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THE STUMBLING THREE-STEP, BURDEN-SHIFTING APPROACH IN EMPLOYMENT DISCRIMINATION CASES*

Kenneth R. Davis†

INTRODUCTION

In 1973, an ambitious Supreme Court decided *McDonnell Douglas Corp. v. Green.*[1] The case introduced an elaborate three-stage, burden-shifting framework for disparate-treatment employment discrimination cases.[2] Unique in design,[3] the approach requires that the plaintiff establish, at stage one, the elements of a prima facie case,[4] though the Court noted that the elements would vary with the factual context.[5] To rebut

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[1] 411 U.S. 792 (1973).

[2] *Id.* at 802-04.

[3] *See* Melissa A. Essary, *The Dismantling of* McDonnell Douglas v. Green: *The High Court Muddies the Evidentiary Waters in Circumstantial Discrimination Cases,* 21 PEPP. L. REV. 385, 397 (1994) (describing *McDonnell Douglas* as establishing a "unique" framework for allocating the order and burdens of proof).

[4] *McDonnell Douglas,* 411 U.S. at 802. The four elements of a prima facie case for the discriminatory rejection of a job applicant are: (1) the plaintiff belongs to a protected class; (2) he applied and was qualified for an available job; (3) he was rejected; and (4) after the rejection, the defendant continued seeking applicants with plaintiff's qualifications. *Id.*

[5] The Court noted that "the specification above of the prima facie proof required from respondent [in a case of a rejected job applicant] is not necessarily applicable in every respect to differing factual situations." *Id.* at 802 n.13. For example, the Eighth Circuit has held that the elements of a prima facie failure-to-promote case are: (1) the employee is a member of a protected class; (2) the employee was qualified for an available promotion; (3) the employee was rejected for the promotion; and (4) other employees, not in the protected class, received the promotion. Winbush v. Iowa, 66 F.3d 1471, 1480 (8th Cir. 1995). Unfortunately, the elements of a prima facie case differ from circuit to circuit. *See infra* notes

the presumption of discrimination attendant to plaintiff's proving a prima facie case, the employer must articulate, at stage two, a nondiscriminatory reason for its conduct.[6] The process concludes by focusing, at stage three, on whether the articulated reason was a pretext for discrimination.[7]

The *McDonnell Douglas* framework has elicited both plaudits and disapproval. Hailing the approach as a milestone in civil rights law, supporters commend it for sensibly ordering the proof in discrimination cases and promoting efficiency by limiting the issues.[8] They praise the Supreme Court for easing a victim's burden of proving subtle yet invidious discrimination.[9] Critics fault the *McDonnell Douglas* approach for its insistence on jamming facts into an inapt mold and for its unwieldy complexity which displaces reasoned determinations with the vagaries of befuddled jurors.[10] They accuse the high

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150 and 154.

[6] *McDonnell Douglas,* 411 U.S. at 802. The Court avoided the pitfall of attempting to catalogue all potentially legitimate reasons. *Id.* at 802-03.

[7] *Id.* at 804. The plaintiff may prove pretext by showing that the defendant treated people not in the protected class more favorably under similar circumstances. *Id.* Any prior workplace relationship between the parties is also relevant, as are defendant's minority employment policies and practices, which may be illuminated by statistics. *Id.* at 804-05.

[8] *See* Teresa Clark Postle, Comment, St. Mary's Honor Center v. Hicks: *Interpretation of Title VII Takes a Wrong Turn,* 96 W. VA. L. REV. 217, 225 (1993) (commenting that the *McDonnell Douglas* prima facie case "eliminate[s] the most common, legitimate reasons for an adverse employment decision"). *But see* Jody H. Odell, Comment, *Between Pretext Only and Pretext Plus: Understanding* St. Mary's Honor Center v. Hicks *and Its Application to Summary Judgment,* 69 NOTRE DAME L. REV. 1251, 1252 (1994) (citing commentators who fear that the decision prevents recovery for all plaintiffs except those with direct evidence of discrimination).

[9] Odell, *supra* note 8 at 1252 (commending "the *McDonnell Douglas* framework [for] provid[ing] courts and litigants with an ordered method of determining a crucial, yet often elusive, element of the plaintiff's case: the employer's discriminatory intent"); Matthew D. O'Leary, Note, St. Mary's v. Hicks: *The Supreme Court Restricts the Indirect Method of Proof in Title VII Claims,* 13 ST. LOUIS U. PUB. L. REV. 821, 824 (1994) (arguing that the "meticulous" burden-shifting approach was needed to aid civil rights plaintiffs in circumstantial cases); L. Steven Platt, *Demystifying the RIF Defense in Discrimination Cases,* 82 ILL. B.J. 209, 209 (1994) (praising *McDonnell Douglas* for its "common sense," but questioning its usefulness to reduction-in-force cases).

[10] Deborah C. Malamud, *The Last Minuet: Disparate Treatment After* Hicks, 93 MICH. L. REV. 2229, 2301 (1995) (advocating the abandonment of the *McDonnell Douglas* framework because "the *McDonnell Douglas-Burdine* structure can impoverish courts' understanding of the evidence and decrease the likelihood that courts will recognize the novel legal issues about the nature of discrimination that are so

Court of usurping the role of Congress by instituting a system of proof not rooted in Title VII and otherwise unknown to civil law.[11]

Time is the most strident detractor of *McDonnell Douglas*; this cryptic decision has caused endless confusion. Conflict among the circuits prompted the Supreme Court in *Texas Department of Community Affairs v. Burdine*[12] to clarify the defendant's burden of proof at stage two.[13] After *Burdine* explained that defendant's burden was merely to articulate a nondiscriminatory reason for the adverse employment action, disagreement arose concerning the plaintiff's burden of proof at stage three.[14] The issue was whether the employee was entitled to judgment by proving the employer's articulated justification was pretextual or whether additional proof of discriminatory intent was required. In *St. Mary's Honor Center v.*

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often presented by the evidence even in seemingly routine cases"). *See also* Hannah Arterian Furnish, *Formalistic Solutions to Complex Problems: The Supreme Court's Analysis of Individual Disparate Treatment Cases Under Title VII*, 6 INDUS. REL. L.J. 353, 372 (1984) ("*McDonnell Douglas* was a formalistic approach to a complex problem—demonstrating employer intent to discriminate. Formalistic solutions to complex issues seldom resolve them and are subject to misuse.").

[11] Rebuking the *McDonnell Douglas* Court for engaging in "an audacious and arbitrary exercise of power," one commentator has observed: "The Court's pronunciation of the prima facie case and the shift in burden to the employer stands starkly naked, without the armor of Congressional support, common-law authority, or reasoning." 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 COMMENT. 67, 70 (1993).

[12] 450 U.S. 248 (1981).

[13] *Compare* Texas Dep't of Comm. Affairs v. Burdine, 608 F.2d 563 (5th Cir. 1979), *vacated and remanded*, 450 U.S. 248 (1981); Vaughn v. Westinghouse Elec. Corp., 620 F.2d 655, 659 (8th Cir. 1980) (holding that the defendant bears the burden of persuading the factfinder that its alleged legitimate reason accounted for the contested employment decision), *vacated and remanded*, 450 U.S. 972 (1981), *aff'd* 702 F.2d 137 (1983), *cert. dismissed*, 464 U.S. 690 (1984) *and* Turner v. Texas Instruments, Inc., 555 F.2d 1251, 1255-56 (5th Cir. 1977) *with* Lieberman v. Gant, 630 F.2d 60, 65 (2d Cir. 1980); Ambush v. Montgomery Co. Gov't., 620 F.2d 1048, 1054 (4th Cir. 1980) *and* Loeb v. Textron, Inc., 600 F.2d 1003, 1011 (1st Cir. 1979) (holding that the defendant bears only the burden of production of a legitimate reason for the contested decision).

[14] *Compare* Tye v. Polaris Bd. of Ed., 811 F.2d 315, 320 (6th Cir. 1987) *and* King v. Palmer, 778 F.2d 878, 879 (D.C. Cir. 1985) (holding that a plaintiff who proves the employer's articulated reason pretextual is entitled to judgment) *with* EEOC v. Flasher Co., 986 F.2d 1312, 1321 (10th Cir. 1992) *and* Galbraith v. Northern Telecom, Inc., 944 F.2d 275, 283 (6th Cir. 1991) (holding that a plaintiff must prove discriminatory intent in addition to pretext), *cert. denied*, 503 U.S. 945.

Hicks,[15] the high Court again intervened, but rather than clarifying the law, it withdrew on tiptoe from *McDonnell Douglas*, cloaking its retreat in ambiguous language which has assured continued controversy.[16]

Though laudable, the Court's retreat was too halting. The complicated, three-stage, burden-shifting scheme shifts the burden of incomprehensibility to the jury.[17] Recognizing this

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[15] 113 S. Ct. 2742 (1993).

[16] Unlike *McDonnell Douglas* as clarified by *Burdine*, which held that a plaintiff prevails by discrediting the defendant's articulated justification for its conduct, *Hicks* held that the jury may, but is not obliged to, find for the plaintiff who proves pretext. *Hicks*, 113 S. Ct. at 2749. *See* Essary, *supra* note 3, at 387; Emanuel Margolis, *Human Rights Commentator*, 67 CONN. B.J. 429, 433 (1993); Donna G. Goldian, Comment, *New Reason to Lie: The End of Proving Discriminatory Intent by Proving Pretext Only After* St. Mary's Honor Center v. Hicks, 30 WILLAMETTE L. REV. 699, 706 (1994); Shannon R. Joseph, Note, *Employment Discrimination: Shouldering the Burden of Proof After* St. Mary's Honor Center v. Hicks, 29 WAKE FOREST L. REV. 963, 963 (1994); O'Leary, *supra* note 9 at 841; Postle, *supra* note 8, at 243-44; Raymond Nardo, St. Mary's Honor Center v. Hicks *Burst Bubble in Employment Discrimination*, N.Y.L.J., Aug. 9, 1993, at 1. *But see* Odell, *supra* note 8, at 1273 (suggesting that both *Hicks* and *McDonnell Douglas* follow the permissive standard which allows the jury, based on plaintiff's showing of pretext, to find discriminatory intent); *contra* Norma G. Whitis, Note, St. Mary's Honor Center v. Hicks: *The Title VII Shifting Burden Stays Put*, 25 LOY. U. CHI. L.J. 269, 292 (1994) (stating that *Hicks*, like *McDonnell Douglas*, permits, but does not compel, the factfinder to infer intentional discrimination upon rejection of the defendant's proffered reasons).

[17] A jury charge, approved by the Seventh Circuit in a racial discrimination case, demonstrates the complexity, if not the utter incomprehensibility, of a *McDonnell Douglas* instruction. The charge informs the jury:

> To prove intentional discrimination, plaintiff need not prove that his race was the sole motivation or the primary motivation for defendant's employment decision. Also, plaintiff is not required to produce direct evidence of unlawful intent. It is not easy to prove motive directly because there sometimes is no way to fathom or scrutinize the operations of the human mind. Intentional discrimination, however, if it exists, is a fact which you may infer from the existence of other facts.
>
> With respect to each of the plaintiff's claims, in deciding whether the defendant intentionally discriminated against the plaintiff because of his race, you should first consider whether plaintiff has established the following elements:
>
> First, that George Lynch is black;
>
> Second, that George Lynch was satisfactorily performing his job;
>
> Third, that he was denied certain job assignments and promotional opportunities;
>
> Fourth, the employer, Belden, chose white persons with similar qualifications or qualifications not equal to plaintiff's to perform the jobs; and
>
> Fifth, that George Lynch was damaged as alleged in his complaint.
>
> If you find that plaintiff has proved each of these elements, then

problem, some courts do not even instruct the jury on the *McDonnell Douglas* approach, fearing that a *McDonnell Douglas* charge may sabotage the factfinding process by leading jurors "to seize upon poorly understood legalisms."[18] The efficacy of a system is suspect when judges distrust the jury's ability to understand it.

Even when applied properly, *McDonnell Douglas* may defeat an otherwise meritorious civil rights claim. Elements of the *McDonnell Douglas* prima facie case conflict with the mandate of the Civil Rights Act of 1991[19] that plaintiffs establish a claim by proving that unlawful discrimination motivated an adverse employment decision.[20] Under the 1991 Act, if a black

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> plaintiff has proved a prima facie case. A prima facie case means that the plaintiff has sufficiently established his cause of action by a preponderance of the evidence and is entitled to a verdict in his favor unless the defendant rebuts such evidence.
>
> Thus, it then becomes your duty to determine the second issue, namely, did the defendant introduce evidence showing that there was a legitimate nondiscriminatory reason why it did not promote or transfer plaintiff. If your answer on the second issue is yes, that defendant has articulated or stated his legitimate nondiscriminatory reason for its failure to promote or transfer the plaintiff, then you should decide in favor of the defendant, unless the plaintiff has also proved by a preponderance of the evidence that the defendant's legitimate nondiscriminatory reason is a pretext, disguising an underlying intent to discriminate on the basis of race.

Lynch v. Belden and Co., 882 F.2d 262, 265-66 (7th Cir. 1989), *cert. denied*, 493 U.S. 1080 (1990). In light of *Hicks*, this charge might be modified to state that if plaintiff proves pretext, the jury may, but is not compelled to find for plaintiff. *See generally* 3 HON. EDWARD J. DEVITT, ET. AL., FEDERAL JURY PRACTICE AND INSTRUCTIONS, CIVIL § 104.04 (4th ed. 1987 & Supp. 1995) (discussing *McDonnell Douglas* jury instructions used among the circuits).

[18] Loeb v. Textron, 600 F.2d 1003, 1016 (1st Cir. 1979). In *Loeb*, the First Circuit said:

> *McDonnell Douglas* was not written as a prospective jury charge; to read its technical aspects to the . . . 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."

Id. Similarly, the Fourth Circuit in Mullen v. Princess Anne Volunteer Fire Co., 853 F.2d 1130, 1137 (4th Cir. 1988) criticized the district court for giving the jury the "overly complex" *McDonnell Douglas* charge, but held such error not reversible.

[19] The Civil Rights Act of 1991 is sometimes referred to as "the 1991 Act."

[20] 42 U.S.C. § 2000(e)-2(m) (Supp. 1992). See *infra* notes 257-265 and accompanying text for a discussion of the conflict between the 1991 Act and *McDonnell Douglas*.

applicant for a job proves that race contributed to his rejection, he is entitled to relief. Once he shows that race was a motivating factor, job qualifications become irrelevant. Yet, an element of a prima facie case under *McDonnell Douglas* is that the applicant was qualified for the job.[21]

McDonnell Douglas also disadvantages defendants by depriving them of flexibility in presenting their cases. Stage two requires defendants to articulate a legitimate reason for the challenged conduct. Defendants, however, might prefer instead to rely on other evidence, including statistics. *McDonnell Douglas* denies them this option.

Parts I and II of this Article discuss the advent of the burden-shifting framework in *McDonnell Douglas* and the refinement of that approach in *Burdine*.[22] Part III examines the three alternative approaches to step three developed by the circuit courts.[23] First, the pretext-only rule entitles the plaintiff to relief if he proves that the employer's articulated reasons were pretextual. Second, the permissive pretext-only rule permits, but does not compel, the factfinder to grant judgment to the plaintiff who proves pretext. Third, the pretext-plus rule requires the plaintiff to prove discriminatory intent in addition to pretext. This Article analyzes *Hicks* in Part IV and concludes that *Hicks*, despite its denials, departed from *McDonnell Douglas* and *Burdine* by replacing the pretext-only rule with the permissive standard.[24] The continuing judicial controversy, after *Hicks*, over whether the Court adopted the permissive standard or the pretext-plus rule is the subject of Part V.[25] In Part VI this Article explores each of the pretext rules and finds all unsatisfactory.[26]

Part VII of this Article criticizes the *McDonnell Douglas* scheme.[27] In addition to the failure of the three pretext rules, the Article emphasizes the constraints that the burden-shifting

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[21] The second element of a prima facie case is "that he [the plaintiff] applied and was qualified for a job for which the employer was seeking applicants." *McDonnell Douglas*, 411 U.S. at 802.

[22] *See infra* notes 29-57 and accompanying text.

[23] *See infra* notes 58-76 and accompanying text.

[24] *See infra* notes 77-128 and accompanying text.

[25] *See infra* notes 129-218 and accompanying text.

[26] *See infra* notes 219-30 and accompanying text.

[27] *See infra* notes 231-302 and accompanying text.

framework places on litigants and the confusion it foists on juries. It also points out the clash between the *McDonnell Douglas* approach as modified by *Hicks* and the Civil Rights Act of 1991. Viewing the claimed benefits of the *McDonnell Douglas* approach as largely illusory, this Article finds *McDonnell Douglas* superfluous in light of the motivating factor test of the Civil Rights Act of 1991. The Article concludes by calling for the abandonment of *McDonnell Douglas*.[23] In its place this Article urges that the courts apply to all disparate-treatment cases the practices customary in civil cases and replace the *McDonnell Douglas* scheme with the motivating-factor test of the 1991 Act, which merely requires a plaintiff alleging disparate treatment to prove that discriminatory intent played a part in the adverse employment decision.

