jury's ultimate determination of discrimination. If the answer is no, then the court need proceed no further. The defendant would be entitled to summary judgment or judgment as a matter of law.

If the facts alleged would be sufficient to support a finding of discrimination, then the plaintiff's evidence must be separately evaluated to determine whether the different pieces of evidence can be relied upon. Is the evidence admissible? Is the evidence concrete and specific or is it merely conclusory and subjective? Does the evidence prove the point for which it has been presented? Does the evidence actually support an inference of discrimination?⁸¹

Of course, in evaluating the plaintiff's evidence on a motion for summary judgment or judgment as a matter of law, the court may not engage in fact-finding, and the evidence must be interpreted in the light most favorable to the plaintiff. Moreover, although each piece of evidence must be separately evaluated, the court must be mindful that the jury would be entitled to view the evidence as a whole.⁸² A discriminatory comment, for example, that might be considered, by itself, an inadmissible "stray remark" may be admissible if "other indicia of discrimination" are present.⁸³ Likewise, although a "sudden and unexpected downturn" in a performance evaluation does not, by itself, permit an inference of discrimination, it may constitute some proof of discrimination if supported by other such evidence.⁸⁴

After evaluating plaintiff's evidence, the court must then consider what admissible, relevant evidence remains. The question is whether plaintiff's different "pieces of circumstantial evidence"⁸⁵

⁸¹ See, e.g., *Pollis v. New School for Soc. Research*, 132 F.3d 115, 123 (2d Cir. 1997) (where statistics were based on "tiny" sample spread over long period of time composed largely of individuals who were not comparable to plaintiff, the statistics did not reasonably support an inference of discrimination).

⁸² *Stern v. Trustees of Columbia Univ.*, 131 F.3d 305, 314 (2d Cir. 1997) (criticizing the dissent for "consider[ing] the record solely in piecemeal fashion, proffering innocent explanations for individual strands of evidence," and noting that the jury was "entitled to view the evidence as a whole").

⁸³ *Danzer*, 151 F.3d at 56; see also *Shafir v. Ass'n of Reform Zionists*, 998 F. Supp. 355, 363 (S.D.N.Y. 1998) (holding that alleged comments by a supervisor coupled with "all the circumstances of the case" satisfied plaintiff's burden and could lead a reasonable person to infer that the termination of employment was illegally discriminatory).

⁸⁴ *Danzer*, 151 F.3d at 56; see also *Miles v. North Gen. Hosp.*, 998 F. Supp. 377, 388 (holding that a jury could find that the employer's claim of poor performance was a pretext "intended to mask [the employer's] desire to fire plaintiff.>").

⁸⁵ *Fisher v. Vassar College*, 114 F.3d 1332, 1338 (2d Cir. 1997) (en banc, cert.

and the other "bits and pieces of available evidence" together are sufficient to support an inference of discrimination, i.e., whether together they create a "mosaic" of intentional discrimination.⁸⁶

B. *Defendant's Proof*

If plaintiff's admissible evidence is sufficient to support an inference of discrimination, the next step is to evaluate the defendant's evidence that it did not discriminate. This will usually consist of evidence offered to contradict or undermine plaintiff's proof of discrimination as well as evidence that the employer acted for legitimate, nondiscriminatory reasons. For example, the employer may offer evidence of performance problems on the part of the plaintiff⁸⁷ or evidence that "the person who made the decision to fire was the same person who made the decision to hire."⁸⁸

The defendant's evidence should be evaluated in the same way as the plaintiff's evidence—for admissibility, relevancy, and materiality. In evaluating the defendant's evidence, courts must be sensitive to the fine line that exists between "second-guess[ing] an employer's hiring standards" and subjecting the employer's articulated justifications for its actions "to scrutiny under Title VII."⁸⁹

On a motion for summary judgment or judgment as a matter of law, the court cannot merely credit the employer's explanation of its actions or draw inferences in favor of the employer.⁹⁰ Rather, the employer must put forth proof that supports its explanation. Otherwise, a plaintiff is unlikely to ever survive a dispositive motion because merely articulating an explanation for an adverse employment decision is not an onerous task.⁹¹

Unlike plaintiff's evidence, the employer can provide the court with more "direct" evidence to support its explanation for an employment action. For instance, the employer can provide documen-

denied, 118 S. Ct. 851 (1998).

⁸⁶ *Gallagher v. Delaney*, 139 F.3d 338, 342 (2d Cir. 1998).

⁸⁷ *Lapsley v. Columbia Univ.-College of Physicians and Surgeons*, 999 F. Supp. 506, 522 (S.D.N.Y. 1998).

⁸⁸ *Grady v. Affiliated Cent., Inc.*, 130 F.3d 553, 560 (2d Cir. 1997).

⁸⁹ *Stern v. Trustees of Columbia Univ.*, 131 F.3d 305, 313 (2d Cir. 1997).

⁹⁰ *Id.* at 313-14.

