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St. Mary's Honor Center v. Hicks: Has the Supreme Court Turned Its Back on Title VII by Rejecting Pretext-Only

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Notes

ST. MARY'S HONOR CENTER v. HICKS: HAS THE SUPREME COURT TURNED ITS BACK ON TITLE VII BY REJECTING "PRETEXT-ONLY?"

I. INTRODUCTION

Discrimination in the workplace, whether subtle or blatant, is a bias that has plagued many respected institutions throughout this nation. In 1964, Congress addressed this problem by passing Title VII of the Civil Rights Act of 1964 (Title VII), a federal civil rights statute that combats discriminatory employment practices based on an individual's race, color, religion, sex or national origin. The language of Title VII "makes plain the purpose of Congress to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered . . . stratified job environments to the disadvantage of minority citizens."

1. See, e.g., James Conway, Mr. Packwood's Neighborhood - No Shame in the Senate, WASH. POST, Jan. 16, 1994, at C1 (discussing Oregon Senator Robert Packwood's unwelcomed sexual advances and harassment of several female staff members and aides); Lynn Duke, Charges Ignite Lobbying Groups - Court Nominee, His Accuser and Senate Process Come Under Fire, WASH. POST, Oct. 8, 1991, at A9 (discussing allegations of sexual harassment/discrimination by Anita Hill against then Supreme Court Justice-nominee Clarence Thomas while both were employed for Equal Employment Opportunity Commission); Dupont, Black Employees Settle Discrimination Suit, ORLANDO SENTINEL, Aug. 15, 1993, at A20 (discussing $14 million settlement of 155 black, former-employees' claims against Fortune 500 company DuPont Co., involving racially discriminatory seniority system); Lisa Petrillo, Thesis Charges Sex Bias Is Still Strong in Navy, S.D. UNION-TRIB., Jan. 26, 1992, at B3 (stating sexual discrimination is deeply-rooted in very structure of Navy, evidenced by 1991 Tailhook Scandal that was source of sexual assault and harassment allegations).


3. Id. Title VII of the Civil Rights Act of 1964 provides in pertinent part:
   (a) It shall be an unlawful employment practice for an employer—
      (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . .
   Id. § 2000e-2(a)(1).


   During extended debate over Title VII in the Senate, Senator Byrd of West Virginia explained:
   The avowed purpose of [T]itle VII of the bill is to eliminate, by formal . . . remedial procedures, discrimination in employment on account of race, color, religion, sex or national origin. The title would provide for a con-

(123)
Although the purpose of Title VII may be evident, the means of interpreting Title VII to further this purpose have recently come into question. The controversy concerns the proper interpretation of the evidentiary framework the United States Supreme Court developed for use in Title VII claims. In 1973, the Supreme Court set forth an evidentiary framework that allowed employees to prove intentional discrimination without direct evidence of discriminatory animus. Subsequently, the Court refined this burden of proof scheme and required that an employer satisfy merely a burden of production of evidence on the issue of non-discriminatory justifications for an employment decision. Under this framework, a Title VII plaintiff could establish discriminatory intent circumstantially, by proving that an employer's reason for a challenged employment decision was pretextual.

This framework had been in place for two decades without any major conflicts, when the federal courts began to diverge in their interpretations of this scheme. Commentators have referred to these conflicting interpretations as "pretext-only" and "pretext-plus." The interpretation of this burden of proof scheme was important as courts that employed the "pretext-plus" approach placed a significantly higher evidentiary burden on the employer to prove that its reasons for a challenged employment decision were non-discriminatory.


8. Burdine, 450 U.S. at 256.

9. For a discussion of the varying interpretations utilized by the federal courts, see infra notes 47-97 and accompanying text.

10. See Lanctot, supra note 5, at 67 (using terms "pretext-only" and "pretext-plus" to describe conflicting interpretations). For a further discussion of the "pretext-only" approach, see infra notes 47-72 and accompanying text. For a further discussion of the "pretext-plus" approach, see infra notes 73-97 and accompanying text.
Recently, the Supreme Court confronted the issue of the proper evidentiary burdens for a Title VII race discrimination claim in *St. Mary's Honor Center v. Hicks.* In *Hicks*, the Supreme Court held that a trier of fact's rejection of an employer's proffered legitimate, nondiscriminatory reason for making a challenged employment decision does not entitle an employee to a judgment as a matter of law unless the employee has offered persuasive evidence that the employer acted with discriminatory animus. *Hicks* is significant because it represents one in a series of rulings by the Supreme Court that makes it more difficult for employees who have suffered discrimination to win civil rights lawsuits.

In section II, this Note discusses the evidentiary framework for Title VII suits and cases that are illustrative of the "pretext-only" or "pretext-plus" approaches. Section III of this Note analyzes the *Hicks* Court's rationale for rejecting the "pretext-only" approach. This section also discusses the rationale of the dissent, which advocated the "pretext-only" approach. Finally, this Note suggests that Congress take legislative action to ensure that courts interpret the evidentiary framework of a discrimination suit in a manner consistent with the purposes of Title VII.

11. See Lanctot, *supra* note 5, at 91 (discussing amount and quality of "plus" evidence required in "pretext-plus" courts). Under the "pretext-plus" interpretation, reliance on the evidence comprising the prima facie case will not appease "pretext-plus" courts, even when the Supreme Court has given the indication that pretext could be shown with this evidence in tandem with effective cross-examination of a defendant. *Id.* (citing Grisby v. Reynolds Metals Co., 821 F.2d 590, 596 (11th Cir. 1987), Loeb v. Textron Inc., 600 F.2d 1003, 1015 (1st Cir. 1979) and Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 255 n.10 (1981)). A higher burden on the plaintiff results from the requirement of additional evidence by the pretext-plus courts. *Id.* at 99. Viable forms of such proof include direct, comparative and statistical evidence. *Id.*

12. 113 S. Ct. 2742 (1993). For a discussion of the forms of discrimination affected by this decision and the rationale for its encompassing effects, see *infra* note 24.

13. *Hicks*, 113 S. Ct. at 2748.


15. For a discussion of the evidentiary framework for Title VII suits and the two interpretations of this framework, see *infra* notes 19-97 and accompanying text.

16. For a discussion of the majority's reasoning in *Hicks*, see *infra* notes 120-70 and accompanying text.

17. For a discussion of the dissent's reasoning in *Hicks*, see *infra* notes 171-206 and accompanying text.

18. For a discussion of a proposal for legislative action, see *infra* notes 225-26 and accompanying text.
II. BACKGROUND

A. McDonnell Douglas Evidentiary Framework

In *McDonnell Douglas Corp. v. Green*, one of the first Title VII cases to reach the Supreme Court, the Court addressed the order and allocation of proof in a private, non-class action suit challenging employment discrimination. In *McDonnell Douglas*, the plaintiff, Percy Green, a McDonnell Douglas mechanic and black civil rights activist, was fired by McDonnell Douglas as the result of a general reduction in workforce. Upon Green's re-application to the mechanic position, McDonnell Douglas allegedly refused to rehire Green because of his protest activities following his discharge. Green, however, alleged that the true reason behind McDonnell Douglas' refusal to rehire was his race and his civil rights activities.

The *McDonnell Douglas* Court set forth a tripartite evidentiary framework for evaluating claims of discrimination under Title VII. Under this framework, the plaintiff must first make a prima facie case of discrimination. Then, the defendant must offer a legitimate, non-discriminatory reason for the challenged action. If the defendant succeeds, the burden shifts back to the plaintiff to prove that the defendant's reason is pretextual.


There are, however, several circumstances in which the McDonnell Douglas framework is not appropriate. The framework is not applicable in a number of situations in which intentional discrimination is not at issue. See Diane L. Hoadley, Note, Title VII and Mixed Motives — Too Little Too Late? Price Waterhouse v. Hopkins, 15 S. ILL. U. L. J. 167, 173-74 (1990) (discussing different applicable evidentiary frameworks when intent is not at issue).

First, the McDonnell Douglas framework does not apply to claims involving so-called “mixed motive” discrimination. Price Waterhouse, 490 U.S. at 247. See generally Paul J. Gudel, Beyond Causation: The Interpretation of Action and the Mixed Motives Problem in Employment Discrimination Law, 70 Tex. L. Rev. 17 (1991) (discussing Price Waterhouse and legal standards for dealing with mixed motive discrimination cases). A mixed motive case is one in which the evidence indicates the employer has both permissible and impermissible criteria for the employment decision. Price Waterhouse, 490 U.S. at 247. In Price Waterhouse, the respondent, Hopkins, was a female senior manager for a professional accounting partnership, Price Waterhouse. Id. at 231. In 1982, Hopkins was considered for partnership; however, no decision to offer or deny Hopkins partnership was made that year. Id. Instead, her candidacy was postponed for reconsideration in the following year. Id. When Price Waterhouse later denied Hopkins partnership, she sued Price Waterhouse alleging Price Waterhouse had engaged in gender discrimination against her, in violation of Title VII. Id. at 231-32. A plurality of the Court determined that the employer was required to carry the burden of persuasion “by proving that it would have made the same decision even if it had not allowed [an impermissible reason] to play such a [motivating] role.” Id. at 244-45. The employer’s burden in mixed motive cases, as opposed to pretext cases in which the burden of production applies under McDonnell Douglas, is of persuasion because mixed motive cases by their very nature will always contain direct evidence of intentional discriminatory animus. Id. at 244-47. When mixed-motives are involved, “it simply makes no sense to ask whether the legitimate reason was the true reason” because the court has already determined that both legitimate and illegitimate reasons motivated the employer. Id. at 247. Further, Justice O’Connor, in her concurrence, stated that when there is direct evidence of intentional discriminatory animus, it is logical to place a heavier burden on, the employer. Id. at 271 (O’Connor, J., concurring). The purpose of the McDonnell Douglas framework is to compensate for the “fact that direct evidence of intentional discrimination is hard to come by.” Id. (O’Connor, J., concurring). O’Connor further stated that she did “not think that the employer [was] entitled to the same presumption of good-faith where there [was] direct evidence that it ha[d] placed substantial reliance on factors whose consideration [was] forbidden by Title VII.” Id. (O’Connor, J., concurring). Therefore, the employer must do more than articulate a lawful reason for the chal-
framework, the plaintiff-employee has the initial burden of establishing a prima facie case of discrimination. This is the first stage of the tripartite framework. To establish a prima facie case, the plaintiff must prove: (1) that the plaintiff is part of a protected class; (2) that the plaintiff applied for the position at issue; (3) that the plaintiff was qualified for the position; (4) that the employer rejected the plaintiff; and (5) that the employer kept the position open and continued to seek applicants from persons with plaintiff's qualifications.

Second, the McDonnell Douglas burden structure does not apply in cases where an employer asserts an affirmative defense of a bona fide occupational qualification (BFOQ) in response to charges of discrimination. See International Union v. Johnson Controls, Inc., 449 U.S. 187, 200 (1991) (discussing framework in claim involving BFOQ). When an employer asserts a BFOQ defense, the employer is in effect admitting that he or she used impermissible criteria in the decision, but asserting that its use was justified in the particular instance. EEOC v. Mercy Health Ctr., 29 Fair Empl. Prac. Cas. (BNA) 159, 162 (W.D. Okla. 1982). The employer's admission is direct evidence of intentional discriminatory animus. See Johnson Controls, 499 U.S. at 200. Therefore, the use of the McDonnell-Douglas framework, which functions to create inferences of discriminatory intent, is not needed. See Harden v. Dayton Human Rehabilitation Ctr., 520 F. Supp. 769, 777 (S.D. Ohio 1981) (stating that "[t]he necessity for the McDonnell Douglas allocation of proof, and in particular the prima facie case with its resulting inferences, is absent in situations involving a [BFOQ]"), aff'd, 779 F.2d 50 (1985).

Finally, the Civil Rights Act of 1991 reaffirmed the traditional view that discrimination in the form of disparate impact is another exception to the McDonnell Douglas framework. 42 U.S.C. § 2000e-2(k) (Supp. V 1993). The disparate impact doctrine prohibits employment practices that are facially nondiscriminatory but ultimately have a discriminatory impact on a protected class, when those practices cannot be justified by business necessity. Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971). In a disparate impact claim, there is no need to prove intentional discriminatory animus on the part of the employer. Unlike situations where intent to discriminate is at issue, in disparate impact claims Congress decided to place the burden of persuasion on the employer to prove its legitimate nondiscriminatory reasons for the challenged policy or decision. 42 U.S.C. § 2000e-2(k)(1).

25. Burdine, 450 U.S. at 255; McDonnell Douglas, 411 U.S. at 802.
27. McDonnell Douglas, 411 U.S. at 802. Members of the protected class include those persons protected under the applicable statute. See id. For example, under Title VII, the protected classes include those effected by employment decisions based on race, color, religion, sex or national origin. 42 U.S.C. §§ 2000e to 2000e-17. The ADEA protects persons over the age of forty from employment decisions based on age. 29 U.S.C. §§ 621-634.