I. *McDONNELL DOUGLAS CORP. V. GREEN:* THE INTRODUCTION OF THE BURDEN-SHIFTING FRAMEWORK

In *McDonnell Douglas Corp. v. Green*,[29] the Supreme Court fashioned a three-step scheme establishing the order and burdens of proof in employment discrimination cases.[30] Green had worked for McDonnell Douglas for eight years as a mechanic and laboratory technician until the company, in implementing a reduction-in-force plan, laid him off. A long-time civil rights activist, Green complained that his discharge was racially motivated and he participated in organized protests against the company. One such action, blocking the access road to the company's plant, resulted in his arrest. When the company later sought to hire mechanics, Green applied and the company rejected him. In response, he filed a civil rights action. McDonnell Douglas denied Green's accusations of discrimination, asserting that it had refused to re-employ him because he had engaged in illegal conduct directed against the company.[31]

The case ultimately made its way to the Supreme Court which remanded it for a retrial.[32] The Court noted that "the

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[23] *See infra* notes 303-304 and accompanying text.

[29] 411 U.S. 792 (1973).

[30] *Id.* at 802-04.

[31] *Id.* at 801.

[32] Green alleged two theories at the EEOC. First, he alleged that McDonnell

issue at the trial on remand is framed by those opposing factual contentions [i.e., Green's charge of discrimination and McDonnell Douglas's alleged legitimate reason for refusing to re-hire him]."[33] Rather than allowing the order and burdens of proof at retrial to conform to procedures customarily used in civil cases, the Court created a unique, three-step approach for disparate-treatment cases. First, plaintiff must establish a prima facie case, a burden which plaintiff may meet by showing:

> (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.[34]

Second, after the plaintiff has proven a prima facie case, the burden shifts to the defendant "to articulate some legitimate, nondiscriminatory reason for the employee's rejection."[35] Third, once the defendant meets its burden, the plaintiff must "be afforded a fair opportunity to show that [plaintiff's] stated reason for [defendant's] rejection was in fact a pretext."[36] Summarizing its holding, the court said: "On retrial respondent must be given a full and fair opportunity to demonstrate by competent evidence that the presumptively valid reasons for his rejection were in fact a coverup for a racially discriminatory decision."[37]

Douglas had violated § 704(a) of the Civil Rights Act of 1964 which forbids employment discrimination in retaliation for protests against discriminatory working conditions. Second, he alleged that the company had violated § 703(a)(1) of the 1964 Act which prohibits discrimination in any employment decision. *Id.* at 796. The EEOC found reasonable cause to believe that McDonnell Douglas had violated § 704(a) but made no such finding as to § 703(a)(1). *Id.* at 797. Green thereafter filed a complaint in district court which ultimately found for the company on the § 704 claim because the company had refused to rehire him for a legitimate reason, his illegal protest activity. In addition, the court dismissed the § 703(a)(1) claim based on the EEOC's failure to find probable cause. *Id.* The Court of Appeals for the Eighth Circuit reversed the dismissal, *id.*, a determination which the Supreme Court affirmed. *Id.* at 798. In remanding the case for retrial on the § 703(a)(1) claim, the Court established the three-step burden-shifting approach. *Id.* at 802-04.

[33] *Id.* at 801.

[34] *McDonnell Douglas*, 411 U.S. at 802. The Court added that the elements of a prima facie case may vary with differing factual contexts. *Id.*

[35] *Id.* at 802.

[36] *Id.*

[37] *Id.* at 805.

McDonnell Douglas spawned uncertainty throughout the federal judiciary. The second step of the *McDonnell Douglas* framework was a particular source of confusion. Despite the Court's pronouncement that the employer's burden of proof was merely to articulate a legitimate reason for the challenged action,[38] some courts erroneously required the defendant to prove the legitimacy of its conduct by a preponderance of evidence.[39] In *Texas Dept. of Community Affairs v. Burdine*,[40] the Supreme Court not only allayed this confusion but also supplemented *McDonnell Douglas* by articulating the rationale for its three-step approach. Unfortunately, *Burdine* engendered controversy as to the third step of *McDonnell Douglas*.[41]

II. *TEXAS DEPARTMENT OF COMMUNITY AFFAIRS V. BURDINE*: THE REFINEMENT OF *MCDONNELL DOUGLAS*

Burdine, a woman, worked for the Public Services Careers Division of the Texas Department of Community Affairs, first as an accounting clerk and later as a field services coordinator. Critical of the Division's inefficiencies, the Department threatened to abolish the Division unless it reorganized its staff and appointed a project director. The directorship went to a man, and Burdine, who had applied for the position, was fired. Alleging gender discrimination, Burdine sued the Department for failing to promote her and for firing her.[42]

After a bench trial, the district court found that the Department had refused to promote Burdine and had fired her for legitimate business reasons rather than for gender-bias.[43] The Fifth Circuit reversed as to the firing, holding that the Department, having failed to substantiate its reasons by a preponder-

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[38] Some found the Court's articulation of the defendant's burden at stage-two unclear. *See* Arterian Furnish, *supra* note 10, at 357 (accusing the Court of lacking clarity when it said that the employer's explanation "suffice[d] to discharge [its] burden of proof").

[39] *E.g.*, Vaughn v. Westinghouse Elec. Corp., 620 F.2d 655 (8th Cir. 1980), *vacated and remanded*, 450 U.S. 972 (1981); Whiting v. Jackson St. Univ., 616 F.2d 116 (5th Cir. 1980).

[40] 450 U.S. 248 (1981).

[41] *See infra* notes 42-57 and accompanying text.

[42] The Department rehired Burdine and assigned her to another division where she was paid at the same rate as the project director. *Burdine*, 450 U.S. at 251.

[43] *Id.* at 251.

ance of evidence, had not rebutted Burdine's prima facie case.[44]

Holding that the circuit court had misconstrued the defendant's burden of proof,[45] the Supreme Court explained why it had established the *McDonnell Douglas* burden-shifting approach[46] and how the approach was supposed to function. It began by noting that *McDonnell Douglas* "eliminates the most common nondiscriminatory reasons for the plaintiff's rejection."[47] A prima facie case creates a presumption of discrimination, which, if not rebutted, results in judgment for plaintiff.[48] To rebut the presumption, the defendant does not carry the burden of persuasion; it must merely produce admissible evidence that it acted for a legitimate reason.[49] Once the defendant rebuts the presumption, "the factual inquiry proceeds

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[44] *Id.* at 252. The Fifth Circuit affirmed the district court's determination that the firing was not discriminatory. It held the lower court's "implicit evidentiary finding" that the man hired as Project Director was better qualified than Burdine not clearly erroneous. *Id.*

[45] *Id.* at 256-57. The Supreme Court assigned error also to the Fifth's Circuit's requirement that the defendant prove the person hired or promoted was more qualified than plaintiff. It noted that Title VII does not demand that employers afford minorities or women preferential treatment; nor does it seek to trample on "traditional management prerogatives." *Id.* at 259 (citing Steelworkers v. Weber, 443 U.S. 193, 205-06 (1979)). The Fifth Circuit would have compelled employers to hire minorities and women as qualified as white male applicants, a preference inconsistent with Title VII. *Id. See also* McKennon v. Nashville Banner Publishing Co., 115 S. Ct. 879, 886 (1995) (noting that "[t]he ADEA, like Title VII, is not a general regulation of the workplace but a law which prohibits discrimination"); *see generally* Kenneth R. Davis, *The After-Acquired Evidence Doctrine: A Dubious Defense in Employment Discrimination Cases*, 22 PEPP. L. REV. 365, 403 (1995) (discussing how the Supreme Court in *McKennon* balanced employer prerogatives with the policy to eradicate discrimination).

[46] *McDonnell Douglas* failed to explain why it established the three-step approach. The first explanation of this approach came in Furnco Construction Corp. v. Waters, 438 U.S. 567, 577 (1978) wherein the Court said:

> The *McDonnell Douglas* method is "a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination. . . . [W]e know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting. Thus, when all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, who [sic] we generally assume acts only with *some* reason, based his decision on an impermissible consideration such as race."

[47] *Burdine*, 450 U.S. at 254.

[48] *Id.*

[49] *Id.* at 255.

to a new level of specificity."[50] By meeting its burden of production, the defendant "frame[s] the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext."[51] The plaintiff's burden of proving pretext "merges with the ultimate burden of persuad[ing] the court that she has been the victim of intentional discrimination."[52] The Court then explained how a plaintiff may satisfy his or her ultimate burden of proof: "She may succeed in this 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."[53]

The Court responded to the criticism that the meager burden of production put on the defendant might unduly hinder the plaintiff. It noted that the defendant's alleged legitimate reason must be clear and specific and that, regardless of the formal burden of proof, the defendant will be inclined, as a tactical matter, to endeavor to persuade the trier of fact that its explanation is bona fide.[54] Adding that access to the EEOC's investigatory files will aid the plaintiff,[55] the Court concluded:

> Given these factors, we are unpersuaded that the plaintiff will find it particularly difficult to prove that a proffered explanation lacking a factual basis is a pretext. We remain confident that the *McDonnell Douglas* framework permits the plaintiff meriting relief to demonstrate intentional discrimination.[56]

Burdine succeeded in clarifying the defendant's burden of proof at the second stage of the *McDonnell Douglas* format. However, it muddled what the plaintiff must show at stage three. Floundering in *Burdine's* ambiguity, courts extracted three meanings.[57]

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[50] *Id.*

[51] *Id.* at 255-56.

[52] *Burdine*, 450 U.S. at 256.

[53] *Id.* at 256. *See also* U.S. Postal Serv. v. Aikens, 460 U.S. 711, 717 (1983) (holding that indirect evidence of discrimination may suffice to meet plaintiff's burden to prove pretext for discrimination).

[54] *Burdine*, 450 U.S. at 258.

[55] *Id.*

[56] *Id.*

[57] *See infra* notes 58-76 and accompanying text.

III. THE THREE APPROACHES TO PRETEXT

A. *Pretext Plus*

Some courts interpreted *Burdine* to hold that proving pretext is not enough for the plaintiff to prevail.[58] Under this "pretext-plus" position, even if the plaintiff disproves the defendant's contention that the adverse action occurred because of the articulated legitimate reason, the court will grant the plaintiff judgment only if it provides additional evidence of discrimination.[59]

The least favorable to plaintiffs of the three interpretations of *Burdine*, the pretext-plus position does not follow reasonably from the Supreme Court's instruction that a plaintiff may prevail at step three either by offering direct evidence of discrimination or by proving pretext.[60] *Burdine* at least permits (and probably compels) the trier of fact to find for the plaintiff who proves pretext but does not furnish additional evidence of discrimination. This inconsistency with *Burdine*[61] and the formidable evidentiary burden that pretext-plus imposes on plaintiffs have led many to criticize this rule.[62]

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[58] *See, e.g.*, EEOC v. Flasher Co., 986 F.2d 1312, 1321 (10th Cir. 1992) (citing Galbraith v. Northern Telecom, Inc., 944 F.2d 275, 279 (6th Cir. 1991) approvingly and noting that "even a finding that the reason given for the discipline was pretextual, does not compel such a conclusion, unless it is shown to be a pretext *for discrimination against a protected class*"); *Galbraith*, 944 F.2d at 283 (stating that "we are faced with a situation in which proving that an employer's proffered reason for discharging an employee is a pretext does not establish that it is a pretext for racial discrimination"); Lopez v. Metropolitan Life Ins. Co., 930 F.2d 157, 161 (2d Cir.) (stating that "[i]t is not enough for the plaintiff to show that the articulated reasons were not the true reasons defendant's actions") (quoting *Burdine*, 450 U.S. at 256), *cert. denied* 502 U.S. 880 (1991); Holder v. City of Raleigh, 867 F.2d 823, 827 (4th Cir. 1989) (concluding that "the magistrate's finding that the defendants' proffered reasons may have been themselves pretextual [does not] prove plaintiff's case of racial discrimination"); Clark v. Huntsville Bd. of Ed., 717 F.2d 525, 529 (11th Cir. 1983) (holding that "a simple finding that the defendant did not truly rely on its proffered reason, without a further finding that the defendant relied instead on race, will not suffice to establish Title VII liability").

[59] *See supra* note 58.

[60] *Burdine*, 450 U.S. at 256.

[61] *See* Postle, *supra* note 8, at 227-28.

[62] One critic of the pretext plus rule has argued: "Not only does the rule unduly handicap employees by requiring 'plus' evidence, but application of the rule to reject most of the common forms of 'plus' evidence that plaintiffs produce further

B. *Permissive Pretext Only*

A few courts interpreted *Burdine* to mean that, if the plaintiff establishes that the defendant's alleged legitimate reason was a pretext, the trier of fact is permitted, but is not compelled, to render judgment for the plaintiff.[63] Thus, if the plaintiff at stage three establishes that the defendant's alleged legitimate reason did not motivate defendant but the plaintiff produces no further evidence of discrimination, the trier of fact may, in its discretion, find either for the plaintiff or the defendant.

More favorable to the plaintiff than the pretext-plus position, this "permissive pretext-only" standard allows, but does not require, a finding of discrimination based solely on a plaintiff's showing of pretext. Some favor this rule because it "represents a reasonable balance of the interests of employee and employer."[64]

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hampers" plaintiffs' cases. Catherine J. Lanctot, *The Defendant Lies and the Plaintiff Loses: The Fallacy of the "Pretext-Plus" Rule in Employment Discrimination Cases*, 43 HASTINGS L.J. 57, 140-41 (1991). *See also* Essary, *supra* note 3, at 405 (arguing that the pretext-plus rule has proven "almost insurmountable" for most plaintiffs, even when they present credible evidence from which the trier of fact could infer discrimination).

[63] *See, e.g.*, Samuels v. Raytheon Corp., 934 F.2d 388, 392 (1st Cir. 1991) (holding that "[e]ven assuming the original prima facie case plus the evidence of pretext suffices to raise a reasonable inference of discrimination, this does not automatically entitle the plaintiff to judgment"); Benzies v. Illinois Dep't of Mental Health and Developmental Disabilities, 810 F.2d 146, 148 (7th Cir. 1987) (noting that "[a] demonstration that the employer has offered a spurious explanation is strong evidence of discriminatory intent, but it does not compel such an inference as a matter of law"), *cert. denied*, 483 U.S. 1006 (1987).

[64] Robert C. Cadle, *Burdens of Proof: Presumption and Pretext in Disparate Treatment Employment Discrimination Cases*, 78 MASS. L. REV. 122, 131 (1993) (citation omitted). *See also* Richard A. Samp, *Intent Is Needed for Workplace Bias*, NAT'L L.J., June 14, 1993, at 15 (agreeing with the permissive standard because false explanations do not always signal discrimination, such as where the employer fires a worker in violation of a labor agreement and conceals this reason at a discrimination trial); Whitis, *supra* note 16, at 298 (concluding that "the *St. Mary's* majority [which adopted the permissive standard] both correctly interpreted existing precedent and properly followed the Federal Rule of Evidence [Rule 301] that governs presumptions in civil proceedings"). *But see* Margolis, *supra* note 16, at 433 (criticizing the permissive rule as "unfair at worst and extremely cumbersome at best" and predicting that the implementation of the permissive rule will cause "longer trials and more pre-trial discovery" and "increased expense and delay").

C. *Pretext Only*

The third interpretation of *Burdine*, predominant among courts that have decided the issue, is known as the "pretext-only" position.[65] This view holds that, if a plaintiff proves that the defendant's alleged legitimate reason is a pretext, the plaintiff is entitled to judgment. To prevail, the plaintiff need establish only that the alleged legitimate reason did not motivate the defendant. No additional evidence of discrimination is required. Of the three positions, pretext-only is most favorable to plaintiffs. This alternative has evoked substantial support from commentators[66] who stress that "pretext only" follows from the purpose of the three-stage *McDonnell Douglas* framework, which is to narrow the issues.[67] They also argue that an employer caught in a pretext is probably hiding discrimination.[68]

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[65] Caban-Wheeler v. Elsea, 904 F.2d 1549, 1554 (11th Cir. 1990) (holding that, by proving pretext, "the plaintiff satisfies the required ultimate burden of demonstrating . . . intentional racial discrimination") (citations omitted); Tye v. Board of Educ., 811 F.2d 315, 317 (6th Cir. 1987) (citations omitted) (explaining that "[i]f the defendant carries this burden [at stage two], then the plaintiff must show that the defendant's stated reason was pretextual"), *cert. denied*, 484 U.S. 924 (1987); King v. Palmer, 778 F.2d 878, 879 (D.C. Cir. 1985) (ruling that when the plaintiff "discredits the defendants' purported explanation, she has carried her ultimate burden"); Thornbrough v. Columbus and Greenville R.R., 760 F.2d 633, 646 (5th Cir. 1985) (citations omitted) (reading *Burdine* to hold that at stage three "the burden reverts to the plaintiff to prove that the employer's reasons are pretextual"); Bibbs v. Block, 778 F.2d 1318, 1321 (8th Cir. 1985) (stating in dictum that "[i]f the plaintiff shows the defendant's proffered reason to be a pretext for race, the case is over"); Duffy v. Wheeling Pittsburgh Steel Corp., 738 F.2d 1393, 1396 (3d Cir. 1984) (holding that "a showing that a proffered justification is pretextual is itself equivalent to a finding that the employer intentionally discriminated"), *cert. denied*, 469 U.S. 1087 (1984).

