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Employment Law - Ramifications of St. Mary's Honor Center v. Hicks: The Third Circuit's Revival of the Pretext-Only Standard at Summary Judgment

Alison M. Donahue

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I. Introduction

For over twenty years, America has waged war against employment discrimination. Two congressional enactments, Title VII of the Civil Rights Act of 1964 (Title VII) and the Age Discrimination in Employment Act of 1967 (Age Discrimination Act), provide “a strong vehicle for minorities and women to challenge the myriad conscious and unconscious, historically erected impediments that severely hindered equal opportunities throughout society and the working life of this country” (footnotes omitted); see also Theodore Eisenberg, Civil Rights Legislation 5-8 (1987) (noting that Presidents Kennedy and Johnson, as well as Supreme Court, supported antidiscrimination laws). Commentators viewed the enactment of federal civil rights legislation as the culmination of the social revolution of the civil rights struggles of the 1950s and 1960s. See William R. Doerner, We Still Have A Dream, TIME, Sept. 5, 1983, at 8 (reviewing social climate during 1963 March on Washington and further noting legislation Congress passed in response, including Civil Rights Act of 1964); see also Rossein, supra, § 1.1, at 1-15 (“Title VII was the product of decades of black struggle, which culminated in the political and social agitation of the late 1950s and early 1960s led by the black church and the student civil rights movement.” (footnote omitted)). The social climate of the 1950s and 1960s did not escape the United States Supreme Court, where the political tone of the day played a significant role in the Court’s invalidation of state laws and policies based on race distinctions. See, e.g., Brown v. Board of Educ., 347 U.S. 483 (1954) (invalidating segregation of public schools on basis of race); Morgan v. Virginia, 328 U.S. 373 (1946) (barring racial discrimination in interstate travel); Missouri ex rel. Gaines v. Canada, 305 U.S. 337 (1938) (declaring denial of legal education to African Americans unconstitutional); see also Additional Statement of the Honorable A. Leon Higgenbotham, Jr., in Commission Statement on Civil Disobedience, Nat'l Comm'n on the Causes & Prevention of Violence 16 (1969) (“[T]he major impetus for the Civil Rights Acts of 1957, 1960, 1964 and 1965 ... resulted from the determination, the spirit and the nonviolent commitment of the many who continually challenged the constitutionality of racial discrimination [e.g., Brown v. Board of Education] and awakened the national conscience.”).
environments to the disadvantage of minority citizens."); Griggs v. Duke Power Co., 401 U.S. 424, 429-31 (1971) ("The objective of Congress in the enactment of Title VII... was to... remove barriers that have operated in the past to favor an identifiable group of white employees.").

Section 703 of Title VII contains the primary substantive provisions and provides in pertinent part: "[I]t shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or... 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." 42 U.S.C. § 2000e-2(a)(1).

Title VII was the first comprehensive civil rights legislation since the Reconstruction Civil Rights statutes. Rossein, supra note 1, § 1.1, at 1-3. The adoption of Title VII, however, completed a mission begun many years before. Legislative History of Title VII, supra, at 1. Prior to Title VII, Congress, by proposing legislation, and several presidents of the United States, through the issuance of executive orders, attempted to eradicate racial barriers in employment. Id. at 1-5, 7-9.

Despite several executive and legislative attempts, the only legislative successes in the area of employment discrimination were achieved in the states. For example, in 1945, New York enacted new fair employment practice laws, in response to the failures of earlier attempts to combat discrimination. Michael I. Sovern, Legal Restraints on Racial Discrimination in Employment 19-20 (1966). This legislation, identified as the Ives-Quinn Bill, became the model for a series of enactments in other states. Id. For a complete reprint of the Ives-Quinn Bill, see id. at app. D.

By the time the Civil Rights Act was adopted in 1964, over half the states had legislation addressing equal opportunity in employment. See Legislative History of Title VII, supra, at 5-6. Generally, the state statutes took one of three forms: (1) those that provided for an administrative hearing and judicial enforcement of orders of an administrative agency or official (Alaska, California, Colorado, Connecticut, Hawaii, Illinois, Indiana, Kansas, Massachusetts, Michigan, Minnesota, Missouri, New Jersey, New Mexico, New York, Ohio, Oregon, Pennsylvania, Rhode Island, Washington and Wisconsin); (2) those that did not provide for any type of administrative agency or enforcement of orders but made employment discrimination a misdemeanor (Delaware, Idaho, Iowa and Vermont); and (3) those that were strictly voluntary and had no enforcement provisions (Nevada, Oklahoma and West Virginia). Id.

Despite the efforts of Presidents Roosevelt, Truman, Eisenhower, Kennedy and Johnson, their numerous executive orders addressing discrimination in employment were only minimally successful due to limitations in scope. Id. at 1-4. Legislative response was needed to reach the widespread problem of discrimination in employment. See Sovern, supra, at 61 ("Given the national and international dimensions of the problem, it is entirely appropriate that Congress attempt to solve it."). Each year from 1943 until 1964, Congress introduced a bill prohibiting discrimination in employment. Rossein, supra note 1, § 1.4, at 1-18; Norbert A. Schlei, Foreword to Barbara Lindemann Schlei & Paul Grossman, Employment Discrimination Law (1983); Sovern, supra, at 61 ("After over twenty years of deliberation on dozens of bills, Congress finally made that attempt in Title VII."). One of the first attempts to legislate occurred in February 1943 with the proposal of a bill by Representative Marcantonio. Legislative History of Title VII, supra, at 7. His proposal did not "get very far." Id. at 8. The next serious attempt occurred in 1950 with the McConnell Bill. Id. Sponsored by Representative McConnell, the "bill would have set up a Fair Employment Practices Commission with power to study the matter of discrimination on the basis of race, creed or color, to recommend procedures for elimination of such discrimination and to create minority employment opportunities. Id. While the bill passed the House, the Senate never brought the bill to a vote. Id.
The next significant attempt to legislate in the area of Civil Rights was sparked by President Kennedy's televised conference on June 11, 1963. Id. at 9. During the conference, President Kennedy announced his intention to seek the enactment of civil rights legislation; on June 19, 1963, President Kennedy sent his first draft proposal to Congress. Id. Soon thereafter, H.R. 7152, which was to become the Civil Rights Act of 1964, was introduced by Representative Celler on June 29, 1963. Id. After the assassination of President Kennedy, civil rights legislation was among President Johnson's top priorities. Id. at 10. After the addition of over 100 amendments by both houses of Congress, the Senate adopted H.R. 7152 on June 17, 1964; the House adopted H.R. 7152 on July 2, 1964. Id. at 10-16. On July 2, President Johnson signed the bill, creating the first widespread federal anti-employment discrimination legislation. Id. at 11.