In Burdine, the Supreme Court noted that the prima facie case requirements can vary because the prima facie case "is not inflexible as 'the facts necessarily will vary in Title VII cases,'" depending on the type of discrimination and the differing factual situations. Burdine, 450 U.S. at 253 n.6 (quoting McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 n.13 (1973)). For example, the United States Court of Appeals for the First Circuit in Mesnick v. General Electric Co. stated that a prima facie ADEA case involving a discharge requires a plaintiff to demonstrate that "(i) the plaintiff was over the age of forty, (ii) his [or her] work was sufficient to meet his [or her] employer's legitimate expectations, (iii) his [or her] employer took
Once the plaintiff establishes a prima facie case, the burden of production then “shift[s] to the employer to articulate some legitimate, non-discriminatory reason for the challenged employment decision.” 28 This is the second stage of the tripartite framework. 29 If the employer cannot offer a legitimate, nondiscriminatory reason for the employment decision, the employee prevails. 30 If, however, the employer offers legitimate, non-discriminatory reasons, the plaintiff is given an opportunity to prove that the employer’s proffered reasons were in fact a pretext for impermissible discrimination. 31 While the burden of production lies with the defendant

adverse action against him [or her], and (iv) the employer sought a replacement with roughly equivalent job qualifications.” 950 F.2d 816, 823 (1st Cir. 1991), cert. denied, 112 S. Ct. 2965 (1992). In addition, the United States Court of Appeals for the Third Circuit in Bennun v. Rutgers State University stated that the prima facie case in a Title VII discrimination claim involving promotion requires a showing that the employee “is a member of a [protected class,] that [the employee] applied for, is qualified for and was rejected for the position sought, and that non-members of the protected class were treated more favorably.” 941 F.2d 154, 170 (3d Cir. 1991), cert. denied, 112 S. Ct. 956 (1992). Finally, the United States Court of Appeals for the Seventh Circuit in Williams v. Williams Electronics, Inc. stated that a prima facie case involving a dismissal based on a “reduction in force” requires a showing that the employee was a member of the protected class, that the employee’s job performance met his or her employer’s legitimate expectations, that the employee was fired, and that other employees, not members of the protected class, were treated more favorably. 856 F.2d 920, 922-23 (7th Cir. 1988) (citing Oxman v. WLS-TV, 846 F.2d 448, 455 (7th Cir. 1988)); see BARBARA LINDEMANN SCHLEI & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 1317-18 nn.80-91 (2d ed. 1983) (discussing various applications of McDonnell Douglas framework and noting that significance of McDonnell Douglas framework “lies not in its specification of the precise elements of proof required to establish a prima facie case, but in its creation of a method by which plaintiffs may carry their burden of offering sufficient evidence to create an inference that the defendant’s actions were discriminatory”).

28. Burdine, 450 U.S. at 254; McDonnell Douglas, 411 U.S. at 802. This burden is one of production, not persuasion; therefore the employer “need not persuade the court that it was actually motivated by the proffered reasons.” Burdine, 450 U.S. at 254. The purpose of this burden is to “frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext.” Id. at 255-56. To satisfy the burden of production, “the defendant must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff’s rejection.” Id. at 255 (emphasis added).

29. Burdine, 450 U.S. at 253.

30. Id. at 254. The Court noted that the prima facie case under McDonnell Douglas establishes a rebuttable presumption of unlawful discrimination. Id. Further, the Court stated that “[i]f the trier of fact believes that plaintiff’s evidence, and if the employer is silent in the face of the presumption, the court must enter judgment for the plaintiff because no issue of fact remains in the case.” Id. For a discussion of the rationale behind the rebuttable presumption of unlawful discrimination established by the prima facie case, see infra notes 37-38 and accompanying text.

31. Burdine, 450 U.S. at 253. Once the employer has met its burden of production, “the factual inquiry proceeds to a new level of specificity.” Id. at 255.
(employer) at the second stage of a Title VII action, the burden of persuasion rests with the plaintiff (employee) at all times.\textsuperscript{32}

One of the main concerns that pervades employment discrimination litigation is the unavailability of evidence regarding discriminatory animus.\textsuperscript{33} Even plaintiffs with a bona fide claim may find his or her case impossible to prove if he or she had to produce direct evidence of discriminatory animus. Because discrimination in the employment setting is often invidious\textsuperscript{34} and employers are becoming increasingly sophisticated about employment law, direct evidence of intentional discrimination is rare.\textsuperscript{35} The \textit{McDonnell Douglas} framework accommodates this scarcity of direct evidence by allowing the factfinder to infer discriminatory intent from the circumstances.\textsuperscript{36} Thus, under the shifting burdens of proof

\textsuperscript{32} Id. at 254, 256. "Placing this burden of production on the defendant thus serves simultaneously to meet the plaintiff's prima facie case by presenting a legitimate reason for the action and to frame the factual issue with sufficient clarity... The plaintiff retains the burden of persuasion." Id. at 255-256.

Commentators have suggested that courts examine several factors including policy, convenience, fairness and probability in allocating burdens of production and persuasion. McGinley, supra note 5, at 215 n.46 (citing Candace S. Kovacic-Fleisher, \textit{Proving Discrimination After Price Waterhouse and Wards Cove: Semantics as Substance}, 39 Am. U. L. Rev. 615, 622-23 (1990)). Under the \textit{McDonnell Douglas-Burdine} framework, "patterns of proof were designed to ease the evidentiary burdens on employment discrimination plaintiffs, who rarely are fortunate enough to have access to direct evidence of intentional discrimination." Grisby v. Reynolds Metals Co., 821 F.2d 590, 595 (11th Cir. 1987). Similarly, when evaluating other areas of law,


\textsuperscript{34} See, e.g., United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 716 (1983) (stating that "[t]here will seldom be 'eyewitness' testimony as to the employer's mental processes"); Thornbrough v. Columbus & G. R.R., 760 F.2d 635, 638 (5th Cir. 1985) (stating that "[e]mployers are rarely so cooperative as to include a notation in the personnel file" stating that employee was fired for discriminatory reason).

\textsuperscript{35} See McGinley, supra note 5, at 214 (stating that "[a]s defendants become increasingly sophisticated about the law, these admissions [constituting direct evidence] occur very rarely") (footnote omitted).

\textsuperscript{36} See Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121 (1985). An employer who intentionally discriminates is not likely to leave a 'smoking gun'...
scheme articulated in *McDonnell Douglas*, establishing a prima facie case creates a rebuttable presumption that differences in treatment were the result of unlawful motives.\(^37\) Nevertheless, the employer can rebut the presumption of discriminatory intent, and thereby meet its burden of production, by clearly setting forth legitimate, nondiscriminatory reasons for its employment decision through the introduction of admissible evidence.\(^38\) By doing so, the employer raises a genuine issue of fact as to whether the employer discriminated against the plaintiff.\(^39\)

The third stage of the *McDonnell Douglas* three-part scheme is the "pretext stage."\(^40\) At this stage, the plaintiff must prove that the legitimate, nondiscriminatory reasons proffered by the defendant were not the true reasons for the challenged employment decision.\(^41\) This stage raises an issue of sufficiency of evidence — namely, what evidence will be sufficient to prove "pretext for discrimination."\(^42\) Again, the frequent lack of avail-

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\(^37\) Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253-54 (1981). The requirements of the prima facie case eliminate claims based on the most common nondiscriminatory reasons — an employer's rejection of the plaintiff-job candidate for lack of requisite qualifications and absence of vacancy. Id. at 254; see Teamsters, 431 U.S. at 358 n.44 (stating most common nondiscriminatory reasons for rejection of applicant).

\(^38\) *Burdine*, 450 U.S. at 255. Proving a prima facie case establishes a presumption that "is intended progressively to sharpen the inquiry into the elusive factual question of intentional discrimination." Id. at 255 n.8. See generally Mack A. Player, *The Evidentiary Nature of Defendant's Burden in Title VII Disparate Treatment Cases*, 49 Mo. L. Rev. 17 (1984) (discussing and analyzing requirements of defendant's burden of production in intermediate stage of *McDonnell Douglas* framework).

\(^39\) *Burdine*, 450 U.S. at 255-56.


\(^41\) *Burdine*, 450 U.S. at 253.

\(^42\) See id. at 256 (stating that burden on plaintiff to demonstrate pretext "merges with the ultimate burden of persuading the court that [he or] she has been the victim of intentional discrimination").

In addition, when deciding a summary judgment motion, a court does not evaluate the credibility of the parties to discover the true reason for the employment decision. See Lanctot, *supra* note 5, at 64 (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986)). Instead, the court simply decides whether there is...
able direct evidence of discriminatory motive remains a prime concern for the courts when dealing with discrimination in the employment setting.\(^{43}\) The Supreme Court, in *Texas Department of Community Affairs v. Burdine*,\(^{44}\) addressed the sufficiency issue, succinctly stating that a plaintiff may succeed 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."\(^{45}\) This statement appeared to set forth the plaintiff's evidentiary burden to obtain a judgment as a matter of law. However, the pretext stage has undergone much turmoil as a decisive minority of federal courts have parted from this "pretext-only" interpretation.\(^{46}\)

"sufficient evidence from which a factfinder could infer that the stated justifications for rejecting the plaintiff were 'pretextual.'" See id. (citing Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986)).

43. Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121 (1985). For a further discussion of the unavailability of direct evidence in an employment discrimination case, see supra note 36.

44. 450 U.S. 248 (1981). In *Burdine*, the Supreme Court faced a Title VII dispute predicated on gender discrimination. Id. at 251. The Court, while reaffirming the *McDonnell Douglas* framework, confirmed that the defendant bears only the burden of production in the second stage of the framework. Id. at 256-59.

45. Id. at 256 (emphasis added). The Supreme Court in *United States Postal Service Board of Governors v. Aikens*, reaffirmed the language of *Burdine*, which permits the plaintiff to succeed with indirect proof. 460 U.S. 711, 716 (1983). In *Aikens*, a black employee of the United States Postal Service filed suit under Title VII alleging that the Service discriminated against him because of his race by refusing to promote him. Id. at 713. In an opinion by then Associate Justice Rehnquist, the Court stated that when the defendant proffers legitimate, nondiscriminatory reasons for an employment decision, the presumption of unlawful discrimination created by the prima facie evidence "drops from the case." Id. at 715 (quoting Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 255 n.10 (1981)). The Court further stated that the factfinder must then decide the ultimate issue of whether the "defendant intentionally discriminated against the plaintiff." Id. (quoting Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981)).

There has been debate concerning the appropriate interpretation of the *Aikens* decision. See generally Szteinbok, Note, supra note 5 (discussing efficacy of indirect proof in disparate treatment claims after *Aikens*). The ambiguity centers around the issue of the sufficiency of indirect evidence in proving pretext. See id. at 1119 (stating that "the Supreme Court cast doubt upon the conclusiveness of proving the defendant's explanation to be false"). The majority opinion in *Aikens* did not address the probative value or sufficiency of indirect evidence in proving pretext. Id. In fact, Rehnquist made no explicit reference to the evidentiary sufficiency issue at all. Id. However, Justice Blackmun, who concurred in a separate opinion, stated his interpretation of this issue. *Aikens*, 460 U.S. at 717-18 (Blackmun, J., concurring). Blackmun's concurrence stressed the interpretation that the plaintiff may prevail through the use of indirect evidence by proving the employer's proffered reasons false. Id. at 718 (Blackmun, J., concurring). The confusion has resulted over whether the majority's omission constitutes an implicit acceptance or rejection of the concurrence's interpretation. See Szteinbok, Note, supra note 5, at 1119 (stating that Blackmun concurrence in *Aikens* created "considerable confusion . . . [in] the relationship between proof that the [employer's] reason is spurious and proof of discriminatory intent").

46. For a further discussion of cases rejecting the "pretext-only" approach, see infra note 73.
B. The "Pretext-Only" Approach

Until June 1993, a majority of lower federal courts followed the "pretext-only" approach set forth in McDonnell Douglas.47 This approach entitled the plaintiff to judgment as a matter of law when, in the third stage of the McDonnell Douglas framework, the plaintiff persuaded the factfinder that the defendant's proffered legitimate, nondiscriminatory reason for the challenged employment decision was not the true reason.48 Courts

47. See, e.g., Williams v. Valentec Kisco, Inc., 964 F.2d 723, 728 (8th Cir.) (stating that, under ADEA, "Burdine clearly does not support a pretext-plus approach"), cert. denied, 113 S. Ct. 635 (1992); Adams v. Nolan, 962 F.2d 791, 795 (8th Cir. 1992) (allowing plaintiff in sex discrimination case to rebut employer's legitimate nondiscriminatory reason for employment decision solely by indirect or circumstantial evidence); McCoy v. WGN Continental Broadcasting, Co., 957 F.2d 368, 372 (7th Cir. 1992) (holding that ADEA plaintiff must "show by a preponderance of the evidence either (1) that the employer was more likely motivated by a discriminatory reason, or (2) that the employer's proffered reason is unworthy of credence" to show pretext (quotation omitted)); Lopez v. Metropolitan Life Ins. Co., 930 F.2d 157, 161 (2d Cir.) (stating that to prove pretext, Title VII plaintiff need not prove discriminatory intent but may simply prove defendant's reasons were untrue), cert. denied, 112 S. Ct. 228 (1991); Grohs v. Gold Bond Bldg. Prods., 859 F.2d 1283, 1286 (7th Cir. 1989) (holding that ADEA plaintiff proves pretext by "demonstrat[ing] that (1) the proffered reasons had no basis in fact, (2) the proffered reasons did not actually motivate his [or her] discharge, or (3) they were insufficient to motivate discharge" (emphasis added)), cert. denied, 490 U.S. 1036 (1989); Dister v. Continental Group, Inc., 859 F.2d 1108, 1113 (2d Cir. 1988) (noting that, under ERISA, "Burdine made it plain that ... a plaintiff may prevail upon a showing that the employer's given legitimate reason ... was not the true reason for the unfavorable employment decision"); Roebuck v. Drexel Univ., 852 F.2d 715, 726 (3d Cir. 1988) (holding that if Title VII plaintiff presents "enough evidence for a jury to find that the asserted reasons for the tenure denial were not the actual reasons, then the jury may infer that the employer actually was motivated in its decision by race; plaintiff is not required to provide independent, direct evidence of racial discrimination"); Chipollini v. Spencer Gifts, Inc., 814 F.2d 893, 899 (3d Cir.) (holding that if ADEA plaintiff persuades "the trier of fact that it is more likely than not that the employer did not act for its proffered reason, then the employer's decision remains unexplained and the inferences from the evidence produced by the plaintiff may be sufficient to prove the ultimate fact of discriminatory intent"), cert. dismissed, 483 U.S. 1052 (1987); Tye v. Board of Educ. of Polaris Joint Vocational Sch. Dist., 811 F.2d 315, 319-20 (6th Cir.) (holding that under Title VII McDonnell Douglas framework, "the plaintiff may indirectly prove intentional discrimination by showing that the defendants' justifications are untrue"), cert. denied, 484 U.S. 924 (1987); King v. Palmer, 778 F.2d 878, 881 (D.C. Cir. 1985) (holding in sexual discrimination claim that "Burdine makes it absolutely clear that a plaintiff who establishes a prima facie case of intentional discrimination and who discredits the defendants' rebuttal should prevail, even if he or she has offered no direct evidence of discrimination"); Thornbrough v. Columbus & G. R.R., 760 F.2d 633, 647 (5th Cir. 1985) (holding that ADEA plaintiff "is not required to prove that the [defendant] was motivated by bad reasons; he [or she] need only persuade the factfinder the [defendant's] purported good reasons were untrue").