[66] *See, e.g.*, Postle, *supra* note 8, at 244 (refuting the argument that by requiring the plaintiff to disprove the employer's articulated reason, the burden of persuasion is shifted to the defendant in violation of Federal Rule of Evidence 301).

[67] *See* Goldian, *supra* note 16, at 714-15 (arguing that the third stage of *McDonnell Douglas*, which supposedly limits the issues, is meaningless unless the plaintiff prevails by proving pretext); O'Leary, *supra* note 9, at 844-46 (supporting the pretext only rule because it narrows the issues at stage three allowing the victim of subtle discrimination to prevail).

[68] Robert Brookins, Hicks, *Lies, and Ideology: The Wages of Sin Is Now Exculpation*, 28 CREIGHTON L. REV. 939, 989 (1995) (arguing that if the employer's justification for the challenged action is shown at trial to be false, the factfinder should infer discrimination); Odell, *supra* note 8, at 1258-59 (asserting that dis-

D. Burdine *Adopts Pretext Only*

Although *Burdine* is not free from ambiguity, the opinion points most convincingly to the pretext-only rule. Once the defendant articulates a legitimate reason for its conduct, the Court tells us that the factual inquiry rises to "a new level of specificity,"[69] suggesting that the issue narrows to whether the plaintiff can prove pretext. Reinforcing this interpretation, the *Burdine* Court comments that, in meeting its burden of production at stage two, the defendant "frame[s] the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext."[70] After noting that the plaintiff's burden at stage three is to prove that the defendant's articulated, legitimate reasons were a "pretext for discrimination," the Court emphasizes that it is the plaintiff's ultimate burden to prove intentional discrimination and that the *McDonnell Douglas* burden-shifting framework "bring[s] the litigants and the court expeditiously and fairly to this ultimate question."[71] The Court seems to be saying that, at stage three of *McDonnell Douglas*, proving pretext is inseparable from proving discrimination. It underscores this unity by stating that the burden of proving pretext "merges with the ultimate burden of persuading the court that [the plaintiff] has been the victim of intentional discrimination."[72]

The quoted passages suggest that the Court intended to establish the pretext-only rule.[73] Unfortunately, the Court injected ambiguity into its opinion when it declared that a plaintiff *may* succeed *either* by direct evidence of discrimination *or* by proving pretext.[74] One may construe this statement to support the permissive pretext-only position, because the statement suggests that the trier of fact *may* but is not *com-*

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crediting the employer's articulated reason strongly implies discrimination).

[69] *Burdine*, 450 U.S. at 255.

[70] *Id.* at 255-56.

[71] *Id.* at 253.

[72] *Id.* at 256.

[73] *See* Lanctot, *supra* note 62, at 119 (arguing that the "merger" language in *Burdine* implies the Court's adoption of the pretext-only rule).

[74] *See Burdine*, 450 U.S. at 256.

pelled to hold for the plaintiff who proves pretext.[75] One may, however, read the statement to support the pretext-only position; the statement may mean that a plaintiff who proves pretext is entitled to judgment and that a plaintiff who cannot prove pretext must rely on direct evidence of discrimination.[76] In light of the entire opinion, the pretext-only interpretation appears correct.

IV. *ST. MARY'S HONOR CENTER V. HICKS*:[77] AN ATTEMPT TO END THE CONFUSION

Because of conflicting interpretations of *McDonnell Douglas* and *Burdine*, federal civil rights law might have vindicated a plaintiff's claim in one circuit while denying an essentially identical claim in another. To achieve uniformity, the Supreme Court, in *St. Mary's Honor Center v. Hicks*,[78] sought to clarify its prior decisions.

A. *The Facts and Procedural History*

St. Mary's Honor Center, a half-way house, employed Hicks, a black man, as a correctional officer and later promoted him to shift commander. After the installation of a new supervisory team, Hicks, who had a satisfactory employment record, became the subject of escalating disciplinary action which culminated in his dismissal. Alleging racial discrimination, Hicks commenced a civil rights action.[79] Although Hicks proved at trial that St. Mary's articulated reasons for firing him were pretextual, the district court, following the pretext-plus position, granted judgment to St. Mary's because Hicks had failed to satisfy his burden that the firing was racially

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[75] *See* Schuman, *supra* note 11, at 80.

[76] Justice Scalia, writing for the majority, conceded that "[w]e must agree with the dissent on this one: The words bear no other meaning but that the falsity of the employer's explanation is *alone enough* to compel judgment for the plaintiff." St. Mary's Honor Ctr. v. Hicks, 113 S. Ct. 2742, 2552 (1993).

[77] 113 S. Ct. 2742 (1993).

[78] 113 S. Ct. 2742 (1993).

[79] *Id.* at 2746. Hicks alleged employment discrimination in violation of both § 703(a)(1) of Title VII and 42 U.S.C. § 1983 which forbids discrimination under color of state law. *Id.*

motivated.[80] The district court concluded that St. Mary's might have discharged Hicks out of personal rather than racial animus.[81]

The Eighth Circuit reversed, holding that, because Hicks had proven pretext, he was entitled to judgment as a matter of law.[82] Favoring the pretext-only position, it reasoned that, once Hicks had discredited St. Mary's alleged justifications for firing him, St. Mary's should have been in no better position than if it had offered no explanation at all.[83] Since the failure to rebut the presumption of discrimination by articulating a "legitimate" reason results in judgment for plaintiff, the court concluded that the same result should follow when the plaintiff disproves the alleged legitimate reason.[84]

B. *The Majority Opinion*

Writing for a five-justice majority, Justice Scalia labored to harmonize the *Hicks* opinion with *Burdine*, but his efforts were unavailing. Despite his denials, he led the Court in a new direction.[85]

1. The Holding

The majority disagreed with the circuit court[86] and adopted the permissive pretext-only approach.[87] The Court held:

> The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of a prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons, will *permit* the trier of fact to infer the ultimate fact of intentional discrimination.... But the Court of Appeals [erred in] holding that rejection of the defendant's proffered reasons

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[80] *Id.* at 2748.
[81] *Id.*
[82] *Id.*
[83] *Hicks*, 113 S. Ct. at 2748.
[84] *See id.* at 2748.
[85] *See* Margolis, *supra* note 16, at 433-34 (arguing that *Hicks* is incompatible with *McDonnell Douglas* which established the pretext only rule); *see also* O'Leary, *supra* note 9, at 842.
[86] *Hicks*, 113 S. Ct. at 2746.
[87] *See id.* at 2749.

compels judgment for the plaintiff.[88]

To support this approach, the Court proposed a hypothetical which, in its view, demonstrated the folly of the pretext-only standard. In the hypothetical, a company hires a disproportionately *higher* percentage of blacks than that occurring in the relevant labor market. The company's black hiring officer rejects a minimally qualified black applicant, who sues under Title VII. Before the court hears the suit, the company fires the hiring officer, who, now antagonistic to the company, refuses to cooperate with its efforts to establish the legitimate reason for not hiring the black applicant. Unassisted by the discharged hiring officer, the company attempts, perhaps unsuccessfully, to piece together the reason for the hiring officer's rejection of the applicant. Under the pretext-only approach, if the jury finds the company's alleged reason for not hiring the plaintiff unpersuasive, the jury must find for the plaintiff even if it does not believe that the company was guilty of racial discrimination.[89] Citing this hypothetical, the Court concluded that the pretext-only approach may compel the jury to find for a plaintiff, despite evidence convincing the jury that the defendant did not discriminate.[90]

2. The Dissection of *Burdine*

Asserting that it was following *Burdine*, the *Hicks* Court analyzed *Burdine* sentence by sentence.[91] The Court pointed out that *Burdine* requires the plaintiff to prove at stage three that the defendant's alleged legitimate reasons were a "pretext for discrimination."[92] The plaintiff must show "*both* that the reason was false, *and* that discrimination was the real reason."[93] According to the majority, later allusions to "pretext"

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[88] *Id.*

[89] *Id.* at 2750-51.

[90] *Id.* at 2751.

[91] *See Hicks*, 113 S. Ct. at 2751-53. It performed this task "grudgingly," objecting to dissecting the sentences in decisions as if they were clauses in statutes. Nevertheless, the Court felt compelled to scrutinize the language of *Burdine* to rebut Justice Souter's dissenting opinion in which Justices White, Blackmun and Stevens joined. *Id.* at 2751.

[92] *Id.* at 2752 (citing *McDonnell Douglas*, 450 U.S. at 253).

[93] *Id.*

in *Burdine* refer to the previously described "pretext for discrimination."[94] However, Justice Souter, writing for a four-justice dissent, observed that the majority's pronouncement that a plaintiff must prove pretext and discrimination—an endorsement of the pretext-plus rule—contradicts the majority's statement that the jury is permitted, but is not compelled, to hold for the plaintiff who shows pretext—an endorsement of the permissive pretext-only rule.[95]

Although the majority opinion suffers from murky language,[96] it is possible to reconcile the apparently conflicting statements. The majority adopted the permissive pretext-only rule in unequivocal language. Its statement that the plaintiff must prove both pretext and discrimination does not deny the possibility that proving pretext may also prove discrimination. If the finder of fact determines that plaintiff's proof of pretext simultaneously proves discriminatory intent, the plaintiff will win. If those facts, standing alone, do not satisfy the factfinder that the defendant discriminated, the plaintiff will have to submit additional proof to prevail.

Continuing with its "dissection" of *Burdine*, the *Hicks* majority interpreted *Burdine's* statement that at stage three "the factual inquiry proceeds to a new level of specificity"[97] to mean that a case at that juncture turns to proofs and rebuttals

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[94] *Id.*

[95] *Id.* at 2762.

[96] *See* Cadle, *supra* note 64, at 130 (agreeing with the dissent that the "majority gives 'conflicting signals' about the scope of its holding" (citing *Hicks*, 113 S. Ct. at 2762 (Souter, J., dissenting))); *see also* Odell, *supra* note 8, at 1267. Most writers correctly construe *Hicks* to adopt the permissive standard. *See, e.g.*, Joe Keith Windle, Comment, St. Mary's Honor Center v. Hicks: *Is the Supreme Court's Definition of Pretext Beneficial or Detrimental to Title VII Plaintiffs?*, 18 AM. J. TRIAL ADVOC. 213, 224-27 (1994) (analyzing cases differing on whether the defendant is entitled to summary judgment if the plaintiff does not offer proof of discrimination in addition to evidence of pretext, and concluding that summary judgment should not be awarded under such circumstances); *see also* Joseph, *supra* note 16, at 990-91. Some, however, extract the pretext-plus standard from *Hicks*. *See, e.g.*, Patrick M. Edwards, Note, *Civil Rights—Title VII Employment Discrimination—Proof of Employer Pretext Does Not Entitle Employee to a Decision Without Further Proof of Discrimination*. St. Mary's Honor Center v. Hicks, 113 S. Ct. 2742 (1993), 71 U. DET. MERCY L. REV. 693, 708 (1994) (lamenting that "the jury or judge will normally be left without direct evidence of discrimination, and under direction from *Hicks*, must rule in favor of the defendant").

[97] *Hicks*, 113 S. Ct. at 2752 (citing *Burdine*, 450 U.S. at 255).

of discriminatory motivation.[98] The dissent, however, interpreted this language in *Burdine* to mean that the factual inquiry at stage three reduces to whether the defendant's alleged reasons were pretextual.[99] The dissent has the more persuasive view because the description of stage three as requiring "a new level of specificity" implies a narrowing rather than a broadening of focus.

The majority then considered the next sentence in *Burdine*, which says, "Placing the burden of production on the defendant thus serves . . . to frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext."[100] Undaunted by this problematic language, the majority asserted feebly that "the requirement that the employer 'clearly set forth' its reasons, gives the plaintiff a 'full and fair' rebuttal opportunity."[101] Consistent in its misreading of *Burdine*, the *Hicks* majority posited that "proving the employer's reason false becomes part of (and often considerably assists) the greater enterprise of proving that the real reason was intentional discrimination."[102]

Despite the majority's brave denials, the above-quoted sentence from *Burdine* demonstrates that under that case the issues of pretext and discriminatory intent are inseparable. As the dissent recognized, *Burdine's* statement that plaintiff's burden of proving pretext "merges" with the burden of proving intentional discrimination supports this view.[103]

As if exhausted by its energetic reasoning, the *Hicks* majority concluded its analysis of *Burdine* with the unexpected concession that it was unable to explain the passage in *Burdine* asserting that the plaintiff may prevail "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."[104] Characterizing this language as dictum, the majority dismissed

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[98] *Id.*
[99] *Id.* at 2759.
[100] *Id.* at 2752 (citing *Burdine*, 450 U.S. at 255-56).
[101] *Id.* (citing *Burdine*, 450 U.S. at 255).
[102] *Hicks*, 113 S. Ct. at 2752.
[103] *Id.* at 2760 (Souter, J., dissenting).
[104] *Id.* at 2752 (citing *Burdine*, 450 U.S. at 256).

it as contrary to the letter and spirit of *Burdine* and *McDonnell Douglas*, and argued that, despite this concession, its view harmonized more perfectly with *Burdine* than did the dissent's view.[105] Ironically, *Burdine's* ambiguous language should not have troubled the majority. The quotation is compatible with the permissive pretext-only rule, the approach which the majority apparently adopted, for the language may fairly be interpreted to mean that the factfinder may, but is not compelled to, find for the plaintiff who proves pretext.[106]

3. Practical Consequences

When the Court turned to practical consequences of its decision, it criticized the dissent's observation that an alleged legitimate reason exposed as a pretext is necessarily a lie.[107] The Court explained that a corporation defending against charges of discrimination may rely on the explanation of a relatively low-level employee. Thus, one should not attribute dishonesty to the employer merely because the jury disbelieves the explanation.[108] Even when the employer lies, the Court would not require a finding for the employee, since an employer may lie without having discriminated.[109]

Addressing the argument that articulating a lie should not put the employer in a position better than the one in which it would have been had it remained silent, the Court cited other instances where rebutting a presumption, even deceitfully,

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[105] *Id.* at 2752-53. Claiming to show conclusive support for its position, the majority quoted *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 714 (1983), which says, "the ultimate question [is] discrimination *vel non*." At stage three, "[t]he District Court was . . . in a position to decide . . . whether the defendant discriminated against the plaintiff." *Id.* at 715. These ambiguous quotes from *Aikens* did not sway the dissent. *Hicks*, 113 S. Ct. at 2765.

[106] *See* Schuman, *supra* note 11, at 80 (arguing that Justice Scalia's "surrender" on this point was "mistaken and unnecessary," because the quoted language says that the plaintiff *may* rather than *must* prevail by establishing pretext).

[107] *Hicks*, 113 S. Ct. at 2754.

[108] *Id.*

[109] *Id.* The Court noted that lying, either by the plaintiff or defendant, at any other stage of the *McDonnell Douglas* framework does not automatically compel an adverse judgment. Therefore, the Court concluded, it is inconsistent to require judgment against an employer who utters this particular kind of lie. *Id.* at 2754-55.

enhances a litigant's position.[110] For example, untruthfully denying the material allegations of a complaint avoids default.[111] Accordingly, the Court asserted that a dishonest employer should not be punished with an adverse judgment where the record does not support a finding of discrimination.[112] Rule 11 sanctions appropriately penalize the perjurer.[113]

C. *The Dissenting Opinion*

Justice Souter wrote the dissenting opinion, asserting that the *McDonnell Douglas* approach provides a fair method of resolving the issue[114] of discrimination given that most civil rights violators do not announce their discriminatory intent.[115] Souter charged the majority with shackling the plaintiff with the "amorphous requirement of disproving all possible non-discriminatory reasons that a factfinder might find lurking in the record."[116] Allowing the jury to search the record for justifications of the employer's conduct subverts the purpose of the second stage of *McDonnell Douglas*, which is to limit the inquiry of why the employer engaged in the challenged conduct.[117] Justice Souter rightly accused the majority of transforming the employer's burden to articulate a legitimate reason for its conduct into a "useless ritual."[118]

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[110] *Id.* at 2755.

[111] *Id.* (citing FED. R. CIV. P. 55(a)). Similarly, an affidavit containing a lie may avoid summary judgment. *Id.* (citing FED. R. CIV. P. 56(e)).

[112] *Hicks*, 113 S. Ct. at 2755-56.

[113] *Id.* at 2755.

[114] *Id.* at 2758. Justices White, Blackmun, and Stevens joined in the dissent.

[115] *Id.* at 2762. *See also* United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 716 (1983).

[116] *Id.* at 2762 (Souter, J., dissenting).

[117] *See Hicks*, 113 S. Ct. at 2759-61.