⁹¹ See *supra* notes 37-40 and accompanying text.

tation concerning performance problems,⁹² employee misconduct,⁹³ and statistics regarding its hiring, firing, and promotion of employees.⁹⁴

C. *The Evidence as a Whole*

Finally, the evidence must be considered as a whole. The question is whether, after resolving all conflicts in the evidence and drawing all reasonable inferences in favor of the plaintiff, a reasonable jury could find that it was more likely than not that the plaintiff was discriminated against for an impermissible reason. It is not enough that some evidence of discrimination remains, for, as the Second Circuit has held:

[S]ome evidence is not sufficient to withstand a properly supported motion for summary judgment; a plaintiff opposing such a motion must produce sufficient evidence to support a rational finding that the legitimate, nondiscriminatory reasons proffered by the employer were false, and that more likely than not the . . . [alleged unlawful reason] was the real reason for the discharge.⁹⁵

Because of this standard, assessing the evidence as a whole is the most difficult part of the analysis.

Determining whether evidence permits a rational inference of discriminatory intent or, rather, gives rise to mere "speculation and conjecture" requires courts to draw a "careful distinction."⁹⁶ After all, "[a]n inference is not a suspicion or a guess. It is a reasoned, logical decision to conclude that a disputed fact exists"⁹⁷

⁹² See, e.g., *Lapsley*, 999 F. Supp. at 522 (where employer offered documentation concerning employee's deficiencies as well as sworn statements by supervisors about employee and employee's own admissions); *Miles v. North Gen. Hosp.*, 998 F. Supp. 377, 387 (where employer offered numerous performance evaluations and other documents concerning plaintiff's deficient performance about which plaintiff had been warned).

⁹³ See, e.g., *Shafir v. Ass'n of Reform Zionists*, 998 F. Supp. 355, 362 (S.D.N.Y. 1998) (employer offered substantial evidence that it fired employee because employee "refused to return to work when ordered to.").

⁹⁴ *Miles*, 998 F. Supp. at 387-88 (where employer offered compiled data to demonstrate that it did not discriminate against older employees of Jamaican national origin).

⁹⁵ *Woroski v. Nashua Corp.*, 31 F.3d 105, 109-10 (2d Cir. 1994) (citation omitted).

⁹⁶ *Jalal v. Columbia Univ. in the City of N.Y.*, 4 F. Supp. 2d 224, 235 (S.D.N.Y. 1998).

⁹⁷ *Id.* (quoting 1 LEONARD B. SAND ET AL. MODERN FEDERAL JURY INSTRUCTIONS ¶ 6.01 (1997)).

Thus, notwithstanding the fact that the plaintiff has presented some arguable evidence of discrimination, the court must look more critically at the evidence as a whole to determine if an employer's conduct was legitimate and lawful.⁹⁸

In addition, the court must go beyond determining that a reasonable jury could infer pretext when it views the evidence as a whole. As discussed in Part I, *supra*, the court must also be persuaded as to the "ultimate issue," that a reasonable jury could find that the pretext was a "mask for . . . discrimination,"⁹⁹ that, more likely than not, the employer's "proffered reason was not the true reason for the employment decision, and that race [or some other impermissible factor] was."¹⁰⁰

If, viewing the evidence as a whole, the court concludes that a plaintiff presents sufficient evidence to support a jury verdict in her or his favor on the "ultimate issue," the court must deny any dispositive motion by the employer.

D. *The Benefits of the Approach*

The *McDonnell Douglas* test unquestionably confuses and distorts the critical inquiry concerning the "ultimate issue" in discrimination cases. The Supreme Court's goal that the ordering of proof prescribed by the test be a tool "to sharpen the inquiry into the elusive factual question of intentional discrimination"¹⁰¹ remains unfulfilled. The goal, on the other hand, is a laudable one that can be achieved by using the simpler, clearer method to assess proof of discrimination as outlined above.

Eliminating the *McDonnell Douglas* three-prong (seven-step¹⁰²) test will free parties and courts from having to engage in the tedious and tiresome burden-shifting exercise that, in the end, proves little and adds nothing. Courts and parties will, therefore, be able to focus on what actually matters—identifying and assessing

⁹⁸ See *Lapsley v. Columbia Univ.-College of Physicians and Surgeons*, 999 F. Supp. 506, 523 (S.D.N.Y. 1998) (determining that plaintiff did not present a "thick cloud" of smoke, but only a "fleeting wisp" that was "easily dissipated" by the employer's proof).

⁹⁹ *Id.* at 523.

¹⁰⁰ *Fisher v. Vassar College*, 114 F.3d 1332, 1336 (2d Cir. 1997) (en banc), cert. denied, 118 S. Ct. 851 (1998) (quoting *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 507-08 (1993)).

¹⁰¹ *Texas Community Affairs v. Burdine*, 450 U.S. 248, 255 n.8 (1981).

¹⁰² See *supra* Part I.

evidence of discrimination. This is a desirable result for everyone. The modified approach suggested above achieves this result while, at the same time, providing courts and parties with guidance as to how evidence will be assessed and dispositive motions will be judged.

CONCLUSION

Once all the burdens have shifted pursuant to the *McDonnell Douglas* test, courts must still address the ultimate and key issue in a discrimination case: whether the plaintiff has presented evidence from which a rational finder of fact could conclude that the defendant illegally discriminated against her or him. This ultimate issue, however, can be addressed without relying upon the cumbersome, confusing, burden-shifting scheme. We have argued here that it *should* be done without relying on that scheme. It is time to discard the *McDonnell Douglas* test in favor of a simpler, better method for weighing evidence of discrimination. The "ping-pong-like match" that has produced a "thick accretion" of confusing precedents should be abandoned.