For a further discussion of cases adopting the "pretext-only" approach, see Lanctot, supra note 5, at 71-72 & nn.46-53.

48. See, e.g., Valentec Kisco, 964 F.2d at 728 ("We reject [defendant]'s contention that [plaintiff] had to both discredit [defendant]'s stated reason for firing him and prove that age was a determining factor in [defendant]'s decision."); Palmer,
following this approach made no further inquiry into the true reason for the act once the plaintiff proved pretext. Instead, these courts inferred discriminatory motive from the employer's lies. Under this approach, the plaintiff bore the ultimate burden of persuasion that the employer's proffered reason for the challenged employment decision was false.

778 F.2d at 881 (stating that "a district court may not require direct evidence of intentional discrimination as opposed to circumstantial evidence thereof"). For example of the application of this rule, see Tye v. Board of Education of Polaris Joint Vocational School District. 811 F.2d at 320. In Tye, a female guidance counselor whose contract was not renewed because of a reduction in force brought a Title VII claim. Id. at 316. The employer offered several legitimate reasons to justify its decision to renew a male counselor's contract instead of Tye's. Id. at 318. The defendant submitted a list of 10 reasons for the non-renewal of Tye's contract. Id. Of those 10, four reasons concretely justified the staff reductions, but not why Tye was singled out. Id. The other six were accepted "to meet the intermediate burden of articulating legitimate, non-discriminatory reasons why 'someone else was preferred.'" Id. (quoting Texas Dep't of Community Affairs v. Burdine 450 U.S. 248, 254 (1981)). These six reasons proffered by Tye's superintendent for Tye's non-renewal were: (1) a desire for multiple certification of staff, (2) a concern for staff diversity and complement, (3) Tye's poor demeanor and attitude, (4) Tye's interaction with other faculty, (5) program changes at the school, and (6) the superintendent's subjective feelings and impressions. Id. at 318-19. Tye proved that the offered explanations were pretextual by showing that the district superintendent was not personally familiar with her or her work. Id. at 320. The district superintendent did not interview Tye or examine Tye's personnel file. Id. The United States Court of Appeals for the Sixth Circuit held that where the employer makes no attempt to gather information, and "gives evasive ... testimony regarding the choice [between a male and female counselor], he [or she] runs the risk that a Title VII plaintiff will be able to prove pretext. Ms. Tye achieved precisely that by disproving all of the defendants' proffered reasons." Id. Accordingly, the Sixth Circuit entered judgment for the plaintiff-counselor. Id.

49. See, e.g., Adams, 962 F.2d at 796 (holding that "defendants' proffered reason for the adverse action against plaintiff was a pretext for intentional discrimination on the basis of sex," thus concluding in plaintiff's favor under McDonnell Douglas-Burdine analysis); McCoy, 957 F.2d at 372 (stating that "a plaintiff may simply attack the credibility of the employer's proffered reason for termination" to succeed in plaintiff's claim).

50. See, e.g., Adams, 962 F.2d at 796 (holding in favor of plaintiff once pretext is proven): McCoy, 957 F.2d at 372 (same); MacDissi v. Valmont Indus., Inc., 856 F.2d 1054, 1059 (8th Cir. 1988) (noting that "employer's submission of a discredited explanation for firing a member of a protected class is itself evidence . . . that such unlawful discrimination actually occurred"); Duffy v. Wheeling Pittsburgh Steel Corp., 738 F.2d 1393, 1396 (3d Cir.) (holding that "under the McDonnell Douglas test, 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).

51. See, e.g., McCoy, 957 F.2d at 372 (stating that "[a] showing that a proffered justification is pretextual may itself be equivalent to a finding that the employer intentionally discriminated" (quoting Graefenhain v. Pabst Brewing Co., 827 F.2d 13, 18 (7th Cir. 1987), overruled on other grounds sub nom. Costen v. Plitt Theatres, Inc., 860 F.2d 834 (7th Cir. 1988))); Dister, 859 F.2d at 1113 (holding that "[w]e reaffirm this view today and . . . [f]ind that a plaintiff may prevail at trial if, in addition to establishing a prima facie case, he [or she] persuades a reasonable jury that the reason advanced for his [or her] discharge . . . was unworthy of credence");
In Haglof v. Northwest Rehabilitation Inc., the United States Court of Appeals for the Eighth Circuit illustrated the application of the "pretext-only" rule. Haglof was an age discrimination case. The plaintiff in Haglof was a physical therapy aide for Northwest, a nursing home. Haglof was fifty-one years old when Northwest terminated her employment and permitted the company president's twenty-one year-old daughter to fill the aide position. Northwest claimed it fired Haglof because the nursing home was restructuring its workforce, which involved eliminating Haglof's position and replacing the position with one requiring greater credentials. Northwest stated that it had intended to immediately restructure, but that the candidate chosen to replace Haglof had become unavailable. Consequently, the president's daughter, who lacked the requisite higher credentials, temporarily replaced Haglof. According to Northwest, it took one month to find another candidate with the requisite credentials. Haglof did not believe Northwest's proffered reason for discharging her and pointed out that the restructuring did not occur until after she filed a complaint with the Equal Employment Opportunity Commission (EEOC) claiming age discrimination. In addition, Haglof emphasized Northwest's inability to produce any evidence proving the existence of the candidate it had purportedly originally chosen.

The United States District Court for the District of Minnesota held that Haglof had produced sufficient evidence to establish a prima facie case of age discrimination and that Northwest had satisfied its burden by offering the restructuring of the workforce as its legitimate, nondiscriminatory reason for Haglof's termination. Specifically, the district court, in an unpublished opinion, found that:

(1) Haglof was in the protected age bracket,
(2) Haglof had performed her job...
whether, in light of Northwest's proffered reason for the discharge, Haglof ultimately produced sufficient evidence for a jury to find that age discrimination had been a "substantial factor in her dismissal." The district court decided that Haglof's evidence was insufficient and granted summary judgment for the defendant, Northwest.

The Eighth Circuit reversed the district court's grant of summary judgment. First, the Eighth Circuit determined that the district court had misconstrued the principles governing the inference of discriminatory intent. Consistent with the Supreme Court's decision in *Burdine*, the court held that a plaintiff need not offer direct evidence of discriminatory animus to discredit an employer's proffered reason for making a challenged employment decision. Second, the Eighth Circuit found that Haglof introduced evidence beyond that necessary to establish a prima facie case, and that this evidence was sufficient for "the jury to find that the restructuring was a sham." The court decided there were two possible reasons for the employment action — age discrimination or nepotism. In light of Haglof's evidence of pretext regarding Northwest's proffered reasons, the court decided that summary judgment was inappropriate and the determination of motive was for the jury, not the court, to decide. *Haglof* illustrates the "pretext-only" approach to the *McDonnell Douglas* framework. "Pretext-only" courts presumed that if the defendant satisfactorily, (3) Haglof was terminated and (4) Haglof was replaced, albeit temporarily, with a younger person providing similar skill or service. *Id.* 63.

64. *Id.*

65. *Id.* at 495.

66. *Id.*

67. *Id.* at 494. This holding is consistent with the Supreme Court's statement in *Burdine* that a plaintiff may succeed "indirectly by showing that the employer's proffered explanation is unworthy of credence." *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981).

The *Haglof* court further stated that in certain circumstances, the evidence comprising the plaintiff's prima facie case may rebut the employer's proffered reason for the employment decision. *Haglof*, 910 F.2d at 494. Under this scenario, the plaintiff does not have to produce any additional evidence beyond the evidence that establishes the prima facie case. *Id.* (citing *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 255-256 n.10 (1981)). Senior District Judge Stuart concurred with the above analysis, stating that if the evidence the plaintiff introduces to establish a prima facie case tends to show that the employer's proffered reasons are not credible, such a showing could render summary judgment for the employer inappropriate. *Id.* at 495 (Stuart, J., concurring).

68. *Haglof*, 910 F.2d at 495. Specifically, the court found that the plaintiff's evidence showed that Northwest did not restructure its work force until plaintiff filed the EEOC complaint. *Id.* at 494-95. Further, the evidence that showed that the restructuring had "no practical effect" on the nursing home workforce, clearly would have allowed the jury to infer a discriminatory motive. *Id.*

69. *Id.* at 495. Nepotism is arguably an illegitimate, nondiscriminatory reason that would not cause liability under the ADEA. *See Lanctot, supra* note 5, at 136-40 (discussing probative value of illegitimate, nondiscriminatory reason).

70. *Haglof*, 910 F.2d at 495.
had a lawful motive, the defendant would advance this true nondiscrimi-
natory reason.71 These courts reasoned that falsity of an employer's justifi-
cation is "strong evidence that the defendant is concealing a discriminatory motive."72

C. The "Pretext-Plus" Approach

In spite of the seemingly well-grounded history of the "pretext-only"
approach, a minority of federal courts embraced an alternative approach
known as "pretext-plus."73 The "pretext-plus" rule required a plaintiff to

71. Lanctot, supra note 5, at 81; see McGinley, supra note 5, at 218 ("The ra-
tionale for the plaintiff's victory if the defendant cannot articulate a legitimate,
non-discriminatory reason for the hiring decision is that employers normally act
rationally unless motivated by an illegal prejudicial motive." (footnote omitted)
citing Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978)).

72. Lanctot, supra note 5, at 81. This rationale is well-supported in Burdine,
which allows the plaintiff to succeed via both direct and indirect means. Texas
Dep't of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981); see Duffy v.
Wheeling Pittsburgh Steel Corp., 738 F.2d 1395, 1401 (3d Cir.) (Adams, J., dissent-
ing on other grounds) ("Our intuitive understanding of bigotry supports an infer-
ence of pretext from virtually any defect in an employer's explanation of a
decision to disfavor a member of a Title VII protected class.") , cert. denied, 469 U.S.
1087 (1984); see also Szteinbok, Note, supra note 5, at 1120 (stating that "common
experience with employment discrimination shows that such a decision, unless le-
gitimately explained, was more likely than not based on impermissible considera-
tions"). Courts that adhered to the pretext-only approach inferred "discrimination
from disproof of the defendant's proffered explanation for two reasons. First, the
defendant's falsehood casts a shadow of doubt over the credibility of the evidence
it has introduced... Second, an inference of discrimination is warranted because
the evidence cannot support a finding of some permissible motive" for the employ-
ment action. Szteinbok, Note, supra note 5, at 1121.