[118] *Id.* at 2761. Essary argues that *Hicks* has emasculated *McDonnell Douglas* by negating the issue-narrowing function of stage two. In her view, all the procedural machinations of *McDonnell Douglas* lead nowhere if, in the final analysis, the factfinder applies the ordinary civil model to resolve the ultimate issue. She therefore questions the perpetuation of the *McDonnell Douglas* framework. Essary, *supra* note 3, at 423. Essary is right. The Court should abandon *McDonnell Douglas* not simply because *Hicks* has undermined the burden-shifting framework but more significantly because the motivating factor test of the 1991 Act is the superior and legally appropriate standard. *See infra* notes 232-93 and accompanying text.

Responding to the majority's argument that, as in any civil case, the factfinder should be able to consider the entire trial record regardless of what reasons were "officially" articulated,[119] Justice Souter rejoined that the very means of articulating a legitimate reason is through the introduction of "testimony or other admissible evidence."[120] This exchange suggests that the difference between the majority and dissent on this point is merely semantic. Both would allow the factfinder to consider any evidence in the record, regardless of what reasons were "formally" articulated.[121]

Justice Souter argued also that, as a matter of common sense, an employer relying on a pretext most likely discriminated.[122] An employer with a legitimate explanation for its actions will probably assert it. Although conceding that an employer might conceal a nondiscriminatory reason that would prove embarrassing, Justice Souter asserted that an employer must bear the consequences of its deceit.[123]

Reproaching the majority for saddling plaintiffs with an unfair burden of proof, Justice Souter foresaw that the *Hicks* holding would frustrate the policies of Title VII.[124] Confronted with the specter of "unarticulated" reasons "lurking in the record,"[125] plaintiffs with worthy claims might go down to defeat or not sue at all.[126] Justice Souter predicted also that the majority rule[127] would cause longer trials, more pretrial dis-

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[119] *Hicks*, 113 S. Ct. at 2755.

[120] *Id.* at 2759 n.3.

[121] Most writers, however, see a significant difference between the two positions, arguing that the "lurking" problem will haunt plaintiffs. *See* Victoria A. Cundiff & Ann E. Chaitovitz, St. Mary's Honor Center v. Hicks: *Lots of Sound and Fury, but What Does It Signify?*, 19 EMP. REL. L.J., 143, 159 (1993-94) (deploring the rule which encourages the jury to "keep digging" for legitimate reasons to justify the employer's conduct thereby rewarding employers who have "given false evidence"); Essary, *supra* note 3, at 417 (faulting the majority for requiring the plaintiff to "disprove all other reasons suggested, no matter how vaguely, in the record" (citing *Hicks*, 113 S. Ct. at 2756)); O'Leary, *supra* note 9, at 846 (stating that under *Hicks* a plaintiff may lose unfairly "if the court scans the record and comes up with a legitimate, yet unarticulated, reason"); Postle, *supra* note 8, at 243 (arguing that under *Hicks* a defendant can avoid liability based on "wholly unarticulated reasons").

[122] *Hicks*, 113 S. Ct. at 2762-63.

[123] *Id.* at 2763.

[124] *Id.*

[125] *Id.* at 2762.

[126] *Id.* at 2763.

[127] The dissent complained also that the majority's holding is ambiguous. Parts

covery and increased expense and delay.[128]

D. *The Fundamental Question*

The possibility of explanations "lurking in the record" arises in all civil suits. Generally, parties to civil cases submit their evidence and the jury sifts through the record to decide the controversy. The burden-shifting machinations of the *McDonnell Douglas* approach depart from customary practice. While the dissenters correctly interpreted *McDonnell Douglas* and *Burdine*, the majority arrived at a more defensible conclusion because it granted to juries more latitude in weighing the evidence. The permissive standard adopted by the majority, however, does not guide the jury in determining when pretext alone is sufficient to prove discriminatory intent. The failings of both rules raise the more fundamental question of whether the *McDonnell Douglas* approach should be retained in any form.

V. THE AFTERMATH OF *HICKS*

As the dissent warned, the ambiguity in *Hicks* has spurred continued division among federal courts.[129] Though most read

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of the majority opinion seem to adopt the permissive pretext-only approach, while other parts seem to adopt the pretext-plus approach. *Hicks*, 113 S. Ct. at 2762. The dissent's confusion notwithstanding, a fair reading of the majority opinion favors the view that it adopted the permissive pretext-plus approach.

[128] *Id.* at 2762. Some agree with the dissent that *Hicks* will cause plaintiffs, wary of late-surfacing unarticulated reasons, to intensify their approach to pre-trial disclosure. *See, e.g.*, Joseph, *supra* note 16, at 991; Margolis, *supra* note 16, at 435. *But see* Essary, *supra* note 3, at 425 (arguing that *Hicks* will not change discovery practice in discrimination cases because, in any event, most plaintiffs conduct extensive discovery).

[129] *See infra* notes 130-218 and accompanying text. In response to *Hicks*, Senator Howard Metzenbaum sponsored the Civil Rights Standards Restoration Act, which would have reestablished the pretext-only rule. S. 1776, 103rd Cong., 1st Sess. (1993). Section 4(a) provides in part:

> Standards.—In a case or proceeding brought under federal law in which a complaining party meets its burden of proving a prima facie case of unlawful intentional discrimination and the respondent meets its burden of clearly and specifically articulating a legitimate, nondiscriminatory explanation for the conduct at issue through the introduction of admissible evidence, unlawful intentional discrimination shall be established where the complaining party persuades a trier of fact, by a preponder-

Hicks to establish the permissive pretext-only approach,[130] some courts require the plaintiff to meet a more demanding standard similar to pretext-plus.[131] Others expressly interpret

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ance of the evidence, that—(1) a discriminatory reason more likely motivated the respondent; or (2) the respondent's proffered explanation is unworthy of credence.

139 CONG. REC. S. 16,948-50 (daily ed. Nov. 22, 1993). This bill was referred to the Labor and Human Resources Committee on November 22, 1993. 1 CONG. INDEX § 14,246 (1993). Major Owens, Chairman of the Education and Labor Select Education and Civil Rights Subcommittee, introduced a companion bill in the House of Representatives. *Congress Moves to Overturn* Hicks *Ruling*, DAILY LAB. REP. (BNA) 235 (Dec. 9, 1993); *see generally* Susan J. Schleck, *Title VII—Burden of Proof—Employee Has Ultimate Burden of Proof in a Title VII Case to Show Discriminatory Intent Even if Employer's Reasons for Dismissal Are Pretextual-St.* Mary's Honor Center v. Hicks, 113 S. Ct. 2742 (1993), 25 SETON HALL L. REV. 696, 718 (1994) (discussing the proposed legislation). Although the Clinton Administration and the EEOC support the position that these bills take, the Republican victories in the 1994 Congressional elections make passage of this or similar legislation improbable.

[130] *E.g.*, Washington v. Garrett, 10 F.3d 1421 (9th Cir. 1994) (reversing partial summary judgment for defendant on the ground that the factfinder could infer discrimination from inconsistency in defendant's articulated reasons for plaintiff's termination); Durham v. Xerox Corp., 18 F.3d 836, 838 (10th Cir. 1994) (affirming summary judgment for defendant on the ground that plaintiff presented no evidence of pretext); Anderson v. Baxter Healthcare Corp., 13 F.3d 1120, 1125 (7th Cir. 1994) (affirming summary judgment for defendant on ground that the employer presented legally insufficient evidence to permit the factfinder to infer pretext); DeMarco v. Holy Cross High Sch., 4 F.3d 166, 170 (2d Cir. 1993) (reversing summary judgment for defendant because district court erroneously exempted religious institution from ADEA); Mitchell v. Data General Corp., 12 F.3d 1310, 1317 (4th Cir. 1993) (affirming summary judgment for defendant because plaintiff failed to create genuine factual dispute over defendant's articulated reasons); *cee* Saulpaugh v. Monroe Community Hosp., 4 F.3d 134, 142 (2d Cir. 1993) (stating in dictum that "a fact finder's disbelief of a defendant's proffered rationale may allow it to infer the ultimate fact of intentional discrimination in some cases"); Southwest Merchandising Corp. v. NLRB, 53 F.3d 1334, 1339 (D.C. Cir. 1995) (holding, in a labor case, that *Hicks* adopted the permissive pretext-plus standard). *But cee* United States v. Crosby, 59 F.3d 1133 (11th Cir. 1995) (focusing, at stage three, exclusively on discriminatory intent rather than disproof of pretext).

[131] *E.g.*, Huston v. McDonnell Douglas Corp., 63 F.3d 771 (8th Cir. 1995) (affirming summary judgment for employer despite statistical and documentary evidence of age discrimination); Udo v. Tomes, 54 F.3d 9, 14 (1st Cir. 1995) (affirming summary judgment for the employer because the employee's showing of pretext failed to raise an issue of discriminatory intent); Anderson v. Baxter Healthcare Corp., 13 F.3d 1120, 1125 (7th Cir. 1994) (rejecting testimonial evidence of supervisor and co-worker that employee performed satisfactorily as insufficient to controvert employer's explanation that it fired employee for incompetence); Manzer v. Diamond Shamrock Chemicals Co., 29 F.3d 1078, 1084 (6th Cir. 1994) (requiring plaintiff to produce "overwhelming" evidence of discriminatory intent); LeBlanc v. Great Amer. Ins. Co., 6 F.3d 836, 845-49 (1st Cir. 1993) (rejecting statistical and other evidence of pretext as insufficient); EEOC v. IMPC, Inc., 834 F. Supp. 200,

Hicks to adopt the pretext-plus rule.[132] One court has evaded the ambiguity in *Hicks* but has effectively followed the pretext-plus approach by granting an employer summary judgment despite the employee's submission of evidence creating a material issue of fact on the question of pretext.[133]

A. *Post-*Hicks*: Permissive Pretext Only*

The Third Circuit is among those which have interpreted *Hicks* to approve the permissive pretext-only standard. In *Seman v. Coplay Cement Co.*,[134] U.S. Cement discharged Seman, a sixty-five-year-old. Seman, who asserted an age discrimination claim against his former employer, had no trouble proving a prima facie case. U.S. Cement argued at stage two of the *McDonnell Douglas* process that it had discontinued seeking new business and had discharged Seman as part of a reduction-in-force initiative because he lacked necessary experience.[135] To rebut U.S. Cement's alleged reason for his discharge, Seman offered evidence that, after his termination, the company assigned young, inexperienced salesmen to seek new accounts in his territory.[136] He also submitted proof that he was more qualified than some of the younger salesmen and that his superiors had never criticized his job performance.[137] The district court denied U.S. Cement's motion for judgment as a matter of law.[138]

Although reversing judgment for Seman on other

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206 (E.D. Mich. 1993) (granting the employer summary judgment, despite the employee's presentation of evidence creating a genuine issue of fact as to pretext because the record contained no additional evidence of discrimination).

[132] *E.g.*, Atkins v. Coltec Indus., Inc., No. 93-1641, slip op. at 6 (4th Cir. Aug. 18, 1994) (per curiam), *cert. denied*, 115 S. Ct. 1094 (1995) (holding that "[m]erely demonstrating that the employer's proffered reasons were pretextual, however, will not alone establish age discrimination"); Bodenheimer v. PPG Indus., Inc., 5 F.3d 955 (5th Cir. 1993) (requiring the plaintiff to produce evidence beyond pretext to establish discrimination).

[133] EEOC v. MCI Int'l, Inc., 829 F. Supp. 1438, 1451 (D.N.J. 1993) (granting the employer summary judgment, even assuming pretext, because the employer offered no additional proof of discrimination).

[134] 26 F.3d 428, 433 (3d Cir. 1994).

[135] *Id.*

[136] *Id.*

[137] *Id.*

[138] *Id.* at 429; *see* FED. R. CIV. P. 50(a).

grounds,[139] the Third Circuit upheld the district court's denial of U.S. Cement's motion.[140] The circuit court recognized that *Hicks* permits a verdict for a plaintiff based on a finding of pretext,[141] and pointed out that "Seman had established a prima facie case of age discrimination *and* had presented substantial evidence creating a factual dispute concerning U.S. Cement's facially legitimate business reasons."[142]

The Ninth Circuit has similarly construed *Hicks* to adopt the permissive pretext-only rule. In *Washington v. Garrett,*[143] Washington, a black female in the civil service, was an editor for a Navy newspaper. The only employee fired as the result of a reduction-in-force program, she raised allegations of racial discrimination[144] at the appropriate civil service administrative tribunal ("Board").[145] In addition to proving a prima facie case,[146] Washington presented evidence of racial tension on the job. The Navy responded that Washington's discharge was

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[139] The court held the jury instructions misleading. The instructions suggested that the jury could find for the plaintiff solely because defendant did not discharge workers younger than he. *Seman*, 26 F.3d at 438.

[140] *Id.* at 433.

[141] *Id.*

[142] *Id.*

[143] 10 F.3d 1421 (9th Cir. 1994).

[144] Washington also alleged sex discrimination and illegal retaliation. *Id.* at 1426. The court affirmed dismissal of these claims. *Id.* at 1438.

[145] This administrative tribunal is known as the Merit Systems Protection Board.

[146] The court held that, in a reduction-in-force context, the elements of a prima facie case are (1) plaintiff belongs to a protected class; (2) she was discharged from a job for which she was qualified; and (3) others not in her protected class were treated more favorably. *Compare* Mitchell v. Data General Corp., 12 F.3d 1310, 1315 (4th Cir. 1993) (holding that the elements of a prima facie reduction-in-force case are: (1) the employee was in the protected class; (2) he was selected for discharge from a larger group of candidates; (3) he was performing equivalent to the lowest performers in the retained group; and (4) the retained group contained some workers not in the protected class performing below his level) *with* LeBlanc v. Great Amer. Ins Co., 6 F.3d 836, 842 (1st Cir. 1993) (holding that the elements of a prima facie reduction-in-force case are: (1) the employee was in the protected class; (2) he was qualified; (3) he was discharged; and (4) he was replaced with someone of roughly the same qualifications, or the employer did not treat age neutrally, or employees not in the protected class were retained in the same position. One writer has suggested that a prima facie reduction-in-force case should be composed of five elements: "(1) Did a RIF (reduction-in-force) really occur? (2) Was the plaintiff's job really eliminated? (3) Was the selection process fair in determining that the plaintiff should be RIF'd? (4) Was there a legitimate reason why the plaintiff wasn't transferred to another position? and (5) What were the events that surrounded the RIF?" Platt, *supra* note 9, at 209.

motivated by economic constraints and a realignment of office structure.[147] After the Board and district court had rejected the racial discrimination claim, the Ninth Circuit reversed, finding the Navy's two articulated reasons for its conduct inconsistent.[148] The court concluded that the factfinder might infer pretext from the inconsistency.[149]

Washington highlights subtle features of the *Hicks* holding. It shows that proof of pretext may be found in *defendant's* case. The defendant may interpose several justifications for its conduct, each of which taken alone is creditable. Yet the jury might reasonably find defendant's articulated reasons unbelievable because they contradict one another, even where the plaintiff presents no evidence of pretext, direct or circumstantial. It is also possible that, based on plaintiff's prima facie case, the jury might reasonably reject a reason which the defendant offers to justify its conduct. For example, where the plaintiff was the target of a reduction-in-force plan, one element of a prima facie case is that others not in the protected class were treated more favorably.[150] As in *Washington*, a plaintiff might make such a showing with proof that the employer eliminated her job alone. This evidence, which satisfies an element of the prima facie case, may suffice simultaneously to prove pretext.

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[147] *Garrett*, 10 F.3d at 1425.

[148] *Id.* at 1434.

[149] *Id.* Judge Thompson dissented, arguing that the court failed to review the determination of the Merit Systems Protection Board under the deferential substantial evidence test. Accordingly, he would have affirmed the Board's determination in all respects. *Id.* at 1438.

[150] *E.g.*, Thornbrough v. Columbus and Greenville R.R., 760 F.2d 633, 639 (5th Cir. 1985); Duffy v. Wheeling Pittsburgh Steel Corp., 738 F.2d 1393, 1395 (3d Cir. 1984). Other circuits use somewhat dissimilar elements in an age discrimination case. *See* Nitschke v. McDonnell Douglas Corp., 68 F.3d 249, 251 (8th Cir. 1995) (requiring the plaintiff to show that age was a factor which motivated the termination, an element which obfuscates the distinction between stages one and three); LeBlanc v. Great American Ins. Co., 6 F.3d 836, 842 (1st Cir. 1993) (requiring the plaintiff show that "the employer did not treat age neutrally or that younger persons were retained in the same position" (quoting Hebert v. Mohawk Rubber Co., 872 F.2d 1104, 1111 (1st Cir. 1989))); Mitchell v. Data General Corp., 12 F.2d 1310, 1315 (4th Cir. 1993) (requiring the plaintiff to show that "he was performing at a level substantially equivalent to the lowest level of those of the retained group").

B. *Post*-Hicks: *The Masquerading Standard*

In *Manzer v. Diamond Shamrock Chemical Co.*,[151] the Sixth Circuit ostensibly construed *Hicks* to support the permissive pretext-only position. In effect, however, the court came close to following the pretext-plus position, erecting evidentiary barriers blocking the plaintiff's case.[152] Despite substantial evidence of pretext, the Sixth Circuit affirmed the district court's grant of a directed verdict for Diamond Shamrock.[153] Diamond Shamrock fired Manzer, a fifty-five-year-old employee, and replaced him with someone who was thirty-three. Manzer responded by filing an age discrimination suit. After Manzer had proven a prima facie case,[154] Diamond Shamrock articulated two legitimate reasons for discharging him: he was "obnoxious and unreliable."[155] Noting that the *Hicks* decision rejected both the pretext-plus and pretext-only positions, the circuit court properly held that at stage three of *McDonnell Douglas* the jury is permitted, but not compelled, to find for the plaintiff who proves pretext.[156] The court stressed, however, that the plaintiff will reach the jury only if he produces evidence sufficient to discredit the defendant's alleged legitimate reasons.[157] To require less would contradict *McDonnell Douglas* and *Burdine* by shifting the burden of persuasion to the defendant.[158]

The court discerned three ways in which a plaintiff might satisfy this burden of proof. First, he may show that the alleged legitimate reasons have no factual basis.[159] Second, he may show that the employer did not discharge employees not in the protected class though those employees engaged in con-

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[151] 29 F.3d 1078, 1084 (6th Cir. 1994).

[152] *Id.* at 1083.

[153] *Id.* at 1085.

[154] *Id.* at 1082. The court stated that the fourth element of the *McDonnell Douglas* prima facie case requires that someone not in the protected class replace the plaintiff, unlike *McDonnell Douglas* itself which merely required that the defendant seek to fill the position. *Id.* at 1081.

[155] *Id.*

[156] *Manzer*, 29 F.3d at 1083.

[157] *Id.* at 1083.

[158] *Id.*

[159] *Id.* at 1084.

duct similar to that for which the plaintiff was allegedly fired.[160] Third, he may show "that the sheer weight of circumstantial evidence of discrimination makes it 'more likely than not' that the employer's explanation is a pretext, or cover-up."[161] Observing that Manzer had relied on the third type of rebuttal, the court held that, for Manzer to get his case to a jury, the strength of his circumstantial evidence of age discrimination must overwhelm, "or at least permit a reasonable juror to conclude that it overwhelms, Diamond Shamrock's nondiscriminatory reasons."[162]

Manzer attempted to prove pretext by showing that he received good performance evaluations and merit increases in pay even after the incidents of his alleged combativeness and ineptitude.[163] Despite finding Manzer's proof of pretext irrelevant, the court addressed and dismissed these arguments. Good evaluations did not constitute ringing affirmations. Merit pay increases similarly meant nothing because such raises were given almost universally, though the court did not discuss the prevalence of merit raises among those deserving discharge.[164] The circuit court thus ruled that Manzer had failed, as a matter of law, to show pretext.[165] Accordingly, it affirmed the district court's directed verdict for Diamond Shamrock.[166]

Before *Hicks*, the Sixth Circuit had followed the pretext-plus rule.[167] Despite its recognition that *Hicks* rejected this approach, the Sixth Circuit circumvented the *Hicks* holding,

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[160] *Id.*

[161] *Manzer*, 29 F.3d at 1084.

[162] *Id.*

[163] *Id.* at 1085.

[164] *Id.* Lapsing into irrationality, the court characterized these arguments as irrelevant, because "[t]he issue is not whether Manzer was truly 'obnoxious' enough, or 'unreliable' enough, to justify firing him." *Id.* at 1084. Rather, the court believed those facts relevant to "qualification," one of the elements of a prima facie case, and not pretext. *Id.*

[165] *Id.*

[166] *Manzer*, 29 F.3d at 1084. The court also rejected Manzer's arguments that the district court erred in admitting evidence of Manzer's inaccurate work and "bad attitude." *Id.*

[167] Gagne v. Northwestern Nat. Ins. Co., 881 F.2d 309 (6th Cir. 1989) (holding that "[t]o meet her rebuttal standard, [plaintiff] was required to produce direct, indirect or circumstantial evidence that her age was a factor in the decision to terminate her and that 'but for' this factor she would not have been fired").

and continued to follow the pretext-plus position by heightening the threshold for proving pretext. In the Sixth Circuit, circumstantial proof of pretext must "overwhelm" the alleged legitimate reasons, or at least reasonably permit the jury to make such a finding. The preponderance of evidence standard, held applicable by the Supreme Court,[168] is, in the opinion of the Sixth Circuit, too light a burden. Although proof of favorable evaluations and merit raises may indirectly prove pretext, the court inexplicably found this evidence, not only so unpersuasive to fail as a matter of law, but also irrelevant.[169]

The Seventh Circuit reached a similar decision in *Anderson v. Baxter Healthcare Corp.*[170] There, Anderson, fired allegedly for inadequate performance, submitted an affidavit of his former supervisor attesting that Anderson was not responsible for the mishaps allegedly leading to his termination. In addition, Anderson submitted an affidavit of a coworker asserting that Anderson was not fired because of his performance. While recognizing the ambiguity in *Hicks*,[171] the *Anderson* court read that decision to adopt the permissive pretext-only rule.[172] Yet the court affirmed summary judgment for Baxter, finding Anderson's submissions legally insufficient to raise a triable issue of fact as to whether Baxter had fired him for good cause.[173] The pretext-plus standard, masquerading as the permissive pretext-only rule, crept into the case.

C. *Post*-Hicks: *Pretext Plus*

As Justice Souter's dissent in *Hicks* predicted, some courts, most notably the Fifth Circuit, have gleaned the pretext-plus rule from the thicket of ambiguities in *Hicks*. In *Bodenheimer*

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[168] St. Mary's Honor Center v. Hicks, 113 S. Ct. 2742, 2751-52 (1993) (stating that "should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not the true reasons, but were a pretext for discrimination") (citing Texas Dept. of Comm. Affairs v. Burdine, 450 U.S. 248, 253 (1981)).

[169] *Manzer*, 29 F.3d at 1084-85.

[170] 13 F.3d 1120 (7th Cir. 1994).

[171] *Id.* at 1123.

[172] *Id.* at 1123-24.

[173] *Id.* at 1125.

v. PPG Industries, Inc.,[174] PPG fired Bodenheimer, a fifty-seven-year-old branch manager, who responded by filing an age discrimination claim. The Fifth Circuit explained the applicable legal standard as follows:

> Prior to the Supreme Court's recent decision in *St. Mary's Honor Ctr. v. Hicks* confusion reigned among the circuit courts as to whether the plaintiff could prove employment discrimination simply by showing that the defendant's reasons were not credible. The Court in *St. Mary's* put the issue to bed. To prevail ultimately, the plaintiff must prove, through a preponderance of the evidence, that the employer's reasons were not the true reason for the employment decision *and* that unlawful discrimination was.[175]

To prove that PPG's reduction-in-force explanation was a pretext, Bodenheimer asserted that upon terminating him PPG's regional manager said, "Cliff, I hope when I get to your age somebody does the same for me."[176] The court understandably found this and other flimsy evidence insufficient to prove pretext, let alone discriminatory intent. The demanding pretext-plus rule required more proof. The court therefore affirmed summary judgment for PPG.[177]

More recently, the Fifth Circuit expanded on its questionable interpretation of *Hicks*. In *Rhodes v. Guiberson Oil Tools*,[178] Rhodes, a fifty-six-year-old, sold a product line for Guiberson, an oil service company. Troubled with economic difficulties, Guiberson, as part of a reduction-in-force plan, terminated Rhodes, allegedly because of his faltering sales. Rhodes sued for age discrimination. At trial, he showed that within two months of his discharge, Guiberson replaced him with a forty-two-year-old. Rhodes also pointed out that his replacement's monthly salary was $2,000 less than his. A sales manager at Guiberson testified that Rhodes's supervisor had commented that two younger salesmen would work for the salary of one older one. Guiberson argued at trial that it had

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[174] 5 F.3d 955 (5th Cir. 1993).

[175] *Id.* at 957; *see also id.* at 959 n.8.

[176] *Id.* at 958. Bodenheimer submitted two affidavits of customers stating that the quality of service deteriorated at Bodenheimer's branch office after his departure, and his own affidavit lauding his abilities as superior to those of his successor. *Id.* at 959.

[177] *Id.* at 959.

[178] 39 F.3d 537 (5th Cir. 1994), *reh'g en banc granted*, 49 F.3d 127 (5th Cir. 1995).

fired Rhodes because of poor performance. The jury found for Rhodes and the magistrate denied Guiberson's motion for judgment based on insufficiency of evidence.[179]

The Fifth Circuit reversed,[180] extracting the pretext-plus rule from *Hicks*. The court interpreted *Hicks* to mean that the language of *Burdine* allowing a plaintiff to show discrimination "'indirectly by showing that the employer's proffered explanation is unworthy of credence' is dictum, which is inconsistent with other language in *Burdine* and *McDonnell Douglas*."[181]

Undermining the court's reading of *Hicks* was the Supreme Court's pronouncement that a finding of pretext permits the jury to find for the plaintiff,[182] but the circuit court similarly discounted this language as dictum.[183] It noted that the Supreme Court in *Hicks* had reversed the Eighth Circuit's determination that Hicks was entitled to judgment as a matter of law,[184] a holding which repudiated the Eighth Circuit's application of the pretext-only rule. The Fifth Circuit reasoned, however clumsily, that the Supreme Court's ruling was limited to the efficacy of "pretext-only." Since *Hicks* was not a "sufficiency of evidence case,"[185] its discussion of the quantum of evidence sufficient to support a finding of pretext was not part of the *Hicks* holding.[186]

After indulging in a skewed analysis of other circuit court cases,[187] the *Rhodes* court embarked on another tortuous path to distance itself from *Hicks*. It correctly cited *Hazen Paper Co. v. Biggins*,[188] an age discrimination case, for the

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[179] This was the second appeal in the case. On the first appeal, the court reversed the magistrate's determination that Rhodes's case was time-barred because he was late in filing a charge with the EEOC.

[180] *Guiberson*, 39 F.3d at 539.

[181] *Id.* at 542 (citing *Hicks*, 113 S. Ct. at 2753).

[182] *Hicks*, 113 S. Ct. at 2749.

[183] *Guiberson*, 39 F.3d at 542.

[184] *Id.*

[185] *Id.* at 543.

[186] *Id.* at 542-43.

[187] *Id.* at 543 (citing Anderson v. Baxter Health Care Corp., 13 F.3d 1120 (7th Cir. 1994)); Durham v. Xerox Corp., 18 F.3d 836 (10th Cir. 1994); Mitchell v. Data General Corp., 12 F.3d 1310 (4th Cir. 1993). *See id.* at 550-52 (Garza, J. dissenting) (substantially rebutting the majority's claimed support in case law and demonstrating that the predominant if not overwhelming view among the circuits is that *Hicks* adopted the permissive approach)).

[188] 113 S. Ct. 1701 (1993).

principle that firing workers over forty to reduce costs does not show age discrimination.[189] In short, cost reduction is a legitimate business goal, and firing a disproportionately high number of older employees to achieve that end does not violate the Age Discrimination in Employment Act ("ADEA"). Despite abundant authority applying the *McDonnell Douglas* scheme to age discrimination cases,[190] the Fifth Circuit found *Hazen Paper*, not *Hicks*, relevant to *Guiberson* because, unlike *Hicks* which involved race discrimination, both *Hazen Paper* and *Guiberson* involved issues of age discrimination. The court implied that *Hazen* establishes a higher burden for plaintiffs than does *Hicks*, and that this standard doomed Rhodes's case.[191]

The *Rhodes* court was correct in concluding that *Hazen* deflates Rhodes's argument that proof that an employer fired older workers to reduce salary costs implies age discrimination. *Hazen* does not, however, diminish the relevance of *McDonnell Douglas* to Rhodes's claim; nor does it dispose of Rhodes's evidence of pretext.

The *Rhodes* court ended by citing the "momentous" conse-

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[189] *Id.* at 1707.

[190] The Fifth Circuit itself has applied the *McDonnell Douglas* scheme to age discrimination cases. *E.g.*, Atkins v. Coltec Indus., Inc., No. 93-1641, slip op. (5th Cir. Aug. 18, 1994) (per curiam), *cert. denied* 115 S. Ct. 1094 (1995); Bodenheimer v. PPG Indus., Inc., 5 F.3d 955 (5th Cir. 1993). Other circuits invariably do the same. *E.g.*, Nitscke v. McDonnell Douglas Corp., 68 F.3d 249, 251 (8th Cir. 1995); Anderson v. Baxter Healthcare Corp., 13 F.3d 1120 (7th Cir. 1994); Manzer v. Diamond Shamrock Chemicals Co., 29 F.3d 1078 (6th Cir. 1994); LeBlanc v. Great American Ins. Co., 6 F.3d 836 (1st Cir. 1993); Seman v. Coplay Cement Co., 26 F.3d 428 (3d Cir. 1994); Mitchell v. Data General Corp., 12 F.3d 1310 (4th Cir. 1993); *cf.* Morris v. Newman, No. 93-35705, 1995 WL 567610 (9th Cir. Sept. 26, 1995) (applying the *McDonnell Douglas* formulation to a case brought under the Rehabilitation Act, which prohibits the federal government from discriminating on the basis of disability).

[191] Judge Garza showed that, contrary to the majority's view, federal courts universally apply the *McDonnell Douglas* framework to ADEA cases. He noted that *Hazen* and *McDonnell Douglas* do not call for a different result in the *Guiberson* case because Rhodes did not base his claim on the denial of a benefit that correlates with age. *See Guiberson*, 39 F.3d at 551 (Garza, J., dissenting). Although Judge Garza was right that pretext might be found in the *Guiberson* record based on Guiberson's shifting alleged reasons for firing Rhodes and on Rhodes's replacement with a younger man, Judge Garza seems to have missed the majority's point. One of Rhodes's arguments was that he was fired because his salary was higher than that of a younger worker. *Hazen* implies that firing older workers to save salary costs is permissible.

quences of adopting the permissive pretext-only standard.[192] First, an employer accused of civil rights violations could not win summary judgment if the plaintiff, unable to show discriminatory animus, merely proved pretext.[193] Hardly "momentous," permitting such cases to go to the jury is the very purpose of the permissive and pure pretext-only approaches, both of which were the law in many circuits before *Hicks*.[194] Some might even find this result desirable. Second, the court complained that, if a jury disbelieves the employer's assigned legitimate reason, the employee will be entitled to judgment.[195] The court's statement is false. Under the permissive rule a jury may find for the plaintiff who proves pretext, but it is not obliged to do so.

Judge Zagel, in a concurring opinion,[196] observed that employers, when firing workers, often give polite explanations to "soften the blow."[197] The purpose of such courtesies is to avoid animosity in the workplace when the fired worker stays on temporarily. Explanations made to discharged employees may therefore be suspect, and evidence of such "lies" may unfairly sway the jury. On the other hand, the jury is responsible for evaluating the probity of facts. Their common sense gives them the same insights into human behavior as does the common sense of judges and commentators.

In a dissenting opinion, Judge Garza read *Hicks* to hold that a finding of pretext permits, but does not compel, a verdict for the plaintiff.[198] He believed that since Guiberson's records falsely indicated that Rhodes was fired because of a reduction in-force, and since Guiberson offered a different and inconsistent justification at trial—poor performance—the jury could infer pretext.[199] Proof of pretext along with the prima

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[192] *Id.* at 545.

[193] *Id.*

[194] *See supra* notes 63-68 and accompanying text.

[195] *Guiberson*, 39 F.3d at 545.

[196] Judge Zagel criticized the jury instructions, which said that the plaintiff could prevail based on either a finding of pretext or a finding that age discrimination was a determining factor in the discharge. *Id.* (Zagel, J., concurring). He argued that the court should have instructed the jury that it could find for plaintiff only if age was a determining factor. *Id.* at 546 (Zagel, J., concurring).

[197] *Id.* at 545-46 (Zagel, J., concurring).

[198] *Id.* at 548 (Garza, J., dissenting).

[199] *Id.* at 547-48 (Garza, J., dissenting).

facie case should have permitted the jury to find for Rhodes.[200]

Judge Garza disagreed also with the majority's pivotal assumption that the Supreme Court's adoption of the permissive pretext-only standard was dictum.[201] Neither hypothetical nor abstract, the high Court's statement set forth the standard applicable for determination of the case on remand.[202] Judge Garza might also have pointed out that the Supreme Court devoted the entire *Hicks* opinion to articulating that standard. Conflicting language may have cast doubt on whether the Court chose the permissive or pretext-plus rule. Nevertheless, the *Hicks* Court's intent to clarify the evidentiary standard of *Burdine* is undeniable and the lower courts should respect that intent, even if one might technically characterize the critical language in the opinion as dictum.

D. *Post*-Hicks: *Summary Judgment*

Most of the courts that follow the pretext-plus interpretation of *Hicks* never allow the case to reach the jury,[203] or if they do, the judge overturns a plaintiff's verdict.[204] Courts following the "masquerading" position are similarly unsympathetic to plaintiffs.[205]

Despite its misinterpretation of *Hicks*, the *Rhodes* court observed correctly that the permissive rule precludes summary

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[200] *Guiberson*, 39 F.3d at 547-48.