73. See Samuels v. Raytheon Corp., 934 F.2d 388, 392 (1st Cir. 1991). In Samu-
els the United States Court of Appeals for the First Circuit noted 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 [a Title VII] plaintiff to judgment. Provided a con-
trary inference... might also reasonably be drawn from the evidence,
such a showing only creates an issue of material fact[,]... and, if discrimi-
nation is subsequently found, will support that finding.
Id.; see Goldman v. First Nat'l Bank, 985 F.2d 1113, 1117 (1st Cir. 1993) (holding
that ADEA "plaintiff-employee must adduce minimally sufficient evidence of pre-
text and discriminatory animus"); EEOC v. Flasher, 986 F.2d 1312, 1321 (10th Cir.
1992) (noting in Title VII termination claim based on national origin that "Burdine
makes clear that the plaintiff must show not merely that the proffered reasons are
pretextual but that they are a 'pretext for discrimination.'" (quoting Texas Dep't of
Community Affairs v. Burdine, 450 U.S. 248, 253 (1981))); Lawrence v. Northrop
Corp., 980 F.2d 66, 69-70 (1st Cir. 1992) (holding that in wrongful discharge claim
under ADEA, "[i]t is not enough... to cast doubt upon the employer's justification...
.. '[r]ather, the evidence as a whole... must be sufficient for a reasonable
factfinder to infer that the employer's decision was motivated by age animus" (quoting Connell
v. Bank of Boston, 924 F.2d 1169, 1172 n.3 (1st Cir.), cert. denied, 111 S. Ct. 2828 (1991));
Galbraith v. Northern Telecom, Inc., 944 F.2d 275, 283
(6th Cir. 1991) (noting that in Title VII race discrimination claim "[t]he plaintiff
still must prove the purpose of the pretext was to hide an impermissible reason for
discharge"), cert. denied, 112 S. Ct. 1497 (1992); Ramos v. Roche Prods., Inc., 936
not only persuade the trier of fact that the employer’s proffered reasons for the employment decision were false, but also required the plaintiff to provide some additional evidence of discriminatory animus to persuade the factfinder that the employer’s true reason for the decision was in fact discriminatory.\textsuperscript{74} The evidentiary requisites for the plaintiff under this approach are much more rigorous than that of “pretext-only,” especially in light of the plaintiff’s difficulty in obtaining direct evidence of discrimination.\textsuperscript{75}

\textsuperscript{74} See, e.g., Goldman, 985 F.2d at 1118 (“[P]laintiff-employee cannot avert summary judgment if the record is devoid of direct and circumstantial evidence of discriminatory animus on the part of the employer.”); Galbraith, 944 F.2d at 283 (noting that particularly in Title VII race discrimination claims “proving that an employer’s proffered reason for discharging an employee is pretext does not establish that it is a pretext for discrimination”); \textit{Holder}, 867 F.2d at 828 (noting that in claims arising under Title VII, section 1981, and section 1983, “\textit{w}e agree . . . that showing that the employer [lied] is not necessarily the same as showing pretext for discrimination . . . \textit{i}t is easy to confuse pretext for discrimination with pretext in the more common sense (meaning any fabricated explanation for an action)”); \textit{Menard v. First Sec. Servs. Corp.}, 848 F.2d 281, 287 (1st Cir. 1988) (“\textit{[P]laintiff’s} proffered evidence does little but dispute the objective correctness of [defendant’s] decision. . . \textit{E}ven assuming it could be shown that [defendant] was wrong to blame him,\textsuperscript{75} this would be insufficient to prove pretext or discriminatory intent \textit{[under ADEA].}”); \textit{Hallquist v. Local 276, Plumbers and Pipe Fitters Union}, 843 F.2d 18, 24 (1st Cir. 1988) (noting that under Title VII, “once the defendant articulates a non-discriminatory reason, the plaintiff has the burden of showing not that the proffered reason was fabricated, but that it ‘was not the true reason for the employment decision’” (quoting Texas Dep’t of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981))); \textit{Benzies v. Illinois Dep’t of Mental Health and Dev. Disabilities}, 810 F.2d 146, 148 (7th Cir.) (noting in \textit{Title VII} action 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”), \textit{cert. denied}, 483 U.S. 1006 (1987); \textit{Clark v. Huntsville City Bd. of Educ.}, 717 F.2d 525, 529 (11th Cir. 1983) (“\textit{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.”).

\textsuperscript{75} See \textit{Lanctot}, supra note 5, at 81-83 \& nn.92-96.
The United States Court of Appeals for the First Circuit had been perhaps the strongest proponent of the "pretext-plus" rule.\textsuperscript{76} The First Circuit's resolve was well illustrated in \textit{Mesnick v. General Electric Co.}\textsuperscript{77} In \textit{Mesnick}, an age discrimination case, the plaintiff worked for RCA Automated Systems Division at RCA's Burlington facility for fourteen years prior to his discharge.\textsuperscript{78} In 1987, General Electric Company (GE), which had recently purchased RCA, named a new director of finance, who became Mesnick's immediate supervisor.\textsuperscript{79} Mesnick's first performance evaluation under new management was largely negative.\textsuperscript{80} This evaluation was the basis for a very rocky relationship between Mesnick and the director of finance.\textsuperscript{81} In December 1987, GE named a forty-two year-old outside candidate to oversee the Contracts Department at both Burlington and another GE facility.\textsuperscript{82} In the process, Mesnick was essentially demoted and cause of the added requirement of proving that this motive did in fact adversely affect the tenure review process").

\textsuperscript{76} See, e.g., \textit{Goldman}, 985 F.2d at 1117 (implementing "pretext-plus" approach); \textit{Lawrence}, 980 F.2d at 69-70 (same); \textit{Ramos v. Roche Prods., Inc.}, 936 F.2d 43, 48 (1st Cir.) (same), \textit{cert. denied}, 112 S. Ct. 879 (1991). \textit{But see Villanueva v. Wellesley College}, 950 F.2d 124, 127-28 (1st Cir.) (contradicting itself, court simultaneously advocated First Circuit's use of "pretext-plus" yet declared that plaintiff's burden may be satisfied without additional evidence), \textit{cert. denied}, 112 S. Ct. 181 (1991).

\textsuperscript{77} 950 F.2d 816 (1st Cir. 1991).

\textsuperscript{78} \textit{Mesnick v. General Elec. Co.}, 55 Fair Empl. Prac. Cas. (BNA) 1291, 1292 (D. Mass.), \textit{aff'd}, 950 F.2d 816 (1991), \textit{cert. denied}, 112 S. Ct. 2965 (1992). Mesnick had eleven years experience with the United States Air Force prior to being hired in 1974 by RCA as a Senior Contracts Administrator. \textit{Id.} at 1293. In June 1977, Mesnick was promoted to Grade 52 Contracts Manager, and in June 1982, he was promoted to a Grade 53 Contracts Manager. \textit{Id.} In this last position, he assumed the duties of the overall Contracts Manager, supervising other managers and subordinates. \textit{Id.} Mesnick remained in this position until December 1987. \textit{Id.}

\textsuperscript{79} \textit{Id.} at 1293. Once GE completed the purchase of RCA in 1986, GE began to phase in a new management team. \textit{Id.}

\textsuperscript{80} \textit{Id.} This poor evaluation caused Mesnick's merit raise to be reduced by 50\%. \textit{Id.} Prior to the managerial change, Mesnick had received mixed evaluations. \textit{Id.} Former supervisors had a very high opinion of his "technical skills, knowledge of his job, and knowledge of the government acquisition process." \textit{Id.} According to these supervisors, Mesnick's major weaknesses were difficulty in interacting with other employees and occasionally engaging in inappropriate behavior. \textit{Id.} Such behavior included drinking at lunch, projecting a poor image with customers, and crude and offensive behavior. \textit{Id.}

At Mesnick's performance evaluation, the new director of finance discussed a plan for corporate reorganization with Mesnick. \textit{Id.} at 1293-94. This plan called for the reorganization of the Contracts Department and the creation of a new position that would oversee both the Burlington facility, where Mesnick worked, and another GE facility. \textit{Id.}

\textsuperscript{81} \textit{Id.} at 1294-95. From January 1987 to September 1988, Mesnick wrote memos to the director of finance's supervisors and other managers, complaining about the director of finance's lack of managerial skills. \textit{Id.}

\textsuperscript{82} \textit{Id.} at 1294.
now reported to the new manager. 83 From that point forward, Mesnick’s tirade against his supervisors escalated until he was terminated on “grounds of insubordination and failure to work harmoniously with others.” 84 Mesnick promptly filed charges with the EEOC alleging a violation of the Age Discrimination in Employment Act (ADEA). 85

The United States District Court for the District of Massachusetts found that Mesnick’s evidence of age discrimination was insufficient to survive summary judgment for the defendant. 86 At the district court level, Mesnick had averred that GE violated the ADEA by cutting his expected salary increases, preventing him from applying for the managerial position eventually filled by a younger person, demoting him and replacing him with a younger person, harassing him and eventually terminating him. 87 While the district court acknowledged that Mesnick had satisfied the first two stages of the McDonnell Douglas framework, 88 it reasoned that to avoid summary judgment the plaintiff not only had the burden of proving that GE’s articulated reasons were pretextual, but also of producing additional evidence showing the reasons were a pretext for age discrimination. 89

83. Id. Although the director of finance discussed the new managerial position with Mesnick, GE never posted the position as an official vacancy. Id. at 1294 & n.2. Consequently, Mesnick never had the opportunity to apply for the position. Mesnick, 950 F.2d at 821. When GE hired the new manager, Mesnick was essentially demoted. Mesnick, 55 Fair Empl. Prac. Cas. (BNA) at 1294. He was assigned to a different office and lacked any supervisory power. Mesnick, 950 F.2d at 821. His salary and benefits, however, remained unchanged. Id.

84. Mesnick, 950 F.2d at 822. Mesnick received a performance evaluation six months after the new manager was hired. Mesnick, 55 Fair Empl. Prac. Cas. (BNA) at 1295. The new manager’s evaluation was very similar to past evaluations, praising his technical skills but giving Mesnick a “marginally acceptable” rating overall. Id. As a result, Mesnick failed to receive a merit raise that year. Id. In response, Mesnick circulated a billet-doux, which rebutted his recent unfavorable evaluation and chastised his superiors. Id.

85. Mesnick, 950 F.2d at 822. Mesnick had also previously filed a complaint with the EEOC for GE’s failure to promote him and its decision to hire a younger man to be manager. Id. at 821. The EEOC dismissed both of these complaints as meritless. Id. at 822.

86. Mesnick, 55 Fair Empl. Prac. Cas. (BNA) at 1296.

87. Id. at 1292.

88. Mesnick, 950 F.2d at 825. A prima facie age discrimination case requires a showing that (1) plaintiff was over age 40, (2) plaintiff’s work met the employer’s legitimate expectations, (3) plaintiff’s employer took adverse action against him or her and (4) plaintiff’s employer sought a replacement with roughly equivalent job credentials, thus revealing a continued need for the same skills and services. Id. at 823. GE conceded that Mesnick may have been able to establish a prima facie case. Mesnick, 55 Fair Empl. Prac. Cas. (BNA) at 1298. However, GE stated that its actions were “wholly justified by [Mesnick’s] continuing poor performance and insubordination.” Id. This proffered reason fulfills GE’s burden of production in the second stage of the McDonnell Douglas-Burdine evidentiary framework. Mesnick, 950 F.2d at 825.

89. Mesnick, 55 Fair Empl. Prac. Cas. (BNA) at 1296 (quoting Olivera v. Nestle Puerto Rico, Inc., 922 F.2d 43, 46 (1st Cir. 1990)).
Upon review, the United States Court of Appeals for the First Circuit affirmed the lower court’s judgment. The First Circuit, adopting the “pretext-plus” rationale, stated that it was not enough for a plaintiff to “merely impugn the veracity of the employer’s justification,” but that the plaintiff must also provide evidence that the employer’s real motive was discriminatory. The First Circuit recognized that Mesnick introduced sufficient evidence to create a triable issue of fact as to the veracity of the employer’s proffered reasons. However, because there was no evidence in the record to indicate that the true reason for GE’s action was discriminatory, Mesnick could not avoid summary judgment.

Courts that adopted the “pretext-plus” approach did so to protect a defendant-employer from deriving a benefit by setting forth an untrue reason for its employment decision. In these circumstances, proof that the

90. Mesnick, 950 F.2d at 820.

91. Id. at 824; see Furnco Constr. Corp. v. Waters, 438 U.S. 567, 578 (1978) (“[P]laintiff must be given the opportunity to introduce evidence that the [employer’s] proffered justification is merely a pretext for discrimination.”). The Mesnick court did not require a “smoking gun” or direct evidence of the discrimination to fulfill this evidentiary burden. Mesnick, 950 F.2d at 824. Admissible evidence showing a truly discriminatory motive includes the use of younger replacements, statistical evidence that displays unequal treatment and the incidence of disparate treatment in the workplace. Id. See generally Lanctot, supra note 5, at 91-100 (noting that although many courts say they do not require direct evidence of discriminatory animus, survey of “pretext-plus” decisions shows that many courts are unwilling to allow most accessible forms of circumstantial evidence to suffice in proving discriminatory motive).

92. Mesnick, 950 F.2d at 825. At the district court level, Mesnick presented a great deal of evidence in an attempt to illustrate his “professional competence and ability to work well with others.” Id. at 825-26.

93. Id. at 825. Mesnick presented two pieces of evidence purporting to show GE’s discriminatory motive. Id. at 826. The court found both pieces of evidence to be unpersuasive. Id. First was a comment by the director of finance, on the occasion of a younger employee’s departure, that the director was “sad to lose the youth of the work force.” Id. The court dismissed this statement as nondiscriminatory, reasoning that, in this instance, lauding the young did not implicitly depreciate the old. Id.; see Shager v. Upjohn Co., 913 F.2d 398, 400-02 (7th Cir. 1990) (construing supervisor’s comment that “[i]t is refreshing to work with a younger man with . . . a wonderful outlook on life and on his job” as not being probative evidence of discriminatory animus).

The second piece of evidence was a list of potential recruits for the new manager position, which was furnished to GE by an outside research firm. Mesnick, 950 F.2d at 826. This list included the names and ages of the candidates. Id. The court dismissed this evidence because Mesnick offered nothing to prove that GE requested such data or had knowledge that such data would be included in the list. Id. The court concluded that the “intentions of a third party may not be attributed to an employer without some rational basis for attribution.” Id.; see Medina-Munoz v. R.J. Reynolds Tobacco Co., 896 F.2d 5, 10 (1st Cir. 1990) (holding that biases of parties other than those of decision-maker are not usually sufficient as probative evidence of discriminatory animus).

94. See EEOC v. Flasher, 986 F.2d 1312, 1321 (10th Cir. 1992) (“A pretextual reason may be advanced to conceal a wide range of possible motivations.” (citing Benzies v. Illinois Dep’t of Mental Health & Dev. Disabilities, 810 F.2d 146, 148 (7th Cir.), cert. denied, 483 U.S. 1006 (1987))).
defendant's proffered reason is pretextual does not prove the ultimate question of discriminatory animus. In recognition of this fact, the "pretext-plus" courts required plaintiffs to prove actual discriminatory intent to meet their ultimate burden of persuasion. "Pretext-plus" courts accept nothing less than proof of discriminatory intent and require the plaintiff to produce additional evidence beyond the evidence that proves an employer's proffered reasons false.

III. St. Mary's Honor Center v. Hicks

A. Facts

In St. Mary's Honor Center v. Hicks, the Supreme Court considered the issue of the proper evidentiary framework for a Title VII race discrimination claim. Melvin Hicks, the plaintiff, sued his employer, St. Mary's

The employer may also feel pressured, for some reason, not to articulate the actual reason for the employment action. One commentator has stated:

If an employer actually makes a decision based on the fact that the applicant is left-handed, or green-eyed... regardless of the irrationality of the reason, the employer will not be engaging in discrimination proscribed by the statute... In the face of a prima facie case creating an inference of discrimination, an employer is obligated to articulate legitimate reasons from which proper motivation can be inferred. Some reasons (such as left-handedness or green-eyedness) are so weak that they will not allow a reasonable inference to be drawn that these reasons... actually motivated the employer.

Mack A. Player, Defining "Legitimacy" in Disparate Treatment Cases: Motivational Inferences as a Talisman for Analysis, 36 MERCER L. REV. 855, 877-78 (1985).

95. See White v. Vathally, 732 F.2d 1037, 1042 (1st Cir.) (stating that under "pretext-plus," plaintiff "can not meet his burden of proving 'pretext' simply by refuting or questioning the defendant's articulated reason"), cert. denied, 469 U.S. 933 (1984).

96. See, e.g., Flasher, 986 F.2d at 1321 ("Merely finding that people have been treated differently stops short of the crucial question: why people have been treated differently."); Medina-Munoz v. R.J. Reynolds Tobacco Co., 896 F.2d 5, 9 (1st Cir. 1990) ("To carry the burden of persuasion, an ADEA plaintiff must do more than simply refute or cast doubt on the company's rationale for the adverse action. The plaintiff must also show a discriminatory animus based on age."); see also Lanctot, supra note 5, at 86-87 (discussing requisites and goal of proving "pretext for discrimination" under "pretext-plus" approach).

97. See, e.g., Flasher, 986 F.2d at 1321 (affirming judgment for employer on Title VII termination claim based on national origin, and stating that "even a finding that the reason... was pretextual, does not compel [a] conclusion of liability,] unless it is shown to be a pretext for discrimination against a protected class"); Goldman v. First Nat'l Bank, 985 F.2d 1113, 1117 (1st Cir. 1993) (noting that ADEA "plaintiff must do more than cast doubt on the employer's justification for the challenged action; there must be a sufficient showing that discriminatory animus motivated the action").

98. Id. at 2746. As previously discussed, the holding of Hicks applies not only to Title VII claims, but to other forms of employment discrimination covered under different statutes. See, e.g., Goldman, 985 F.2d 1113 (applying Title VII principles to ADEA claim); Holder v. City of Raleigh, 867 F.2d 823 (4th Cir. 1989) (applying Title VII evidentiary principals to claims under both 42 U.S.C. § 1981
Honor Center, a halfway house, under Title VII alleging St. Mary's demoted and subsequently terminated him because of his race. 100 Hicks had a satisfactory employment record with consistently satisfactory ratings for six years. 101 Three months prior to Hicks' eventual termination, a new supervisor, who was white, continually disciplined Hicks for procedural violations. 102 All but one of these violations attributed to Hicks were, in fact, direct violations committed by Hicks' subordinates. 103

In June 1984, St. Mary's fired Hicks. 104 Hicks subsequently filed a suit alleging racial discrimination. 105 After Hicks successfully proved a prima facie case of race discrimination. 106 Hicks v. St. Mary's Honor Ctr., 756 F. Supp. 1244, 1245 (E.D. Mo. 1991), rev'd, 970 F.2d 487 (8th Cir. 1992), rev'd, 113 S. Ct. 2742 (1993). Hicks alleged a violation of section 1983 of the Civil Rights Act of 1871, in addition to the Title VII violation. Id. Section 1983, which is just one provision of the Civil Rights Act of 1871, permits an action for a deprivation of rights that constitutes racial discrimination under state law. 42 U.S.C. § 1983. Section 1983 states that any State, Territory or District of Columbia "subjects, any citizen . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured." Id. The elements of a cause of action under 42 U.S.C. § 1983 are identical to those of Title VII when they are both alleged in a race discrimination suit. Hicks, 756 F. Supp. at 1253.

101. Hicks, 756 F. Supp. at 1246. Hicks began working for St. Mary's in August 1978 as a correctional officer and was later promoted to shift commander in February 1980. Id. Hicks did not commit any procedural violations that necessitated documentation until March 1984. Id.

102. Id. In January 1984, in response to substandard operations, St. Mary's replaced its Chief of Custody, Gilbert Greenlee, a black man who was Hicks' superior, with John Powell, a white man. Id. In addition, St. Mary's made other personnel changes that resulted in the demotion or termination of several black employees and the employment of several white employees. Id. at 1246 n.2. St. Mary's, however, initially offered the Chief of Custody position to a black male, who turned it down. Id.

103. Id. at 1246-47. St. Mary's disciplined Hicks on several occasions for violations committed by his subordinates. Id. These violations included documented instances that: (1) the front door officer left his post, (2) the control center officer left his position to tend to the front door, (3) one of Hicks' correctional officers was absent and (4) the lights were off on the first floor of the facility. Id. at 1246. Hicks received a letter of reprimand for failing to adequately investigate a brawl between two inmates. Id. In addition, St. Mary's later demoted Hicks as a result of his subordinate's failure to log in usage of the facility vehicle. Id. St. Mary's directly cited Hicks in only one violation. Id. Hicks' supervisor, Powell, documented a "threat" Hicks made against Powell in a heated argument. Id. Hicks complained that Powell constantly badgered him. Id.

104. Id. at 1248. The superintendent of the facility, who was white, fired Hicks after a meeting of a four-person disciplinary board composed of two blacks and two whites. Id. John Powell, Hicks' supervisor, was a member of the board. Id. at 1247 & n.7. The board recommended suspending Hicks. Id. at 1247. However, the superintendent disagreed with and disregarded the board's recommendation, deciding on his own, to terminate Hicks. Id. There was evidence that Powell had voted to terminate Hicks because of their confrontation and Hicks' personal "threats." Id.

105. Id. at 1245. Hicks successfully proved a prima facie case of race discrimination. Id. at 1249. First, he was black, and therefore a member of a protected
facie case of racial discrimination, St. Mary's proffered its allegedly legitimate and nondiscriminatory reason for firing Hicks. The reasons St. Mary's gave for this decision were the number and severity of violations by the plaintiff. However, at trial, Hicks successfully proved that: (1) he was the only person disciplined for violations actually committed by his subordinates and (2) co-workers had committed more serious violations that were either "disregarded or treated much more leniently."

The United States District Court for the Eastern District of Missouri entered judgment in favor of St. Mary's. The district court found that although Hicks had demonstrated that St. Mary's proffered reasons were pretextual, the "plaintiff ha[d] not... proven by direct evidence or inference that his unfair treatment was motivated by his race." The district court made several observations in coming to this conclusion, including the fact that there were two blacks on St. Mary's disciplinary board, the number of blacks employed at St. Mary's stayed constant and Hicks' black subordinates that were perpetrators of the violations were not disciplined. Hicks appealed the district court's decision to the Court of App-
peals for the Eighth Circuit. The Eighth Circuit reversed, concluding that once Hicks had discredited the stated reasons for his demotions and discharge, he was not required to provide any additional evidence of racial discrimination, but instead was entitled to prevail as a matter of law. In other words, the Eight Circuit applied the "pretext-only" approach to the claim.

Finally, Hicks reached the Supreme Court. The Supreme Court subsequently reversed the Eighth Circuit's judgment. The Supreme Court in Hicks rejected the "pretext-only" approach and held that Hicks was not entitled to judgment as a matter of law. Although the trier of fact had rejected St. Mary's proffered legitimate, nondiscriminatory reasons for Hicks' termination, the Court noted that Hicks failed to offer any admissible evidence proving that the true reason for his termination was discriminatory. This, in the Court's opinion, was fatal to Hicks' claim for a judgment as a matter of law.

B. Narrative Analysis

The Court's opinion, penned by Justice Scalia, initially addressed this area of "well-settled law" by inquiring whether Hicks proved that his employer had in fact intentionally discriminated against him because of his race. The Court began its analysis in Hicks by utilizing a hypotheti-
cal situation to demonstrate that applying the "pretext-only" approach could often produce unfair results. The Court assumed a factual scenario where forty percent of a company's workforce were members of a particular minority group, a group that comprised only ten percent of the relevant employment market. One day, an applicant with the minimum requisite qualifications, who is a member of the same minority group described above, applies for an opening. A personnel officer of that same minority group rejects the applicant, yet continues his or her search to fill the position. Subsequently, the rejected applicant files a claim under Title VII for racial discrimination and, prior to trial, the personnel officer, responsible for hiring, is fired. The Court demonstrated that under the "pretext-only" approach, an employer who does not have access to the thought processes of a supervisory employee who made an alleged discriminatory employment decision can lose its case if the plaintiff can prove the reasons the under-informed employer proffered were false. This outcome could occur despite a disproportionately large make-up of minority employees and the fact that an employee of the same minority group made the questioned employment decision. Essentially, the Court was troubled by the prospect of a jury finding the employer's reasons incredible and a result in which the jury must assess damages regardless of whether it believes the employer was guilty of impermissible racial discrimination.

After illustrating the potential for unfair results under the "pretext-only" approach, the Hicks Court then undertook the task of painstakingly analyzing the language of Burdine to support its interpretation of the requisites necessary to prove discrimination. The first language in Burdine that the Supreme Court tackled was the language stating that the plaintiff's burden in the final step of the McDonnell Douglas analysis is to prove Thus, rejection of these reasons, "will permit the trier of fact to infer the ultimate fact of intentional discrimination." Id. (emphasis added). However, proof that the defendant's proffered reason is pretextual does not entitle the plaintiff to judgment as a matter of law. Id.

122. Id. at 2750-51.
123. Id. at 2750.
124. Id.
125. Id.
126. Id. at 2750-51.
127. Id. at 2751. An employer could also lack access to a supervisory employee if that employee has retired, or changed employment.
128. Id.
129. Id.
130. Id. The Court began its exposition on the explicit language of Burdine, which reaffirmed the McDonnell Douglas framework. Id. The Court stated that there was no authority to impose liability "unless an appropriate factfinder determines ... that the employer has unlawfully discriminated.... But nothing in law would permit us to substitute for the required finding that the employer's action was the product of unlawful discrimination, the much different ... finding that the employer's explanation of its action was not believable." Id.
by a preponderance of the evidence that the employer's proffered reasons were a "pretext for discrimination." The Supreme Court stated in *Hicks* that the plain meaning of this language is unmistakable — that a reason is a "pretext for discrimination" only if the plaintiff proves both that employer's proffered reason was false and that the real reason behind the challenged decision was discriminatory. The Court dismissed subsequent references in *Burdine* to proving or demonstrating "pretext" as being reasonably understood to be synonymous with "pretext for discrimination."

Scalia, in his majority opinion, also addressed the language in *Burdine* that states that when the employer's burden of production has been met "the factual inquiry proceeds to a new level of specificity." The majority interpreted this language to mean that the inquiry proceeds from the generalities of the prima facie case to the specifics incorporated in the "proofs and rebuttals" of discriminatory intent that the parties have set forth. Further, the Court understood the purpose of placing the burden of production on the defendant as serving "to frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext" to address the form, not the substance of the production burden.

The next passage considered by the Court was the *Burdine* language stating that "[t]his burden [to prove pretext] now merges with the ultimate burden of persuading the court that [the plaintiff] has been the victim of intentional discrimination." According to the majority, the most rea-

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131. *Id.* at 2751-52 (quoting Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981)). For a further discussion of *Burdine*, see * supra* note 44 and accompanying text.

132. *Hicks*, 113 S. Ct. at 2752.

133. *Id.* at 2752 & n.6. (citing Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 258 (1981) and McDonnell Douglas Corp. v. Green, 411 U.S. 792, 807 (1973)).

134. *Id.* at 2752 (quoting Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 255 (1981)).

135. *Id.*

136. *Id.* (quoting Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 255-56 (1981)). The "form" of the defendant's burden of production is the requirement that the defendant "clearly set forth" its reasons. *Id.* (quoting Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 255 (1981)). According to the majority, the requirement that the employer "clearly set forth" its reasons affords the plaintiff a "full and fair" opportunity to rebut the employer's reasons. *Id.* (quoting Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 255-56 (1981)). In contrast, the dissent interpreted this passage as addressing the substance of the defendant's burden. *Id.* at 2759 (Souter, J., dissenting). The dissent interpreted this passage to mean that the defendant shapes the sole factual issue — "whether the employer's reason is false." *Id.* (Souter, J., dissenting). For a further discussion of the dissenting opinion, see *infra* notes 171-206 and accompanying text.

137. *Hicks*, 113 S. Ct. at 2752 (quoting Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981)).
A reasonable reading of this passage was that proving the employer's proffered reasons were false was merely part of demonstrating that the true motivation behind the decision was discriminatory. The majority reasoned that a reading to the contrary, that the ultimate burden is simply to persuade the trier of fact that the employer's reason is false, "would be a merger in which the little fish swallows the big one."  

The Supreme Court concluded its review of Burdine by examining the language that states that the plaintiff may succeed "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." The majority agreed with the dissent that this language could have no other meaning than proving the falsity of the defendant's proffered reasons will suffice to compel judgment in favor of the plaintiff. However, Justice Scalia dismissed this language as dictum, noting that the statement "contradict[ed] or render[ed] inexplicable" much of the language of Burdine and subsequent case law in this area.