[201] *Id.* at 550 (Garza, J., dissenting).

[202] *Id.* at 550 (Garza, J., dissenting). The Eighth Circuit, quoting the Supreme Court's articulation of the permissive standard, remanded the case to the district court "because neither the parties nor the district court has had a full and fair opportunity to apply the Supreme Court's newly clarified analytical scheme"). As Judge Garza noted, it is senseless to characterize as dicta the very pronouncement used to resolve the case. *Id.* (Garza, J., dissenting).

[203] *E.g.*, Bodenheimer v. PPG Indus., Inc., 5 F.3d 955 (5th Cir. 1993) (affirming summary judgment for employer).

[204] *E.g.*, Atkins v. Coltec Indus., Inc., No. 93-1641, slip op. (5th Cir. Aug. 18, 1994) (per curiam) (affirming district court's grant of judgment for defendant which overturned jury verdict for plaintiff), *cert. denied*, 115 S. Ct. 1094 (1995).

[205] *E.g.*, Anderson v. Baxter Healthcare Corp., 13 F.3d 1120, 1126 (7th Cir. 1994) (affirming summary judgment for employer); Manzer v. Diamond Shamrock Chemical Co., 29 F.3d 1078, 1080-81 (6th Cir. 1994) (affirming directed verdict for employer); LeBlanc v. Great American Ins. Co., 6 F.3d 836, 849 (1st Cir. 1993) (affirming summary judgment for employer).

judgment[206] against a plaintiff who creates a material issue of fact[207] as to whether the employer's articulated reason was pretextual.[208] This implication arises from the permissive standard because the jury is permitted, based on proof of pretext, to find for the plaintiff.[209] To take such a case from the jury would eviscerate the permissive rule. In effect, such a result would amount to the application of the pretext-plus rule which requires evidence of discriminatory intent beyond pretext (and a prima facie case) to defeat summary judgment.[210]

Other courts, applying the *Hicks* permissive rule correctly, deny employers summary judgment when the employee creates an issue of fact regarding pretext.[211] For example, in *Washington v. Garrett*,[212] the Ninth Circuit understood *Hicks* to hold that "the fact finder *may* infer discrimination from the

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[206] FED. R. CIV. P. 56.

[207] Summary judgment is appropriate when "there is no genuine issue as to any material fact." FED. R. CIV. P. 56. *See* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251 (1986) (holding that, to defeat a motion for summary judgment, a party must submit evidence reasonably supporting a finding in its favor).

[208] *Id.* at 545.

[209] *See Windle*, *supra* note 96, at 223-24 (arguing persuasively that, because the factfinder may infer discrimination based on pretext alone, a material issue of fact on the issue of pretext shields the plaintiff from summary judgment).

[210] A court applying the pretext-plus rule should grant an employer's motion for summary judgment unless the employee submits evidence of discriminatory intent independent of proof of pretext. *See, e.g.*, Bodenheimer v. PPG Ind., Inc., 5 F.3d 955, 957 (5th Cir. 1993) (applying pretext-plus rule and granting the employer summary judgment because the employee failed to submit proof of discriminatory intent); *see also Cadle*, *supra* note 64, at 132 (discussing the favorable treatment courts following the pretext-plus rule give to defendants' motions for summary judgment).

[211] *See, e.g.*, Stoll v. Missouri Osteopathic Foundation, Inc., 68 F.3d 479 (8th Cir. 1995) (per curiam) (holding that the employee must submit evidence of pretext to avoid summary judgment); Perdomo v. Browner, 67 F.3d 140, 145 (7th Cir. 1995) (reversing the district court's order of summary judgment for the employer because the employee raised a triable issue of fact as to pretext); York v. Brown, No. 92 C 7035, 1995 WL 520396, at *3 (7th Cir. Aug. 30, 1995) (holding that "[t]o defeat a summary judgment motion, the employee need produce only enough evidence from which a rational factfinder could infer that the company's proffered reasons were pretextual"); Washington v. Garrett, 10 F.2d 1421, 1434 (9th Cir. 1993) (denying the employer summary judgment because the plaintiff made a showing of pretext which entitles her to reach the jury); Tomka v. The Seiler Corp., 66 F.3d 1295 (2d Cir. 1995) (denying the employer summary judgment in a retaliatory discharge case where the employee submitted evidence of discriminatory intent).

[212] 10 F.2d 1421 (9th Cir. 1993).

showing of pretext."[213] Because the employee created an issue of fact as to whether the employer's reduction-in-force explanation was pretextual, the court denied the employer's motion for summary judgment.[214]

Still other courts take a different approach. In *EEOC v. MCI International, Inc.*,[215] for example, the District Court for the District of New Jersey recognized that evidence of pretext "will permit" the trier of fact to infer discriminatory intent.[216] Its reasoning foundered when it granted the defendant summary judgment "even assuming the falsity of defendant's reasons for purposes of summary judgment."[217] The court insisted on additional proof of discriminatory intent.[218] Apparently, the court believed that only sometimes when a plaintiff submits probative evidence of pretext on a motion for summary judgment does he create an issue of fact for the jury on the issue of discriminatory intent. Other times, however, showing pretext is insufficient to defeat the motion. How a court might distinguish between the two circumstances is a mystery. Perhaps the court's tortured analysis was a subterfuge (or pretext) for using the pretext-plus rule.

VI. FAILINGS OF THE THREE APPROACHES TO PRETEXT

Flaws riddle each of the three versions of the third stage of the *McDonnell Douglas* scheme. The failure of all three pretext rules implies more than their individual inadequacy. The very structure of the *McDonnell Douglas* framework is flawed and, rather than searching for new formulations of stage three, the Court should abandon *McDonnell Douglas* itself.

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[213] *Id.* at 1433.

[214] *Id.*

[215] 829 F. Supp. 1438 (D.N.J. 1993).

[216] *Id.* at 1450 (quoting *Hicks*, 113 S. Ct. at 2749).

[217] *Id.* at 1451.

[218] *Id.*; *see also* Udo v. Tomes, 54 F.3d 9, 14 (1st Cir. 1995) (holding an employee's evidence of pretext insufficient to raise triable issue of fact as to whether the employer acted with discriminatory intent).

A. *Pretext Only*

Burdine explains that the purpose of the burden-shifting framework is to sharpen the factual issues.[219] The plaintiff, at stage one, eliminates some of the common justifications for the employer's challenged conduct.[220] At stage two, the inquiry focuses on the employer's explanations.[221] Resolution of the case then turns, at stage three, on whether the articulated reasons are pretextual.[222] Despite the thrust of *McDonnell Douglas* and *Burdine*, which point to the pretext-only rule, the *Hicks* Court rejected this standard and adopted the permissive rule.

The permissive rule is problematic. Yet, *Hicks* stumbled in the right direction with its implicit retreat from the pretext-only standard. Rejection of this approach enhanced, however imperfectly, the process of adjudicating discrimination cases. While the pretext-only approach defines the relevant issues, it arguably confines the range of admissible proof and restricts the scope of the factfinder's inquiry. By limiting the issues at stage three to the employer's articulated reasons, the pretext-only rule trades a measure of fairness for a measure of precision. It sacrifices fairness because it denies the defendant the choice of pursuing any strategy other than to articulate justifications for its conduct.

Sometimes the defendant would, in any event, proceed in this way. But the defendant might prefer tactically to forego articulating its reasons. The employer might assess its reasons, though true, as unpersuasive or likely to antagonize the jury. It might perceive legitimate reasons as perilously suggestive of discrimination. For example, personal animosity might register in the mind of jurors as a code for discriminatory intent. The

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[219] *Burdine*, 450 U.S. at 255-56.

[220] *Id.* at 253-54.

[221] *Id.* at 255; *see also* United States Postal Serv. v. Aikens, 460 U.S. 711, 714 (1983) (citing *Burdine* for the proposition that, at stage two, the defendant must set forth the reasons for the challenged employment decision).

[222] *Burdine*, 450 U.S. at 253 (reaffirming that, at stage three, the plaintiff must "have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not his or her true reasons, but were a pretext for discrimination"); *see also McDonnell Douglas*, 411 U.S. at 804.

defendant should be permitted to exercise the prerogative that other civil litigants have—to rely on the proof of its choice, whether circumstantial or otherwise. Similarly, as in all civil cases, the factfinder should have the freedom to search the record in deciding the issue. In rejecting the pretext-only rule, however, *Hicks* has rendered these concerns academic.[223]

B. *Permissive Pretext Only*

The virtue of the permissive pretext-only approach is that it approximates more closely than the other two alternatives the practice applicable in any civil trial. Regardless of the formally articulated reasons, all proof relevant to the issue of discrimination is admissible and the factfinder may search the record in resolving the dispute. The permissive approach, however, is less of a sensible compromise than it purports to be. It transfigures the *McDonnell Douglas* burden-shifting regime into a charade.[224] Stages one and two achieve nothing because the factfinder is not limited to considering the employer's articulated reasons. Thus, at stage three, the factual issues are as broad as they were at the inception of the case.

The jury must find the court's charge perplexing when the permissive standard is used. Despite the ostensible narrowing of issues achieved at stages one and two, the court instructs the jury that the case begins anew at stage three, informing the jurors that they are permitted, but not compelled, to infer discrimination based exclusively on a finding of pretext. The court offers no guidance as to what factors a jury should weigh when deciding if pretext alone proves discrimination.[225] Jurors must puzzle over why the presentation of proof is ordered according to an elaborate system which is ultimately ignored. They must doubt whether they understand the instruction. In evaluating the evidence under the permissive standard, jurors must wonder how they are to decide the ultimate issue when the plaintiff has proven a prima facie case and pretext but no

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[223] *See supra* notes 87-88 and accompanying text.

[224] Justice Souter complained that the majority had reduced the burden-shifting framework to a "useless ritual" by refusing to limit the issue at stage three to the reasons that the employer had articulated at stage two. *Hicks*, 113 S. Ct. at 2761.

[225] *See id.* at 2755-56 (holding that the factfinder may rely on any justification in the record for the employer's action).

more.

The permissive pretext-only standard is no standard at all because it leaves resolution of the ultimate issue to the juror's predilections rather than to their evaluation of the evidence. The rule invites arbitrariness, if not bias. Establishing guidelines will not improve the permissive rule because as soon as the jury considers factors beyond pretext, it is applying a standard which bears a suspicious resemblance to pretext-plus.[226] In straddling the gulf between pretext-only and pretext-plus, the permissive standard offers an unreasoned compromise.

C. *Pretext Plus*

After *Hicks*, the pretext-plus rule avoided extinction, clinging to ambiguous language in the opinion.[227] This rule is the most unsatisfactory of the three because it offends good sense. Discrimination is strongly implied when an employer's so-called legitimate reason is exposed as a pretext. An employer will typically articulate a legitimate reason if it has one. Sometimes, admittedly, the conclusion of discrimination will not follow from an employer's articulation of false reasons,[228] but to preclude the jury from inferring discrimination based on a finding of pretext, as the pretext-plus rule directs, defies common experience.

By requiring proof of discrimination in addition to pretext, the pretext-plus rule undercuts the purposes of stages one and

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[226] The *Hicks* Court asserted that the jury's finding of "mendacity" by the employer in articulating a "legitimate" reason may create a basis for finding discriminatory intent. *Id.* at 2749. This standard is inadequate. Employers may lie to conceal objectionable but nondiscriminatory motives. As the majority itself remarked, civil rights law condemns discrimination, not lying. *Id.* at 2754. It is also true that if the jury disbelieves the "legitimate" reason, it is more likely than not that the employer discriminated, even if the jury does not find employer dishonesty.

[227] Though the Court apparently adopted the permissive standard, *id.* at 2749, it muddied the holding by saying that "[i]t is not enough, in other words, to *disbelieve* the employer; the factfinder must *believe* the plaintiff's explanation of intentional discrimination." *Id.* at 2754. Seizing on this language, the dissent chided the majority for writing a self-contradictory opinion. *Id.* at 2762 (Souter, J. dissenting). The dissent's concern proved justified, for some lower courts have interpreted *Hicks* to establish the pretext-plus rule. *E.g.*, Rhodes v. Guiberson Oil Tool, 39 F.3d 537, 542 (5th Cir. 1994) (discounting as dicta the permissive pretext-only language in *Hicks*).

[228] *See Hicks*, 113 S. Ct. at 2756.

two. Any effort at narrowing the issues at those stages is in vain. The permissive standard has the same problem, but pretext-plus magnifies this fault by precluding the inference of discriminatory intent based on a showing of pretext alone.

D. *No More Alternatives*

The three rules are undesirable because all are wedded to a burden-shifting approach which hamstrings the parties' evidentiary presentations and confuses the jury.[229] The Supreme Court, in *Hicks*, may have recognized these inadequacies when it shrank, however subtly, from the failed *McDonnell Douglas* system.[230] But the Court should go further. It should acknowledge the inadequacies of *McDonnell Douglas* by repudiating the faulty burden-shifting model.

VII. ADDITIONAL PROBLEMS WITH THE *MCDONNELL DOUGLAS* SCHEME

In addition to the inadequacy of all three pretext-rule formulations, a problem which in itself calls the *McDonnell Douglas* approach into question, each stage of the *McDonnell Douglas* approach may obstruct the factfinder from fairly resolving the ultimate issue. By erecting artificial evidentiary barriers, each stage restricts the parties from presenting their cases as they see fit. Although the pre-*Hicks* framework may sometimes have facilitated the inquiry by requiring an inference of discrimination based on a finding of pretext, *Hicks* erases any such benefits, making such a finding permissive. The Civil Rights Act of 1991, which amended Title VII, permits the same inference without the rigidity of *McDonnell Douglas*. Perhaps most significantly, the requirements of a prima facie case, under many circumstances, violate the 1991 amendment to Title VII.[231]

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[229] *See supra* notes 219-228 and accompanying text.
[230] *Hicks*, 113 S. Ct. 2742 (1993).
[231] *See infra* notes 232-93 and accompanying text.

A. *Conflict with Title VII*

The burden-shifting approach, in theory if not in practice, is frequently inconsistent with the Civil Rights Act of 1991.[232] To understand the inconsistency, one must first examine the origin of the 1991 Act.

Congress passed the 1991 Act to overrule several Supreme Court decisions.[233] One such decision, *Price Waterhouse v. Hopkins*,[234] provided the analysis for mixed-motives cases. Although overruled, *Price Waterhouse* has left a legacy of misunderstanding because courts and commentators have misinterpreted it (and the motivating factor test of the 1991 Act which supplanted it) to apply only to direct evidence cases, while interpreting the *McDonnell Douglas* scheme to apply only to circumstantial cases.

1. *Price Waterhouse v. Hopkins*: The Mixed-Motives Analysis

Price Waterhouse, a prominent accounting firm, passed over Hopkins, a woman, for partnership. The firm argued that Hopkins' abrasiveness justified the decision. Hopkins alleged that the firm rejected her because of her sex. To support her claim, she offered evidence that several partners of Price Waterhouse had made stereotypical sexual comments about her and that these comments influenced the firm's disposition of her partnership application.[235]

The Court held that where an adverse employment action results from two causes, one legitimate and the other discrimi-

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[232] 42 U.S.C. § 1981(a) (1994).

[233] *See, e.g.*, Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989) (fixing the burden on the plaintiff in a disparate impact case to prove that the employer's job screening methods measured attributes unrelated to job performance or business necessity).

[234] 490 U.S. 228 (1989).

[235] Partners described her as "macho" and criticized her for using profanity "because it's a lady using foul language." The Court found most significant the advice she received from a partner, who, explaining why the firm had delayed her application for partnership, suggested that she "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." *Id.* at 228.

natory, the employer has not violated Title VII if the action would have occurred based on the legitimate reason alone.[236] The plaintiff bears the initial burden of proving that discrimination motivated the action.[237] The burden of proof then shifts to the defendant to show that it would have taken the same action based on the legitimate reason.[238]

Decided sixteen years after *McDonnell Douglas* and eight years after *Burdine*, *Price Waterhouse* addressed the situation where mixed motives influence the employment action.[239] Attempting to harmonize *Price Waterhouse* with *Burdine*, the Court explained that "[w]here a decision was the product of a mixture of legitimate and illegitimate motives . . . it simply makes no sense to ask whether the legitimate reason was *'the* true reason' for the decision—which is the question asked by *Burdine*."[240] The Court acknowledged that "*Burdine's* evidentiary scheme will not help us decide a case admittedly involving *both* kinds of considerations,"[241] but believed *Burdine* useful for determining pretext cases.[242]

McDonnell Douglas and *Burdine*, on the one hand, and *Price Waterhouse*, on the other, address different factual settings. *McDonnell Douglas* and *Burdine* apply when the issue is whether the employer's articulated legitimate reason is a pretext. *Price Waterhouse* applied (before overruled by the 1991 Act) when the legitimate reason was demonstrably not

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[236] *Id.* at 242.