First, Justice Scalia reasoned that McDonnell Douglas, the case that set forth the tripartite evidentiary framework, did not state that a plaintiff merely needs to disprove the employer's asserted reason for its challenged employment decision. In fact, the Court noted that McDonnell Douglas stated that the plaintiff must have an opportunity to prove that the "reasons for his [or her] rejection were in fact a coverup for a racially discriminatory decision."  

Second, Justice Scalia further reasoned that this passage contradicts the Burdine holding regarding who has the ultimate burden of proof. The fact that a plaintiff may prevail simply by disproving the defendant's proffered reason, with no further requirement that the plaintiff persuade the factfinder that intentional discrimination took place, contravenes the Burdine mandate that the burden of persuasion remains with the plaintiff at all times.

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138. Id.  
139. Id.  
140. Id.; Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981) (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804-05 (1973)).  
141. Hicks, 113 S. Ct. at 2752.  
142. Id. The Court coined the Burdine passage that allows success exclusively through indirect evidence of discrimination a "problem" because the passage "contradicts or renders inexplicable numerous other statements, both in Burdine itself and in our later case-law...." Id.  
143. Id. at 2753. For a further discussion of McDonnell Douglas, see supra notes 19-46 and accompanying text.  
144. Hicks, 113 S. Ct. at 2753 (quoting McDonnell Douglas Corp. v. Green, 411 U.S. 792, 805 (1973)).  
145. Id. Scalia also stated that "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." Id. (quoting Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981)).  
146. Id.
Lastly, the majority contended that the statement contradicts the reliance in *Burdine* on the "classic law of presumptions." The Court's reference to the "classic law of presumptions" deals primarily with the theory that a presumption only shifts the burden of production, but not that of persuasion. The majority said that the classic law of presumptions, upon which *Burdine* relies, had been violated because the *Burdine* passage at issue permitted a plaintiff to succeed without carrying the ultimate burden of persuasion. In light of the above reasoning, the Court decided to treat this "dictum" merely as an "inadvertence" because, according to the majority, it contradicts both the Court's interpretation of *Burdine* and the classic law of presumptions.

Upon concluding its analysis of the language of *Burdine*, the Court stated that any confusion concerning its interpretation of *Burdine* was eliminated in *United States Postal Service Board of Governors v. Aikens*. According to the majority, *Aikens* indisputably justified the *Hicks* majority's reading of *Burdine* when the *Aikens* Court stated that "the ultimate ques-

147. *Id.*

148. *Id.* The Court relied in *Burdine* on classic law of presumptions and stated Professors Thayer and Wigmore's theory that a presumption shifts "merely the burden of production, but not the burden of persuasion, and then vanish[es] upon the introduction of evidence that would support a finding of the non-existence of the presumed fact." Texas Dep't of Community Affairs v. *Burdine*, 450 U.S. 248, 254-55 nn.7-8; J.B. Thayer, Preliminary Treatise on Evidence at the Common Law 336 (reprinted by Augustus M. Kelley 1969) (1898). The elimination of probative value from a presumption was coined Thayer's "bursting bubble" theory of presumptions. 2 CHARLES TILFORD MCCORMICK, MCCORMICK ON EVIDENCE § 344, at 462 (John William Strong ed., 4th ed. 1992). It should be noted that the test under the "bursting bubble" theory is "one of sufficiency and not credibility." Miguel A. Mendez, Presumptions of Discriminatory Motive in Title VII Disparate Treatment Cases, 32 Stan. L. Rev. 1129, 1145 n.91 (1980). In other words, "[i]t is immaterial that neither judge nor jury believes the testimony" but that there is "evidence in the case from which a jury could reasonably find the non-existence of the presumed fact." Jack B. Weinstein & Margaret A. Berger, Weinstein's Evidence 300-03 (1990) (citing Edmund W. Morgan, Basic Problems of Evidence 34-36 (1962)). This classic law of evidence is codified in the Federal Rules of Evidence 301. McCormick, supra, § 344, at 462. Federal Rule of Evidence 301 provides:

In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.

FED. R. EVTD. 301.

149. *Hicks*, 113 S. Ct. at 2753 (citations omitted) (stating that *Burdine* language at issue "renders inexplicable *Burdine's* explicit reliance, in describing the shifting burdens of *McDonnell Douglas*, upon authorities setting forth the classic law of presumptions").

150. See *id.* (stating that "dictum at issue must be regarded as an inadvertence, to the extent that it describes disproof of the defendant's reason as a totally independent, rather than an auxiliary, means of proving unlawful intent").

151. *Id.* For a further discussion of *Aikens*, see supra note 45.
tion [is] discrimination vel non." This ultimate factual question of discrimination is answered when the trier of fact decides "which party's explanation of the employer's motivation it believes."

In what seemed to be a direct response to the concerns of the dissenters, the Court proceeded to examine the practical consequences of the Hicks decision. Scalia was unpersuaded by the dissent's argument that the Hicks decision gives defendant-employers an incentive to lie. The majority acknowledged that the procedural device employed in Title VII actions, namely the burden shifting of the McDonnell Douglas-Burdine framework, may place a perjurer, initially, in a better position than a truthful party who does not respond to the prima facie case. However, the majority noted that "the books are full of procedural rules" that have the same effect. Furthermore, although a perjuring defendant may "purchase ... a chance at the factfinder," Federal Rule of Civil Procedure 11 and the expenses associated with affidavits made in bad faith under Federal Rule of Civil Procedure 56(g) effectively deter perjury.

152. Id. at 2753 (citing United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 714 (1983)). Once the defendant satisfies its burden of production, the factfinder must decide not "whether that evidence is credible, [but] whether the rejection was discriminatory within the meaning of the Title VII." Id. (quoting United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 714-15 (1983)). This is what is meant by "discrimination vel non." Aikens, 460 U.S. at 714-15.

153. Hicks, 113 S. Ct. at 2754 (quoting United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 716 (1983)). The Court understood this to mean that it is not sufficient "to disbelieve the employer; the factfinder must believe the plaintiff's explanation of intentional discrimination." Id.

154. See id. (stating that "our rule in no way gives special favor to those employers whose evidence is disbelieved"). Justice Scalia stated that there is "no justification for assuming ... that those employers whose evidence is disbelieved are perjurers and liars." Id. Scalia reasoned that often the defendant is a company that must rely on the testimony of an employee, "often a relatively low-level employee — as to the central fact; and that central fact is not a physical occurrence, but rather that employee's state of mind ... Title VII is not a cause of action for perjury; we have other civil and criminal remedies for that." Id.

155. See id. at 2755 (stating that "under the McDonnell Douglas framework, perjury may purchase the defendant a chance at the factfinder — though there, as here, it also carries substantial risks, see Rules 11 and 56(g)").

156. Id.


Federal Rule of Civil Procedure 11 provides in pertinent part:
Every pleading, motion, and other paper of a party shall be signed .... If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.
Additionally, the Court rejected the contention that, under the “pretext-plus” approach, the plaintiff would be unfairly expected to refute unarticulated reasons that a trier of fact could find “lurking in the record” because “pretext-plus” fails to limit the inquiry to the employer’s proffered reasons. The majority disagreed with this contention because, practically speaking, an employer’s articulated reasons do not exist apart from the record. In light of this fact, the majority reasoned that unarticulated reasons “lurking in the record” would not constitute a record because essentially all proffered reasons exist in the record, and are set forth “through the introduction of admissible evidence.”

Next, the Court proceeded to reject Hicks’ argument that this decision is “ill-advised” in light of the recent availability of jury trials under Title VII. Hicks argued that the availability of jury trials in conjunction with an evidentiary framework that required the factfinder be “plunged standardless into a sea of defenses where every possible . . . shred of indirect and direct evidence might matter” would create chaos. In contrast,

Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney’s fees, and any offending party or attorney may be adjudged guilty of contempt.

FED. R. CIV. P. 56(g).

158. Hicks, 113 S. Ct. at 2755.
159. Id.
160. Id. (quoting Texas Dep’t of Community Affairs v. Burdine, 450 U.S. 248, 255 (1981)). Justice Scalia opined that “Title VII does not award damages against employers who cannot prove a nondiscriminatory reason for adverse employment action, but only against employers who are proven to have taken adverse employment action by reason of . . . race.” Id. at 2756. Further, just because an employer’s reason is “unpersuasive, or even obviously contrived” does not automatically establish racial discrimination. Id. The question of discrimination remains a question for the trier of fact. Id.

161. Id. at 2756. Prior to 1991, the vast majority of authority held that because the relief available under Title VII was primarily equitable in nature, no right to a jury trial existed for actions under Title VII. See, e.g., Teamsters Local No. 391 v. Terry, 494 U.S. 558, 572 (1990) (assuming without explicitly deciding that “a Title VII plaintiff has no right to a jury trial”); Lehman v. Nakshian, 453 U.S. 156, 164 (1981) (stating that “there is no right to trial by jury in cases arising under Title VII”); see also Henry H. Perritt, Jr., Civil Rights Act of 1991: A Special Report § 3.2, at 61-62 (1992) (discussing judicial debate on jury entitlement under Title VII). In 1991, the Civil Rights Act of 1991 granted plaintiffs the right to compensatory and punitive damages, in addition to the right to a jury trial when plaintiffs seek compensatory damages or punitive damages. 42 U.S.C. § 1981a (Supp. V 1993). The Civil Rights Act of 1991 provides in pertinent part: “(c) Jury Trial. — If a complaining party seeks compensatory or punitive damages under this section — (1) any party may demand a trial by jury . . . .” 42 U.S.C. § 1981a(c) (Supp. III 1991).

the Court felt its decision honed the factfinder's ability to decide a discrimination case. Further, Scalia countered Hicks' argument by stating that a clear understanding of all the elements of proof becomes vital when a jury must be instructed about the elements involved and when detailed findings at the trial level will be unavailable upon review. Therefore, the majority, when compared to the dissent, came to a diametrically opposite conclusion on the impact of jury trials, stating that its decision was even more warranted in light of jury trial availability under Title VII.

Finally, the majority of the Court summarized its analysis by maintaining that its interpretation reaffirms Aikens. The Court reaffirmed its position in Aikens by stating that although direct evidence is seldom available, the procedural framework for Title VII does not provide that courts should treat the question of discrimination differently than any other ultimate question of fact. Accordingly, the majority stated that it declined to make the factfinder's inquiry in deciding the ultimate question of discrimination more difficult by requiring the application of legal rules devised to govern the allocation of burdens and order of presentation.

Therefore, the holding in Hicks is that a factfinder's disbelief of the defendant's proffered reasons does not entitle an employee to a judgment as a matter of law. However, an employee can prevail, absent a showing of direct evidence, if proof of pretext together with the prima facie case persuades the finder of fact of the presence of the ultimate fact of discriminatory animus.

163. See Hicks, 113 S. Ct. at 2756 (discussing impact of Court's decision in light of availability of jury trials under Title VII).

164. Id. (stating that "[c]larity regarding the requisite elements of proof becomes all the more important when a jury must be instructed concerning them, and when detailed findings by the trial court will not be available upon review").

165. Id.

166. Id.

167. Id. (citing United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 716 (1983)).

168. Id. (citing Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 252 (1981) and United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 716 (1983)).

169. Id. at 2749.

170. Id. The factfinder's disbelief of the defendant's proffered reasons "may, together with the elements of the 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 . . . ." Id. Further, the majority concurred with the Court of Appeals that upon the rejection of the defendant's proffered reasons, "no additional proof of discrimination is required." Id. (quoting Hicks v. St. Mary's Ctr., 970 F.2d 487, 493 (8th Cir. 1992), rev'd, 113 S. Ct. 2742 (1993)). No additional proof is required only when no evidence of legitimate nondiscriminatory reasons are offered by the defendant, or the rejection of the proffered reasons and the evidence set forth to establish the prima facie case is "enough at law to sustain a finding of discrimination." Id. at 2748, 2749 n.4.
Four members of the Court disagreed with the majority's interpretation of the evidentiary framework under Title VII.171 The dissenting opinion, written by Justice Souter, primarily contended that the majority has taken the McDonnell Douglas-Burdine framework, a well-settled body of law, and cast it aside.172 The dissent began its analysis by outlining the McDonnell Douglas framework and identifying the underlying function of the framework — to reconcile competing employer-employee interests in a discrimination action.173

Justice Souter stated that the employer has an important interest in being afforded the opportunity to come forward in the second stage of the McDonnell Douglas evidentiary framework with a nondiscriminatory explanation for its decision.174 This opportunity is vital because the reasons the prima facie case dismisses, namely, lack of an open position and requisite qualifications, are not a complete set of nondiscriminatory reasons that might explain the employment decision.175 Therefore, the defendant has his or her opportunity to dispel the presumption of unlawful discrimination that the prima facie case created, by proffering a legitimate, nondiscriminatory reason for the challenged employment decision.176

In contrast, Justice Souter opined that the employee's interest focuses on not being burdened with having to eliminate all possible nondiscriminatory reasons for a personnel decision or to produce direct evidence of discriminatory intent.177 Therefore, the McDonnell Douglas approach allowed an employee to enjoy the opportunity to succeed on an indirect showing of discrimination by proving the employer's reasons false.178

Justice Souter recognized that the Supreme Court, in McDonnell Douglas, reconciled these competing interests in a "very sensible way by requiring the employer to 'articulate,' through the introduction of admissible evidence, one or more 'legitimate, nondiscriminatory reason[s]' for its ac-

171. Id. at 2756. The dissenters were Justices Souter, White, Blackmun and Stevens. Id.
172. Id. at 2757 (Souter, J., dissenting).
173. Id. at 2758 (Souter, J., dissenting). The dissent, in its overview of the McDonnell Douglas scheme, emphasized the role and importance of the prima facie case. While in many areas of law, a prima facie case "only requires production of enough evidence to raise an issue for the trier of fact, here it means that the plaintiff has actually established the elements of the prima facie case to the satisfaction of the factfinder by a preponderance of the evidence." Id. (Souter, J., dissenting). By proving a prima facie case, Hicks "eliminat[ed] the most common nondiscriminatory reasons for demotion and firing: that he was unqualified for the position or that the position was no longer available." Id. (Souter, J., dissenting) (quoting Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981)). For a further discussion of McDonnell Douglas, see supra notes 19-46 and accompanying text.
174. Hicks, 113 S. Ct. at 2758 (Souter, J., dissenting).
175. Id. (Souter, J., dissenting).
176. Id. (Souter, J. dissenting).
177. Id. (Souter, J., dissenting).
178. Id. (Souter, J., dissenting).
The dissent stressed the sensibility and fairness of the McDonnell Douglas framework and accused the majority of abandoning the practical function of the framework, which is to "sharpen the inquiry into the elusive factual question of discrimination." 180

Next, the dissent refuted the majority's approach to Burdine by proceeding to examine the explicit language of Burdine. 181 Justice Souter contended that the Court took the shorthand phrase "pretext for discrimination" and attached requirements that were at odds with the requirements set forth in Burdine. 182 These requirements are that "pretext" or "pretext for discrimination" can simply constitute falsity of the employer's proffered reasons. 183 Further, the dissent attributed these word choices, not to a crucial difference in meaning, but to sloppiness in summarizing the Supreme Court's own opinion. 184

The dissent also interpreted the purpose of the second stage of the McDonnell Douglas framework, where the employer carries the burden of production, to be an opportunity for the employer to choose the factual playing field. 185 Justice Souter discarded contrary interpretations by reasoning that it did not make sense to require the employer to set forth "clear and reasonably specific" reasons if the factfinder is permitted to rely on a reason "not clearly articulated, or on one not articulated at all" in the record. 186 The dissent ultimately concluded, in light of the purpose of choosing the factual playing field, that once the employer makes this choice, "the factual inquiry proceeds to a new level of specificity." 187 This

179. Id. (Souter, J., dissenting) (quoting McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973)).

180. Id. at 2757 (Souter, J., dissenting) (citing Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 255 n.8 (1981)). The dissent also criticized the Court's decision as one that "promises to be unfair and unworkable . . . ." Id. (Souter, J., dissenting).

181. Id. at 2759-61 (Souter, J., dissenting).

182. Id. at 2760 n.7 (Souter, J., dissenting). Specifically, Souter analyzed the Burdine language that states: "[T]he plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination." Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981) (emphasis added).

183. Hicks, 113 S. Ct. at 2760 n.7 (Souter, J., dissenting).

184. Id. at 2759 n.5 (Souter, J., dissenting).

185. Id. at 2759 (Souter, J., dissenting). The dissent commented specifically on the passage in Burdine that requires the employer "to frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext." Burdine, 450 U.S. at 255-56. The dissent interpreted this to mean that the employer has the right to choose the scope of the factual issues to be resolved by the factfinder, and that the scope chosen binds the employer to those factual issues. Hicks, 113 S. Ct. at 2759 (Souter, J., dissenting).

186. Hicks, 113 S. Ct. at 2759 (Souter, J., dissenting) (quoting Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 258 (1981)).

187. Id. (Souter, J., dissenting) (quoting Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 255 (1981)).
more specific inquiry entails the plaintiff proving "by a preponderance of the evidence that [the employer's] proffered reasons are pretextual."188

Concluding the analysis of the Burdine language, Justice Souter analyzed how the merging burdens of proving "pretext" and the "ultimate burden of persuading the court that [the plaintiff had] been the victim of intentional discrimination" could be satisfied.189 Unlike the majority's requirement of proof beyond "pretext-only," the dissent would allow a plaintiff to satisfy his or her burden by proving that the employer's motivation was discriminatory either directly or indirectly by showing that the employer's proffered reason was untrue.190 Souter stated that the dissent's reading of Burdine permits all of Burdine's language to be read in harmony.191

Following the analysis of Burdine's language, the dissent examined what it perceived to be the shortcomings of the majority's approach.192 One of the dissent's objections was that the majority's approach permitted the factfinder's inquiry to go beyond the scope of the employer's proffered reasons.193 According to the dissent, the majority's approach saddles the plaintiff with the burden of "disproving all other reasons suggested, no matter how vaguely, in the record."194 Justice Souter contended that the majority's interpretation rendered the evidentiary framework devoid of effect by asking the factfinder to look beyond an employer's lie and assume the conceivable existence of other reasons the

188. Id. (Souter, J., dissenting).
189. Id. at 2760 (Souter, J., dissenting) (quoting Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 255 (1981)).
190. Id. (Souter, J., dissenting) (citing Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981)). The plaintiff can prove "pretext" or "pretext for discrimination" "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." Burdine, 450 U.S. at 256 (emphasis added). Further, the dissent claimed that the Court has attempted to change the "either . . . or" emphasized in the above passage from Burdine into "both . . . and," which is clearly not within the contemplation of the opinion. Hicks, 113 S. Ct. at 2760 n.7 (Souter, J., dissenting).
191. See Hicks, 113 S. Ct. at 2760 n.6 (Souter, J., dissenting) (noting that majority opinion renders certain passages in Burdine at odds with other passages of same decision).
192. Id. at 2761-66 (Souter, J., dissenting).
193. Id. at 2761 (Souter, J., dissenting). The dissent also stated that "it remains clear that today's decision stems from a flat misreading of Burdine and ignores the central purpose of the McDonnell Douglas framework, which is "progressively to sharpen the inquiry into the elusive factual question of intentional discrimination." Id. (Souter, J., dissenting) (quoting Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 255 (1981)).
194. Id. at 2762 (Souter, J., dissenting). The dissent was astonished by the Court's interpretation, which seemingly rendered the McDonnell Douglas framework meaningless. Id. (Souter, J., dissenting). Further, as the dissent understood the majority opinion, the majority allowed the factual inquiry to be so wide open that it included possible reasons not even stated by the employer in the record. Id. (Souter, J., dissenting).
employer might have forwarded without lying.\textsuperscript{195} In fact, the dissent accused the majority of essentially discarding the limitation on the scope of the factual inquiry for the benefit of employers who give false evidence in court.\textsuperscript{196}

Next, Justice Souter contended that the majority's reliance on Aikens was misplaced.\textsuperscript{197} The Aikens Court explicitly required the factfinder to choose between the employer's explanation for the challenged employment decision and the plaintiff's claim of discrimination, proved either directly or indirectly.\textsuperscript{198} This language, in the eyes of the dissent, barred the majority's conclusion that the factfinder could choose a third explanation, never articulated by the employer, to rule against the plaintiff.\textsuperscript{199}

Finally, the dissent stated that Congress implicitly approved the McDonnell Douglas-Burdine framework by not legislatively correcting the framework.\textsuperscript{200} Justice Souter noted that Congress had proven its readiness to act legislatively to "correct" the Court's misinterpretations of statutory schemes in the past.\textsuperscript{201} In this case, Congress had been aware of the Court's interpretation of the McDonnell Douglas evidentiary framework for nearly two decades and had not taken any action to indicate that the Court was mistaken in either McDonnell Douglas or Burdine.\textsuperscript{202}

In sum, the dissent objected to the enhanced burden the majority placed on the plaintiff.\textsuperscript{203} According to the dissent, this burden does not afford "any opportunity, much less a full and fair one," to demonstrate that the nondiscriminatory explanation for an employment decision is unworthy of credence.\textsuperscript{204} The dissent criticized the Court's approach as one

\begin{itemize}
\item \textsuperscript{195} Id. at 2763 (Souter, J., dissenting).
\item \textsuperscript{196} Id. at 2762 (Souter, J., dissenting). The dissent stated that the majority approach gave incentives to the employer to lie. Id. at 2764 (Souter, J., dissenting). For example, if an employee proves a prima facie case and an employer can offer no nondiscriminatory reason, the court must enter judgment for the employee. Id. (Souter, J., dissenting). Consequently, an employer not only benefits from lying, but must lie to defend a disparate treatment action. Id. (Souter, J., dissenting).
\item \textsuperscript{197} Id. at 2765 (Souter, J., dissenting). In fact, Aikens repeated the language of Burdine that allows a plaintiff to prove discrimination indirectly by proving the employer's proffered reason as unworthy of credence. Id. (Souter, J., dissenting) (citing United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 716 (1983)).
\item \textsuperscript{198} United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 716 (1983) (stating that court must "decide which party's explanation of the employer's motivation it believes").
\item \textsuperscript{199} Hicks, 113 S. Ct. at 2765 (Souter, J., dissenting).
\item \textsuperscript{200} Id. at 2765-66 (Souter, J., dissenting).
\item \textsuperscript{201} Id. at 2765 (Souter, J., dissenting). For a further discussion of instances where Congress has legislatively corrected the Supreme Court, see infra note 225.
\item \textsuperscript{202} Hicks, 113 S. Ct. at 2765-66 (Souter, J., dissenting).
\item \textsuperscript{203} Id. at 2766 (Souter, J., dissenting).
\item \textsuperscript{204} Id. (Souter, J., dissenting).
\end{itemize}
that would frustrate the remedial and deterrent purposes of Title VII. Justice Souter closed his pointed dissent by stating: "Because I see no reason why Title VII interpretation should be driven by concern for employers who are too ashamed to be honest in court, at the expense of victims of discrimination who do not happen to have direct evidence of discriminatory intent, I respectfully dissent." \(^{206}\)

C. Critical Analysis

The Hicks Court has significantly altered the litigation of employment discrimination claims. In spite of the Supreme Court's attempt to refine a cause of action for employment discrimination, the Court took a course that has certainly tilted the judicial scales to the marked detriment of employees.\(^{207}\)

The purpose of the McDonnell Douglas framework was to accommodate the unavailability of direct evidence of discriminatory animus to a plaintiff-employee.\(^{208}\) The Court developed this framework as a logical means of allowing a plaintiff to prove discriminatory intent in situations lacking the proverbial "smoking gun."\(^{209}\) Further, to balance the scales, the framework allowed employers an opportunity to frame the factual "playing field" by giving legitimate, nondiscriminatory reasons for the challenged employment decision.\(^{210}\)

The Hicks decision revamps the McDonnell Douglas approach and rejects the "pretext-only" rationale.\(^{211}\) However, rather than whole-heartedly embracing the "pretext-plus" rationale, the Scalia-led majority adopted a hybrid.\(^{212}\) This hybrid places a much greater burden on the employee because a plaintiff who proves "pretext-only" does not necessarily

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205. Id. at 2763 (Souter, J., dissenting). This effect would come at least in part from the uncertainties under the Court's scheme that give disincentives for workers to sue. Id. (Souter, J., dissenting). Justice Souter outlined the main source of the uncertainty facing a plaintiff under the majority's approach as the potentially unlimited scope of admissible evidence going to the ultimate question of consideration. Id. (Souter, J., dissenting). In other words, the dissent contended that plaintiffs will have a disincentive to sue simply because the balance has been tipped in favor of the employer under the majority approach. See id. (Souter, J., dissenting) (discussing impact of Hicks decision on potential litigants).

206. Id. at 2766.

207. See Lanctot, supra note 5, at 140-41 (stating that pretext-plus "unduly handicap[s] employees by requiring 'plus' evidence" and "treats employment discrimination cases as if they were some uniquely disfavored type of lawsuit that may not be proven circumstantially"); Szteinbok, Note, supra note 5, at 1120 (asserting that pretext-plus approach "ill meets the purpose [that] the indirect method of proof was intended to serve").

208. Loeb v. Textron, Inc., 600 F.2d 1003, 1014 (1st Cir. 1979).

209. Id. For a further discussion of the lack of direct evidence of discrimination in employment discrimination cases, see supra notes 34-36.


212. Id.
succeed as a matter of law, but may succeed if he or she persuades the finder of fact on the ultimate question of unlawful discrimination.213 Although the Hicks Court was justified in holding that the ultimate question is discrimination, prior Supreme Court decisions seem to have contemplated that it is acceptable to equate the falsity of an employer’s proffered reasons with proof of discrimination.214

The Supreme Court’s interpretation of Burdine is flawed. Justice Scalia gave an impressive and quite persuasive initial interpretation of this framework when he artfully examined the language of Burdine.215 However, the Court’s interpretation of Burdine’s language, which allows a plaintiff to succeed indirectly by proving the employer’s proffered reasons false, is directly at odds with the Court’s understanding of the remainder of the Burdine language.216 Justice Scalia further trivialized the Burdine language by stating that the language of such precedential cases is irrelevant because such cases are not in the form of statutes.217 The majority all but ignored the provision for success via indirect means, simply dismissing it as dictum and stating that it contradicts the rest of Burdine.218

213. Id. at 2754 (stating that “[i]t is not enough . . . to disbelieve the employer; the factfinder must believe the plaintiff’s explanation of intentional discrimination”). If the Court had adopted “pretext-plus,” it would simply have reversed the court of appeals and reinstated the district court decision. The fact that the Supreme Court remanded this decision is evidence that the holding adopts a hybrid approach.

214. See United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 716 (1983) (interpreting McDonnell Douglas framework and repeating language of Burdine); Burdine, 450 U.S. at 256 (interpreting McDonnell Douglas and holding that plaintiff may succeed by “indirectly . . . showing that the employer’s proffered explanation is unworthy of credence”).