[237] *Id.* at 241-42.

[238] *Id.* at 242.

[239] The *Price Waterhouse* Court borrowed the mixed-motives rationale from Mt. Healthy Board of Education v. Doyle, 429 U.S. 274 (1977). In *Mt. Healthy*, the school board discharged a public school teacher for two reasons: he made an obscene gesture to students, and he disclosed the school's proposed, confidential faculty dress code to a disc jockey who revealed the code on the air. The board's dismissal of the teacher based on his obscene conduct was legitimate. The discharge based on his comments about the dress code violated his First Amendment freedom of speech. *Id.* at 287. The Court held that, once the teacher proved that the First Amendment violation was a factor which motivated the discharge, the burden of persuasion shifted to the board to show that "it would have reached the same decision . . . even in the absence of the protected conduct." *Id.*

[240] *Price Waterhouse*, 490 U.S. at 247 (citations omitted).

[241] *Id.*

[242] *Id.* Concurring in the judgment, Justice White noted: "The court has made clear that 'mixed-motives' cases, such as the present one, are different from pretext cases such as *McDonnell Douglas* and *Burdine*." *Id.* at 260 (White, J., concurring).

pretextual, but rather, where the issue was whether the legitimate reason alone would have led to the adverse employment action.

Nothing in any of these decisions suggests that the application of the different approaches depends on different qualities of proof. Yet this misapprehension of the opinions has stamped itself indelibly on them.[243] The confusion may have arisen with Justice O'Connor's remark that "*McDonnell Douglas* itself dealt with a situation where the plaintiff presented no *direct* evidence" of discrimination.[244] She believed *McDonnell Douglas* applicable where the plaintiff relies on circumstantial or indirect evidence of discrimination.[245] By contrast, Justice O'Connor felt that in mixed-motives cases, such as *Price Waterhouse*, "[the] plaintiff must show by direct evidence that an illegitimate criterion was a substantial factor in the decision."[246] Justice O'Connor's position, though mistaken, predominates among courts,[247] and most commenta-

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[243] *See infra* notes 244-48 and accompanying text.

[244] *Price Waterhouse*, 490 U.S. at 270 (O'Connor, J., concurring) (emphasis added).

[245] *Id.* (O'Connor, J., concurring). Justice O'Connor's view has gained acceptance among commentators. *See* Mack A. Player, *Applicants, Applicants in the Hall, Who's the Fairest of Them All? Comparing Qualifications under Employment Discrimination Law*, 46 OHIO ST. L.J. 277, 284 (stating that *McDonnell Douglas* provides a method for proving discrimination claims by "indirect, objective, nonstatistical elements"); Odell, *supra* note 8, at 1251 (remarking that the Supreme Court designed *McDonnell Douglas* to aid civil rights plaintiffs lacking direct evidence of discriminatory intent); O'Leary, *supra* note 9, at 824-25 (asserting that *McDonnell Douglas* applies to "circumstantial" cases); Windle, *supra* note 96, at 213 (commenting that the *McDonnell Douglas* framework applies to cases involving "indirect" evidence).

[246] *Price Waterhouse*, 490 U.S. at 276 (O'Connor, J., concurring.) Justice Kennedy, in a dissenting opinion in which Chief Justice Rehnquist and Justice Scalia joined, argued correctly that the *Burdine* framework was intended to apply in all disparate-treatment cases, regardless of whether the evidence is direct or circumstantial. *Id.* at 289 (Kennedy, J., dissenting). Nevertheless, he echoed Justice O'Connor's error of applying the *Price Waterhouse* mixed-motives analysis to cases based on direct evidence. *Id.* at 280 (Kennedy, J., dissenting). He faulted the majority for violating the mandate of *Burdine* by shifting the burden of persuasion to the defendant in mixed motives cases. *Id.*

[247] *See, e.g.*, Caban-Wheeler v. Elsea, 904 F.2d 1549, 1554 (11th Cir. 1990) (quoting Justice O'Connor and agreeing with her that *Price Waterhouse* rather than *McDonnell Douglas* applies when the plaintiff presents direct evidence of discrimination); EEOC v. MCI, Int'l, Inc., 829 F. Supp. 1438, 1446 (D.N.J. 1993) (stating that "[i]f the plaintiff is able to point to direct evidence of discrimination, the burden shifting analysis first enunciated by the Supreme Court in *McDonnell*

tors now unquestioningly accept this viewpoint.[248]

Rather than establishing a framework for deciding cases based on direct as opposed to circumstantial evidence, *Price Waterhouse* established an exception to the rule, articulated in *Burdine*, that the burden of persuasion is always on the plaintiff.[249] This exception provides that once the plaintiff has proven a discriminatory motive for the defendant's action, the burden of persuasion shifts to the defendant to prove that it would have reached the same decision based on a legitimate reason.[250] The Court, however, did not distinguish *Price Waterhouse* from *McDonnell Douglas* based on whether the plaintiff relies on direct or circumstantial evidence.

The very language of *Burdine* refutes Justice O'Connor's

Douglas is inapplicable") (citation omitted). Of course, the *McDonnell Douglas* framework applies to circumstantial as well as direct evidence cases. As the dissent in *Hicks* commented, "we devised a framework [in *McDonnell Douglas* and *Burdine*] that would allow both plaintiffs and the courts to deal effectively with employment discrimination revealed only through circumstantial evidence." *Hicks*, 113 S. Ct. at 2757 (Souter, J., dissenting). This statement, however, does not purport to restrict the application of *McDonnell Douglas* to circumstantial cases; it merely instructs that *McDonnell Douglas* is suited for such cases. Indeed, the *Hicks* majority reaffirmed that the plaintiff may prove discriminatory intent "directly" under the *McDonnell Douglas* approach. *Id.* at 2752.

[248] *See* Cadle, *supra* note 64, at 122 (stating that the *McDonnell Douglas* framework applies in circumstantial cases); Essary, *supra* note 3, at 426 (commenting that the courts apply the *McDonnell Douglas* model to circumstantial cases whereas the motivating factor test of the 1991 Act applies to direct evidence cases and advising plaintiffs to search for direct evidence so as to avail themselves of the more favorable motivating-factor test); Eileen Kaufman, *Employment Discrimination: Recent Developments in the Supreme Court*, 10 TOURO L. REV. 525, 527-28 (1994) (reporting that *McDonnell Douglas* applies in circumstantial but not direct evidence cases).

[249] Holding that *Price Waterhouse* applies to any mixed-motives case, regardless of whether the plaintiff relies on direct or circumstantial evidence, the Court asserted that "[i]f the plaintiff fails to satisfy the factfinder that it is more likely than not that a forbidden characteristic played a part in the employment decision, then she may prevail only if she proves, following *Burdine*, that the employer's stated reason for its decision is pretextual." *Price Waterhouse*, 490 U.S. at 247 n.12. This language does not exclude circumstantial evidence.

[250] Determination of the ultimate issue of discrimination under both *McDonnell Douglas* and *Price Waterhouse* turns on the existence of a legitimate reason for the employer's conduct. The essential difference between the two cases is who bears the burden of proof. *McDonnell Douglas* places the burden on the plaintiff to disprove the articulated legitimate reason by a preponderance of the evidence. *Price Waterhouse* places the burden on the defendant to prove the legitimate reason by a preponderance of the evidence. Since in both cases the factfinder is apt to find in favor of the party presenting the stronger case, the difference between the two cases may be minimal if not illusory.

analysis. In *Burdine*, a unanimous Supreme Court held that a plaintiff in a discrimination case may succeed "directly by persuading the court that a discriminatory reason more likely motivated the employer."[251] In *United States Postal Service v. Aikens*,[252] the Court again rejected Justice O'Connor's views when it held that under *McDonnell Douglas* a plaintiff "may prove his case by direct or circumstantial evidence."[253] The *McDonnell Douglas* approach, as clarified by *Burdine* and *Aikens*, is not limited to circumstantial cases.

Conversely, the evidence in *Price Waterhouse*, rather than being direct, was arguably if not definitively circumstantial. Circumstantial evidence requires an inference to reach the ultimate conclusion.[254] The statements of sexual stereotyping in *Price Waterhouse* do not prove directly that the firm discriminated against Hopkins based on her sex but rather expose an attitude from which discrimination may be inferred.[255] The 1991 Act, which rejected the *Price Waterhouse* mixed-motives analysis, did not alter the applicability of both direct and circumstantial evidence to mixed-motives cases.[256]

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[251] *Burdine*, 450 U.S. at 256. The Court went on to remark that the plaintiff could prevail indirectly, by showing that the employer's explanation is unworthy of belief, that is, by proving pretext. *Id.*

[252] 460 U.S. 711 (1983).

[253] *Id.* at 714 n.3. *See* Whitis, *supra* note 16, at 293 (observing that *McDonnell Douglas* accommodates the use of direct and circumstantial evidence to prove discrimination).

[254] Circumstantial evidence is "[t]estimony not based on actual personal knowledge or observation of the facts in controversy but of other facts from which deductions are drawn, showing indirectly the facts sought to be proved." BLACK'S LAW DICTIONARY 243 (6th ed. 1990); *see also* 1 MCCORMICK ON EVIDENCE § 185, at 777 (4th ed. 1992) ("Direct evidence is evidence which, if believed, resolves a matter in issue. Circumstantial evidence may also be testimonial, but even if the circumstances depicted are accepted as true, additional reasoning is required to reach the proposition to which it is directed.").

[255] One commentator has argued that "the evidence presented in *Price Waterhouse* was *not* direct evidence in the hornbook definition sense. Direct evidence is evidence which, if believed, resolves a matter in issue." The evidence in *Price Waterhouse* "requires additional reasoning to reach the proposition to which it is directed." Essary, *supra* note 3, at 428.

[256] *See infra* note 260 and accompanying text.

2. The Civil Rights Act of 1991: The Motivating-Factor Test

The Civil Rights Act of 1991 overruled the mixed-motives analysis of *Price Waterhouse* by requiring a plaintiff to prove merely that discrimination was a factor which motivated the adverse employment decision.[257] The 1991 Act provides that "an unlawful employment practice is established when the complaining party demonstrates that race, color, sex, religion or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice."[258] A Title VII plaintiff therefore has a valid claim when mixed motives, one permissible and the other forbidden, contributed to the adverse employment decision. Regardless of its impact on the challenged action, a legitimate motive is not a defense but is relevant only to determining the remedy.[259]

Nothing in the statute or its legislative history[260] sug-

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[257] 42 U.S.C. § 2000(e)-2(m) (Supp. 1992).

[258] *Id.* The amendment to Title VII changed the law applicable to mixed-motives cases by overruling *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), insofar as *Price Waterhouse* held that an employer who illegally discriminates is exonerated from liability if a concurrent permissible reason would have caused the employment action absent the discrimination.

[259] Section 2000e-5(g)(2)(B) of the 1991 Act says:

> On a claim in which an individual proves a violation under § 2000e-2(m) of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court-
>
> (i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under § 2000e-2(m) of this title; and
>
> (ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).

42 U.S.C. § 2000e-5(g)(2)(B) (Supp. III 1991).

[260] The House Report on the proposed legislation destined to become the Civil Rights Act of 1991 states:

> To establish liability under proposed Subsection 703(1), the complaining party must demonstrate that discrimination *actually contributed* or was otherwise *a factor in* an employment decision or *action*. Thus, in providing liability for discrimination that is a *"contributing factor,"* the Committee intends to restore the rule applied in many federal circuits prior to the *Price Waterhouse* decision that an employer may be held liable for any discrimination that is actually shown to play a role in a contested

gests that a plaintiff cannot rely on circumstantial evidence to show that discrimination motivated the employer. A plaintiff may offer all proof of discriminatory intent, whether direct or circumstantial, under the motivating factor test of the Civil Rights Act of 1991. A plaintiff presenting a case under the *McDonnell Douglas* approach may and should offer the same proof of discriminatory intent, for *Hicks* holds that proving pretext without evidence of discriminatory animus does not assure victory.[261]

3. *McDonnell Douglas*: Heightening Plaintiffs' Burden

McDonnell Douglas requires plaintiff to prove a prima facie case. The 1991 Act contains no such requirement. Where a plaintiff fails to prove a prima facie case, *McDonnell Douglas* requires dismissal of the claim irrespective of proof that discrimination motivated the employer.[262] In such cases, *McDonnell Douglas* clashes with the 1991 Act.

Some illustrations highlight the potential disparity between the *McDonnell Douglas* scheme and the motivating-factor test of the 1991 Act. A plaintiff, unqualified for a job, is entitled, under the 1991 Act, to relief if he proves that discrimination motivated the employer's decision to reject, demote or fire him. Similarly, once a rejected job applicant proves a discriminatory motive, the 1991 Act affords him relief even if the employer stopped soliciting applicants.[263] The same result obtains where a worker who is a casualty of a reduction-in-force plan proves discriminatory motive. He does not forfeit his right to relief simply because he cannot prove that he performed on the job as ably as some of the retained workers. In all such cases, courts, dutifully applying the *McDonnell Douglas* prima

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employment decision.
1991 CONG. AND ADMIN. NEWS, House Report No. 102-40(I), at 586 (May 17, 1991).

[261] *Hicks*, 113 S. Ct. at 2754.

[262] *McDonnell Douglas*, 411 U.S. at 802; *Hicks*, 113 S. Ct. at 2746-47; Mitchell v. Data General Corp., 12 F.3d 1310, 1318 (4th Cir. 1993) (affirming summary judgment for the employer because plaintiff failed to establish a prima facie case); EEOC v. IPMC, Inc., 834 F. Supp. 200, 206-07 (E.D. Mich. 1993) (granting summary judgment to the employer because the plaintiff failed to establish a prima facie case).

[263] 42 U.S.C. § 2000e-2(m) (Supp. III 1992).

facie case, must deny relief to injured plaintiffs.[264] By denying recovery to plaintiffs who can prove that discrimination was a motivating factor, *McDonnell Douglas* violates the very statute it avowedly promotes.

4. *McDonnell Douglas*: A Superfluous Approach

One might argue that where the plaintiff disproves the defendant's "legitimate" reason but has no proof of discriminatory intent, *McDonnell Douglas* enhances rather than diminishes a plaintiff's prospects for a favorable outcome because it permits the jury to find for the plaintiff despite his failure to meet the motivating-factor test of the 1991 Act. It is also arguable that *McDonnell Douglas* helps the plaintiff whose evidence of discrimination is sufficient to prevail only when considered in conjunction with his proof of pretext. In other words, plaintiffs whose proof of pretext boosts otherwise deficient evidence of discrimination over the requisite evidentiary threshold benefit from the *McDonnell Douglas* scheme. However, such cases are probably the exception rather than the rule. The readiness of many courts to grant judgment as a matter of law to a defendant when a plaintiff's case is questionable decreases the likelihood that *McDonnell Douglas* will serve plaintiffs with marginal cases.[265]

More fundamentally, it is questionable that the *McDonnell Douglas* scheme, as modified by the *Hicks* permissive rule, ever enhances a plaintiff's case. *McDonnell Douglas* is not necessary to bring the issue of pretext before the finder of fact. Discrediting defendant's articulated legitimate reason is indirect proof that discriminatory intent motivated the defendant. Proof of pretext is, therefore, relevant to and may satisfy the "motivating factor" test of the 1991 Act.

Rather than applying the *McDonnell Douglas* framework,

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[264] *E.g.*, Henson v. Liggett Group, Inc., 63 F.3d 270 (8th Cir. 1995); Mitchell v. Data General Corp., 12 F.3d 1310 (4th Cir. 1993); EEOC v. IPMC, Inc., 834 F. Supp. 200 (E.D. Mich. 1993); EEOC v. MCI Int'l, Inc., 829 F. Supp. 1438 (D.N.J. 1993). For a discussion of these cases see *infra* notes 273-92 and accompanying text.

[265] *E.g.*, Anderson v. Baxter Healthcare Corp., 13 F.3d 1120, 1126 (7th Cir. 1994); Durham v. Xerox Corp., 18 F.3d 836, 840-41 (10th Cir. 1994); LeBlanc v. Great American Ins. Co., 6 F.3d 836, 849 (1st Cir. 1993).

all disparate-treatment discrimination cases should follow the traditional practices of civil litigation, as do cases adjudicated under the motivating-factor test of the 1991 Act. Such practices allow for adducing proof of pretext. Plaintiff's attorney, on cross-examination, might ask the defendant or its responsible agent why he made the contested employment decision. If the party who made the employment decision does not otherwise testify, the plaintiff could call him as a hostile witness. Having elicited the alleged reason for the challenged action, the plaintiff would offer rebuttal evidence. Thus, without the formalism of the *McDonnell Douglas* scheme the plaintiff could present to the finder of fact evidence of pretext. To decide the ultimate issue of discriminatory intent, the jury would weigh this testimony along with all relevant evidence. Proof bearing on the issue of pretext would be before the factfinder. Pretext, however, would not receive undue emphasis and would not necessarily be the determining factor at trial.