215. For a discussion of the Supreme Court’s analysis of Burdine, see supra notes 130-50 and accompanying text.

216. See Hicks, 113 S. Ct. at 2759 (Souter, J., dissenting) (discussing Burdine provision that establishes plaintiff’s success through presentation of circumstantial or indirect evidence that proves employer’s proffered reasons false). For a further discussion of the dissent’s interpretation of Burdine, see supra notes 181-91 and accompanying text.

Burdine provided that the plaintiff’s burden “now merges with the ultimate burden of persuading the court that [he or] she has been the victim of intentional discrimination.” Burdine, 450 U.S. at 256. The Court held that the merging of burdens leaves the plaintiff with the heavy burden of proving that a discriminatory reason motivated the employer. Hicks, 113 S. Ct. at 2752. This holding seems to exclude the option, as expressed in the plain language of the Hicks opinion, that a plaintiff may succeed simply by showing that the employer’s proffered reasons are false. See id. at 2760 n.6 (Souter, J., dissenting) (stating that “[i]t seems to me ‘more reasonable’ to interpret the ‘merger’ language in harmony with, rather than in contradiction to, its immediate context in Burdine”).

217. Hicks, 113 S. Ct. at 2751. The Court stated: “[W]e think it generally undesirable, where holdings of the Court are not at issue, to dissect the sentences of the United States Reports as though they were the United States Code.” Id. This statement fails to recognize the importance of the interpretation of cases like McDonnell Douglas, Burdine, and Aikens as the main issue of debate surrounding the Hicks decision.

218. Id. at 2752-53.
cess, the *Hicks* Court failed to grant the plaintiff a "full and fair opportunity to prove pretext."\(^ {219}\) A more persuasive means of interpreting *Burdine* would be to effectuate the plain meaning of the language so that the entire opinion may be read consistently.

The *Hicks* Court's interpretation of *Aikens* is similarly flawed. In holding that the ultimate factual question is discrimination, *Aikens* explicitly repeated the *Burdine* language permitting success under a "pretext-only" scheme.\(^ {220}\) The *Hicks* Court's assertion that the trier of fact can choose another explanation that was never offered by the employer is contradictory to the holding of the *Aikens* Court, which directed the lower court to decide which party's explanation of the employer's motives it believes.\(^ {221}\)

Additionally, the *Hicks* decision contravenes the intent of Title VII.\(^ {222}\) The Supreme Court, speaking about the purpose of Title VII, has stated that "[w]hat is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification."\(^ {223}\) The holding in *Hicks* gives the employer a distinct advantage by rejecting the "pretext-only" rationale and forcing the employee to go beyond the proof of falsity of the defendant's proffered reasons.\(^ {224}\) This advantage does not permit the courts to effectuate the purpose of Title VII or to effectively break down the barriers of discrimination.

\(^ {219}\) *Burdine*, 450 U.S. at 256. By permitting the factual inquiry to go beyond the reasons proffered by the employer, the Court has effectively nullified the utility of the second stage of the framework. *See* *Hicks*, 113 S. Ct. at 2761 (Souter, J., dissenting) ("[T]he Court thus transforms the employer's burden of production from a device to provide notice and promote fairness into a misleading and potentially useless ritual."). Although the second stage confirms that the employer has a legitimate, nondiscriminatory reason, under the Court's interpretation, this stage fails to "progressively . . . sharpen the inquiry into the elusive factual question of intentional discrimination." *Id.* (Souter, J., dissenting) (quoting *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 255 n.8 (1981)).

\(^ {220}\) *See* United States Postal Serv. Bd. of Governors v. *Aikens*, 460 U.S. 711, 716 (1983) (reaffirming language in *Burdine* that permits plaintiff's success by proof that employer's proffered reasons are pretextual through use of circumstantial or indirect evidence).

\(^ {221}\) *See* *Hicks*, 113 S. Ct. at 2765 (Souter, J., dissenting) (stating in dissent that "*Aikens* flatly bars the Court's conclusion here that the factfinder can choose a third explanation, never offered by the employer, in ruling against the plaintiff" (citing United States Postal Serv. Bd. of Governors v. *Aikens*, 460 U.S. 711, 716 (1983))).

\(^ {222}\) *See* 110 CONG. REC. 13,169 (1964) (statement by Senator Byrd of W. Va.) (stating that "[t]he avowed purpose of Title VII is to eliminate, by formal and informal remedial procedures, discrimination in employment on account of race, color, religion, sex, or national origin").


\(^ {224}\) *Hicks*, 113 S. Ct. at 2749.
D. Congressional Solution Is In Order

The Court's attack on civil rights in recent years has prompted Congress to correct mistaken interpretations of statutory law.225 The Court's holding in *Hicks* runs contrary to the purposes of Title VII and, therefore, warrants congressional action. *Hicks* alters a structure designed to aid the employee who had a meritorious discrimination claim. Congress should codify the "pretext-only" approach to permit a plaintiff to succeed in a disparate treatment action when a plaintiff-employee can prove a defendant-employer's proffered reasons are false.226


The motivation behind this initiative was to impede the Court's attack on civil rights. See Thomas J. Piskorski & Michael A. Warner, The Civil Rights Act of 1991: Overview and Analysis, 8 LAB. LAW. 9, 9 (1992) ("The Civil Rights Act of 1991 ... overturns ... Supreme Court decisions viewed by the civil rights community as turning back the clock on the goal of eradicating employment discrimination."); Leigh Anne Gilbert Hodge, Comment, The Civil Rights Act of 1991: A Legislative Response to the Supreme Court's Weakening of Civil Rights Remedies in the Workplace, 22 CUMB. L. REV. 801, 817 (1992) ("The Civil Rights Act of 1991 was enacted as a direct response to the Court's decisions limiting the enforcement of civil rights in the employment context.").


It should also be noted that on July 28, 1993, Senator David Mann of Ohio introduced legislation, H.R. 2787, 103d Cong., 1st Sess. (1993), to reverse the *Hicks* decision. This proposed bill amends Title VII of the Civil Rights Act of 1964 to specify certain evidentiary matters relating to establishing an unlawful employment practice based on disparate treatment. H.R. 2787, 103d Cong., 1st Sess. (1993). The text of the bill reads as follows:
IV. CONCLUSION

The *Hicks* Court has seemingly turned its back on Title VII. The purpose of Title VII and other civil rights legislation is not only to provide a remedy, but also to provide a deterrent to eradicate discriminatory conduct in the workplace.\(^{227}\) The *Hicks* decision places obstacles in the path of both of these objectives.\(^{228}\)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the “Employment Discrimination Evidentiary Amendment of 1993”.

SECTION 2. AMENDMENT.

Section 706 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5) is amended by adding at the end the following:

“(1) An unlawful employment practice based on disparate treatment is established if-

“(A) the complaining party proves by a preponderance of the evidence a prima facie case that the respondent engaged in such practice; and

“(B) either-

“(i) the respondent fails to produce any evidence to rebut such case; or

“(ii) (I) the respondent articulates, and produces evidence of, one or more legitimate, nondiscriminatory reasons for the conduct alleged to be the unlawful employment practice; and

“(II) the complaining party demonstrates that each of such reasons is not true, but a pretext for discrimination that is the unlawful employment practice.

(2) Paragraph (1) shall not be construed to specify the only mean by which an unlawful employment practice based on disparate treatment may be established.”

\(^{227}\) Price Waterhouse v. Hopkins, 490 U.S. 228, 264-65 (1989). Title VII has two basic purposes. The first is to “deter conduct which has been identified as contrary to public policy and harmful to society as a whole. . . . The second goal of Title VII is 'to make persons whole for injuries suffered on account of unlawful employment discrimination.'” *Id.* (quoting Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975)).

\(^{228}\) See Management, Civil Rights Attorneys Differ On Effect Of Hicks, *Daily Lab. Rep.*, (BNA) No. 126, at d26 (July 2, 1993) [hereinafter Management]. An attorney for the Mexican American Legal Defense and Educational Fund stated that those employers that do discriminate “are going to be less careful” as a result of the *Hicks* decision. *Id.* Similarly, the Director of the Employment Discrimination Project at the Lawyer’s Committee for Civil Rights in Washington, D.C. stated that “[l]ying employers will reap a lot of benefits from the decision. . . . Nothing bad will happen to them if they lie. Employers that discriminate might decide to take the gamble.” *Id.*
Another major hurdle put in place by Hicks will be the plaintiff's difficulty in defeating a motion for summary judgment. Presumably, under the Court's decision in Hicks, a question of fact arises if the plaintiff establishes a prima facie case and later proves the employer's proffered reason false. However, the factfinder's role in federal employment discrimination cases has been eroded. Further, pretrial determinations that were formerly reserved to the factfinder at trial are being made by judges, resulting in the increased use of summary judgment. Today, courts are not reluctant to grant summary judgment to a defendant in a civil rights case, even when questions of motive, intent and credibility exist. The Hicks decision and its heightened evidentiary burden will increase the use of summary judgment in cases and "deny employment discrimination plaintiffs their 'day in court' historically promised by the American model of litigation."

Civil rights advocacy groups are calling the Hicks decision a huge step backwards in the civil rights arena. From the plaintiff's perspective, this decision provides a huge disincentive to spend the time, money and effort
to litigate a claim for discrimination. 236 *Hicks* makes it much more difficult for a plaintiff-employee to prove a meritorious claim in the absence of the elusive "smoking gun." 237 Further, *Hicks* gives a defendant-employer an incentive to lie and keep the "true" reason for an employment decision, if it is in fact discriminatory, either far from the record or at least as obscured in the record as possible. 238

Other commentators and practitioners hail the *Hicks* decision as a step in the right direction. 239 In addition to proving that the employer has lied, the plaintiff-employee must now bear the burden of proving discriminatory intent. 240 Further, employers may now openly, yet reasonably, criticize minority employees without fear of instigating a lawsuit. 241

In terms of other practical effects, the *Hicks* decision may reduce the federal court caseload in all areas of employment discrimination. 242 How-

236. See Vass, supra note 14, at 15A (stating that impact of this decision, as result of evidentiary difficulties, may be that "victims of bias who have provable cases will give up without trying").

237. See Max Boot, *High Court Ruling Makes Proving Racial Bias Harder*, CHRISTIAN SCI. MONITOR, June 28, 1993, at 7. Thomas Henderson of the Lawyer’s Committee for Civil Rights Under Law states that "[t]he ruling will affect an extra-histnary number of thousands and thousands. . . . It makes it much harder for plaintiffs to prove employment discrimination." Id.; see St. Mary's Honor Ctr. v. Hicks, 113 S. Ct. 2743, 2757 (1993) (Souter, J., dissenting) (stating that Court has "substitut[ed] a scheme of proof for disparate-treatment actions that promises to be unfair and unworkable").

238. See *Hicks*, 113 S. Ct. at 2762-64 (Souter, J., dissenting) (discussing effects of *Hicks* decision on practical choices and incentives for defendant in an employment discrimination suit under McDonnell Douglas framework).

239. See Savage, supra note 235, at A1 (noting that attorney from U.S. Chamber of Commerce stated that "[i]t is a terrific decision and it will have an important impact"). Mark Levin, director of the Landmark Legal Foundation, sees a positive impact coming from the *Hicks* decision, stating that "[w]hat this case will do is decrease the number of frivolous claims because now they’ll be put to the test." Boot, supra note 237, at 7.

240. *Hicks*, 113 S. Ct. 2742, 2762 (Souter, J., dissenting) (noting that under majority’s scheme plaintiffs will be “saddled with . . . the amorphous requirement of disproving all possible nondiscriminatory reasons that a factfinder might find lurking in the record”); see Savage, supra note 235, at A1 (stating that "juries will be instructed to consider all the evidence and to remember that the plaintiff must prove he or she was fired for illegal reasons").

241. See Savage, supra note 235, at A1 (noting that attorney for U.S. Chamber of Commerce stated that "[i]n many past cases, employers were reluctant to criticize a ‘problem employee’ and they lost discrimination cases because their explanations were judged not to be the ‘true-reasons’").

242. See Lanctot, supra note 5, at 69 ("Some 'pretext-plus' opinions have explicitly admitted that imposing this additional evidentiary burden on plaintiffs is motivated, at least in part, by a desire to reduce the number of employment discrimination cases tried in the federal courts."). Judge Posner of the Seventh Circuit opined that the "workload crisis of the federal courts, and realization that Title VII is . . . used by plaintiffs as a substitute for principles of job protection that do not yet exist in American law, have led the courts to take a critical look at efforts to withstand defendants' motions for summary judgment." Palucki v. Sears, Roebuck & Co., 879 F.2d 1568, 1572 (7th Cir. 1989). In addition, there are alternative means of reducing the federal court caseload while maintaining the efficacy of civil
ever, *Hicks* has the potential to promote longer trials and more pretrial discovery, which could more than offset the lighter caseload and actually increase the burden on the judiciary. Further, the potential effects on Title VII litigation could increase expenses and cause delays — consequences that adversely affect both plaintiffs and defendants.

The *Hicks* decision is another example of the Supreme Court's conservative activism continuing its chokehold on civil rights. In light of Congress' previous willingness to step in and "re-legislate" what it considers misinterpretations of statutory schemes, it will only be a matter of time before this issue returns to Congress' legislative agenda.

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rights, including alternative dispute resolution (ADR) and other settlement techniques. Brief Amicus Curiae of the National Employment Lawyers Association In Support of Respondent at 29-30, St. Mary's Honor Ctr. v. Hicks, 113 S. Ct. 2742 (1993) (No. 92-602).

243. *Hicks*, 113 S. Ct. at 2763 (Souter, J., dissenting).

244. Id. (Souter, J., dissenting).