B. *Disadvantages to the Employee*

1. Stage One and the Prima Facie Case: The Denial of Meritorious Claims

The mischief of *McDonnell Douglas* does not end with a technical inconsistency with Title VII. Requiring plaintiffs to prove a prima facie case under the *McDonnell Douglas* framework has doomed otherwise valid discrimination claims.[256] Courts, apparently recognizing the potential injustice caused by strict application of the *McDonnell Douglas* prima facie case, often search for alternative, though questionable, grounds to support decisions against civil rights plaintiffs.[257]

The purpose of a prima facie case is to eliminate some of the most common defenses[258] and thereby sharpen the is-

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[256] *See infra* notes 273-92 and accompanying text.

[257] Many courts rely, in the alternative, on a purported lack of evidence of discriminatory intent, despite substantial evidence to the contrary. *See, e.g.*, Henson v. Liggett Group, Inc., 63 F.3d 270, 277 (8th Cir. 1995); Mitchell v. Data General Corp., 12 F.3d 1310, 1317-18 (4th Cir. 1993); EEOC v. IMPC, Inc., 834 F. Supp. 200, 203-06 (E.D. Mich. 1993).

[258] *Burdine*, 450 U.S. at 253-54.

sues.[269] The first element of a prima facie case, regardless of the factual context, is that the plaintiff belongs to a protected class.[270] Fundamental to any civil rights claim, this element is logically necessary to a prima facie case if such a construct is used. The remaining elements of a prima facie case, however, vary with the factual setting[271] and even under identical facts the elements differ from court to court.[272]

In a refusal-to-hire case, an element of a prima facie case is that the plaintiff applied for the job in question.[273] This element seems unobjectionable. Yet even this apparently benign requirement may scuttle an arguably meritorious claim. In *E.E.O.C. v. IPMC, Inc.*,[274] for example, the plaintiff, a sixty-year-old electrician, applied unsuccessfully for one of eight openings at the defendant's plant. All eight positions went to younger men. A month later, the defendant advertised another position for an electrician. Although the defendant's policy was to keep applications active for two years, the defendant did not notify the plaintiff of the opening, and the job too went to a younger man. The plaintiff filed a complaint alleging age discrimination. Because the plaintiff had not applied for the new opening, the court held that he failed to establish a prima facie case and granted the defendant summary judgment.[275] If this case had gone to a jury, the result might have been different.

Another element of a prima facie refusal-to-hire case is that after the defendant rejects a qualified minority applicant the defendant continue to seek applicants with plaintiff's qualifications.[276] In most cases where the employer discriminated,

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[269] *Id.* at 255-56.

[270] *McDonnell Douglas*, 411 U.S. 792, 802 (1973).

[271] *Id.* at 802 n.13.

[272] *See supra* note 146 (discussing the elements of a prima facie case in a reduction-in-force case).

[273] *See, e.g.*, Furnco Constr. Corp. v. Waters, 438 U.S. 567, 575 (1978); Tye v. Polaris Joint Voc. Sch. Dist., 811 F.2d 315, 317 (6th Cir. 1987); King v. Palmer, 778 F.2d 878, 880 (D.C.Cir. 1985).

[274] 834 F. Supp. 200 (E.D. Mich. 1993).

[275] *Id.* at 206-07. Plaintiff alleged also that defendant violated the ADEA by rejecting him for the initial openings. The defendant argued that plaintiff was not as qualified as the accepted applicants. Although finding that the plaintiff had created a triable issue of fact as to whether the defendant's reason was a pretext, the court granted the defendant summary judgment on the ground that plaintiff failed to offer additional evidence of discriminatory intent. *Id.* at 203-06.

[276] *McDonnell Douglas*, 411 U.S. at 802.

the job will remain open and the plaintiff will encounter no difficulty proving this element. But nothing guarantees that the employer will persist in trying to fill the position. A sophisticated employer, perhaps under advice of counsel, might abolish the position to insulate himself from liability. Presumably the plaintiff's case is built on circumstantial evidence, because the courts apply *McDonnell Douglas* to circumstantial cases. Such a case might be based on persuasive statistical evidence. For example, white applicants of the defendant might have fared better than their black counterparts possessing superior qualifications. Black workers deserving promotions might have been overlooked systematically. In addition to this evidence, a plaintiff will try to prove that his employer's professed reason for rejecting him is pretextual. The plaintiff might expose the reason as a lie conjured up on the eve of trial. The record might not even hint of an alternative legitimate explanation. Despite a strong circumstantial case and despite meeting the permissive pretext-only standard, the plaintiff, incapable of proving this element of a prima facie case, is stymied.

Henson v. Liggett Group, Inc.[277] illustrates the absurdity of requiring a plaintiff to show that the defendant rejected him or her for a job that was officially "open," and for which the defendant continued to seek applicants. Henson, a fifty-year-old Liggett employee, sought to transfer to another position with the company when her job became slated for elimination. After the position Henson sought went to a younger applicant, she sued Liggett for age discrimination. The circuit court expressed doubt whether Henson could survive summary judgment because Liggett had never formally posted the opening or accepted any applicants (other than Henson and the person hired) for the job.[278]

A prima facie refusal-to-hire case under the *McDonnell Douglas* framework also requires that the plaintiff qualified for the position for which he unsuccessfully applied.[279]

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[277] 63 F.3d 270 (8th Cir. 1995).

[278] *Id.* at 275. The circuit court ultimately affirmed the district court's order of summary judgment for Liggett on the ground that Henson failed to present sufficient evidence of pretext. *Id.* at 277. Notably, the circuit court found Henson's submission of discriminatory statements of Liggett managers insufficient to withstand the summary judgment motion because the age-biased statements were not directed specifically at her. *Id.* at 276.

[279] *McDonnell Douglas*, 411 U.S. at 802; *see* Malamud, *supra* note 10, at 2282-

McDonnell Douglas does not account for the situation where a defendant summarily rejects an unqualified applicant for an illegal discriminatory reason. In *Mitchell v. Data General Corp.*,[280] a case of alleged wrongful discharge based on age discrimination, the Fourth Circuit affirmed summary judgment for the employer, in part, because the discharged employee failed to show that he was performing at a level that met the employer's legitimate expectations.[281] The potential injustice of such an approach is that, in addition to plaintiff's qualifications, discriminatory intent might have motivated the employer, or, more strikingly, the plaintiff's qualifications may have played only a minor role in influencing an employer's decision motivated primarily by discrimination. In a mixed-motives case, the legitimate reason should not shield the employer.[282]

In a case of discharge or demotion, rather than rejection, an element of a prima facie case is that the employer sought a replacement for the aggrieved employee.[283] The employer, however, may have discriminated although it did not seek a replacement. A convincing circumstantial case, lacking proof that someone filled plaintiff's position, will never reach the jury.[284]

Where the defendant claims to have fired the plaintiff as part of a reduction-in-force plan, the elements are not settled.[285] Some courts require a plaintiff to show that the employer retained some unprotected workers who were performing below the level of the plaintiff.[286] The plaintiff will, in many instances, be able to make such a showing. Where the

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90 (arguing that courts interpret the prima facie element "job qualification" inconsistently and that the courts thus do not apply *McDonnell Douglas* uniformly).

[280] 12 F.3d 1310 (4th Cir. 1993).

[281] *Id.* at 1317. The court granted the defendant summary judgment for a second reason: the plaintiff could not prove that he had performed superior to retained, unprotected employees. *Id.* at 1316-17; *see also infra* notes 287-89 and accompanying text. It also ruled that Mitchell did not establish pretext. *Id.* at 1317-18.

[282] If discriminatory intent contributed to the defendant's conduct, he is liable. 42 U.S.C. § 2000e-2(m).

[283] Anderson v. Baxter Healthcare Corp., 13 F.3d 1120, 1122 (7th Cir. 1994).

[284] *See* Lopez v. Metro. Life Ins. Co., 930 F.2d 157, 161 (2d Cir. 1991) (affirming summary judgment for the employer because the plaintiff failed to prove that "other sales representatives received training opportunities that [the employee] was denied," which is an element of a prima facie case when the employee alleges wrongful discharge).

[285] *See supra* note 146 and accompanying text.

[286] Mitchell v. Data General Corp., 12 F.3d 1310, 1315 (4th Cir. 1993).

plaintiff fails to meet this burden, the discrimination claim may indeed be dubious. In such cases the prima facie case functions appropriately because it screens out weak if not insupportable claims.

A problem arises, however, when a plaintiff who has suffered discrimination cannot prove his performance superior to that of unprotected employees who kept their jobs. If the inability to prove this element coincided necessarily with unworthy discrimination claims, there would be no problem. To put the matter differently, if all victims of discrimination in a reduction-in-force case could fairly be expected to prove that unprotected employees performing less satisfactorily received favorable treatment, this element would be a sound component of a prima facie case. However, some victims may find this element impossible to prove. In *Mitchell v. Data General Corp.* the plaintiff could not, in the court's view, satisfy this element[287] and the result was summary judgment for the employer.[288] If a plaintiff fails to satisfy this element, the court must grant the defendant summary judgment regardless of inferential proof of discrimination.[289]

Such a situation is more than a remote possibility. For example, assume that a work force of one hundred factory workers is composed of eighty whites and twenty blacks. The employer, paring his roster to eighty, fires all twenty black workers. Not a single white worker loses his job. A discharged black worker may not be able to prove past job performance superior to many or even any of the white workers. Comparisons may be difficult to draw. Performance of repetitive factory tasks may be indistinguishable. More ominously, the employer's records of the plaintiff may indicate, through bias and even premeditation, an unfounded work history of inferior performance. Although the disproportionately high number of black firings raises an overwhelming inference of discrimination, the facts of this example do not support a prima facie

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[287] *Id.* at 1316.

[288] *Id.* at 1318. The court also measured Mitchell's case against a prima facie discharge-for-cause case. One element of this prima facie case is that the employee was functioning at a level commensurate with the employer's legitimate expectations. The court held that Mitchell did not meet this element. *Id.* at 1317. *See supra* notes 281-82 and accompanying text.

[289] In *Mitchell* the court found inadequate evidence of pretext. *Id.* at 1317-18.

case.

A reduction-in-force plaintiff may also be required to prove that the employer retained a similarly situated employee not in the protected class.[290] In *EEOC v. MCI International, Inc.*,[291] an age discrimination case, MCI asserted that it fired the plaintiff because of poor job performance. The plaintiff impeached this allegation by submitting a letter of recommendation in which his supervisor at MCI praised his performance. He also presented persuasive statistical evidence that MCI had disproportionately targeted older workers for dismissal. The court nonetheless dismissed the claim because the plaintiff could not prove a prima facie case.[292]

Proponents of *McDonnell Douglas* might argue that shortcomings of its prima facie cases do not lead to the conclusion that the courts should scrap *McDonnell Douglas*. Recasting the elements might salvage the approach. So many problems plague the *McDonnell Douglas* scheme, however, that there seems to be little wisdom in retaining it.

2. Stage Three: Proving Pretext

At stage two, the defendant must merely articulate, not prove, a legitimate reason for the adverse employment action.[293] An employer might brazenly assign a reason for his conduct which the jury finds incredible. The proffered justification might nevertheless satisfy the employer's burden of production. Although the jury disbelieves the employer, he has articulated a legitimate reason which stands unless the plaintiff disproves it at stage three. If the plaintiff cannot meet this burden, the employer wins the case based on the disbelieved reason. For example, the employer might assert that he and the employee "just didn't get along." Although this reason might well be true, it might be a lie transparent to the jury. The employer has nevertheless met his burden of production. The employee may have no way of proving that the employer's

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[290] EEOC v. MCI Int'l, Inc., 829 F. Supp. 1438, 1455 (D.N.J. 1993).

[291] *Id.*

[292] *Id.* The court also dismissed the claim because the plaintiff had failed to present direct evidence of discriminatory intent. *Id.*

[293] *E.g.*, Armstrong v. Dallas, 997 F.2d 62, 65 (5th Cir. 1993); King v. Palmer, 778 F.2d 878, 881 (D.C. Cir. 1985).

reason is a euphemism for prejudice. Strict application of *McDonnell Douglas* does not allow a jury to express its conviction that the employer's professed innocence masks illegal discrimination.

C. *Disadvantages to the Employer: Articulating a Legitimate Reason at Stage Two*

The employer may indeed have not gotten along with the fired employee. A prudent litigant might refrain from raising this explanation because a jury might wrongly infer pretext from it. Strategy might preclude the employer from articulating other legitimate reasons that motivated the challenged action. The employer might perceive vague but true reasons as unpersuasive and suggestive of pretext. Embarrassing reasons might shun revelation.[234] Employers might conceal reasons arguably exposing them to other civil liability.[235] Offensive reasons, even if legitimate, might incite the jury's disapproval.

Wary of the ambiguous or vague, fearful of the embarrassing or offensive, the employer might seek vindication based on circumstantial evidence. Members of the protected class might represent a disproportionately high percentage of the employer's work force. The workplace relationship between the employer and the plaintiff, if congenial or supportive, might tend to counter charges of discrimination. The employer or the manager charged with making the challenged employment decision might be a member of the protected class.[236] One can imagine numerous circumstantial facts that might serve the employer reluctant to rely on the reasons for the challenged action. The jury might reject these facts. It might infer discrimination from the employer's failure to explain its conduct. It might, on the other hand, find the indirect evidence persuasive, particularly if the plaintiff's case is borderline. Although the employer's circumstantial evidence might disprove discrimination to the jury's satisfaction, it is, unless supported by a formally articulated reason, legally insufficient.

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[234] *See* O'Leary, *supra* note 9, at 837.

[235] *See* Samp, *supra* note 64, at 16 (positing that an employer might conceal that it fired an employee in violation of a labor agreement).

[236] *See Hicks*, 113 S. Ct. at 2750.

D. *Pervasive Disadvantages*

The three-stage, burden-shifting *McDonnell Douglas* scheme, beset with burdens of production and persuasion, a rebuttable presumption, and strictures on acceptable forms of proof has afflicted the federal judiciary with unabated turmoil.[297] Subsequent explanations in *Burdine* and *Hicks* have failed to allay the uncertainty and have engendered continued debate among the circuit courts.[298]

One must sympathize with jurors who must make factual determinations in elusive discrimination cases based on law which continues to spark controversy among the judiciary. Under the prevailing standard, the permissive pretext-only rule, the *McDonnell Douglas* framework has degenerated into a "useless ritual."[299] After the plaintiff has established a prima facie case, the employer must articulate legitimate reasons for his conduct.[300] Then, rather than those reasons framing the issues as logic suggests, the employee may present evidence of discrimination unrelated to the articulated reasons, the employer may present any evidence to justify his conduct, and the jury may search the record for justifications.[301] Jurors must wonder why the judge instructs them to apply a self-contradictory standard. They must question their understanding of the instructions. They must believe that they are somehow missing the point.

Even the word "pretext," as used in *McDonnell Douglas* and explained in *Hicks*, is misleading. Although the word denotes subterfuge, the Supreme Court tells us that an employer may indulge in an "innocent" pretext, one motivated by an employer's uncertainty of why a manager fired a protected employee.[302] This Orwellian redefinition of "pretext" will further confound the already mortally perplexed.

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[297] *See supra* notes 12-16 and accompanying text.

[298] *See supra* notes 58-76, 129-133 and accompanying text.

[299] *Hicks*, 113 S. Ct. at 2761 (Souter, J., dissenting); *see also* Essary, *supra* note 3, at 423.

[300] *Burdine*, 450 U.S. at 253.

[301] *Hicks*, 113 S. Ct. at 2765 (Souter, J., dissenting).

[302] *Id.* at 2764 (Souter, J., dissenting).

CONCLUSION

There is some solace in the hope (perhaps the inevitability) that nonplussed jurors, regardless of *McDonnell Douglas*, will revert to their common sense and decide cases based on whether they think the employer discriminated. But the evidentiary distortions of the *McDonnell Douglas* scheme will hinder their deliberations. In rejecting the pretext-only rule, *Hicks* has eliminated any slender justification for retaining the *McDonnell Douglas* scheme. Too many courts, claiming to follow *Hicks*, grant employers summary judgment in cases presenting factual questions for a jury.[303] Confusion is averted at the cost of justice.

Revamping the approach is not the solution. A system with flaws so pervasive and serious eludes even the most laborious efforts at repair. Early optimism must surrender to proof of failure. The Supreme Court should discard the *McDonnell Douglas* scheme and supplant it with the motivating-factor test. Civil rights litigants would then face the serviceable practices applicable in all civil cases. Unfettered by formalism, they would devise a strategy and present the evidence. The jury would decide whether the plaintiff has proven that illegal discrimination motivated the adverse employment decision. The defendant would then have the opportunity to limit the remedy by proving that it would have taken the same action based on a legitimate reason.[304] After twenty years of disarray, sense would be restored to circumstantial employment discrimination cases.

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[303] *See supra* notes 203-218 and accompanying text. *But see* Malamud, *supra* note 10, at 2305 (arguing that some courts erroneously interpret *Hicks* to foreclose summary judgment for employers once the case reaches the pretext stage).

[304] 42 U.S.C. § 2000e-5(g)(2)(B) (1988 & Supp. V 1993).