3. 29 U.S.C. §§ 621-634 (1994). The Age Discrimination in Employment Act (ADEA) was enacted with the specific purpose of eliminating arbitrary employment decisions based on age. Id. § 621(b) ("It is . . . the purpose of this chapter to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment."). Originally, the ADEA protected individuals between the ages of 40 and 65 from employment discrimination based on age. Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, § 12, 81 Stat. 602, 602-08, reprinted in UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMM'N, LEGISLATIVE HISTORY OF THE AGE DISCRIMINATION IN EMPLOYMENT ACT 179 (1981) [hereinafter LEGISLATIVE HISTORY OF ADEA]. In 1978, an amendment to the ADEA extended the upper age limit from age 65 to 70 and eliminated any upper age limit with respect to federal employees. Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, § 12(a)-(c), 92 Stat. 189, 189-90, reprinted in LEGISLATIVE HISTORY OF ADEA, supra, at 546-47. Finally, in 1986, Congress amended the ADEA's coverage and eliminated any upper age limit so that the ADEA now protects all individuals age 40 or older. Age Discrimination in Employment Amendments of 1986, Pub. L. No. 99-592, § 12, 100 Stat. 3342, 3342 (codified as amended at 29 U.S.C. § 631 (1994)).

The substantive prohibitions of the ADEA provide in pertinent part:
(a) It shall be unlawful for an employer—
   (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;
   (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or
   (3) to reduce the wage rate of any employee in order to comply with this chapter.

Despite the ADEA's broad purpose to eliminate age discrimination, the ADEA was not the first attempt to combat discrimination in the workplace. LEGISLATIVE HISTORY OF ADEA, supra, at 1-2. Prior to congressional action, several states enacted anti-age discrimination laws. Irving Kovarsky & Joel Kovarsky, Economic, Medical & Legal Aspects of the Age Discrimination Laws in Employment, 27 VAND. L. REV. 839, 876 (1974). Colorado was the first state to enact age discrimination legislation in 1903, followed by Louisiana and Massachusetts in 1934 and 1937, respectively. Id. Drawing on these state provisions, the first significant attempt to prohibit age discrimination in employment came in February 1962 as part of the Equal Employment Opportunity Act of 1962. See H.R. Rep. No. 87-1370, at 2165 (1962) (declaring that section 6 of H.R. 10144 (Equal Employment Opportunity Act of 1962)
prohibited employment discrimination based on age), reprinted in LEGISLATIVE HISTORY OF ADEA, supra, at 3. This bill, which would have prohibited arbitrary employment discrimination based on age, race, religion, color, national origin or ancestry was later blocked by the House Rules Committee. 110 Cong. Rec. 2599 (1964) (remarks of Representative Pucinski), reprinted in LEGISLATIVE HISTORY OF ADEA, supra, at 8.

The next move towards legislation addressing age discrimination came with the consideration of the Civil Rights Act of 1964. See H.R. Rep. No. 88-914, pt.1, at 15 (1963) ("Sec. 718. The Secretary of Labor shall make a full and complete study of the factors which might tend to result in discrimination in employment because of age and of the consequences of such discrimination on the economy and individuals affected."). reprinted in LEGISLATIVE HISTORY OF TITLE VII, supra note 2, at 2015. After vigorous debate, Congress eventually determined that it did not have enough information to legislate on the issue of age discrimination and declined to include age among the protected classes named in Title VII of the Civil Rights Act of 1964. See 110 Cong. Rec. 2597 (1964) (remarks of Representative Celler ("[Congress] do[es] not have sufficient information, concerning discrimination based on age, to act intelligently. I believe ... it would be rather brash to rush into this situation without having sufficient information to legislate intelligently upon this very vexatious and difficult problem."). reprinted in LEGISLATIVE HISTORY OF ADEA, supra, at 6. But see id. at 2598 (remarks of Representative Smith in response to Representative Celler) ("[Celler] is opposing an amendment that is going to put us out of business. ... I look around the Chamber. I see some gentlemen whose hair has departed from their cranium. I see others who are grey and wrinkled. ... I think he ought to have compassion on the rest of us.").

In order to gain information on the nature and scope of the problem of age discrimination, the Secretary of Labor, W. Willard Wirtz, was ordered to conduct a detailed study of age discrimination in the workplace. See Civil Rights Act of 1964, Pub. L. No. 88-352, § 715, 78 Stat. 241, 265 (authorizing Secretary of Labor to undertake study of age discrimination). The results of Secretary Wirtz’s report were delivered to Congress in June of 1965. SECRETARY OF LABOR, THE OLDER AMERICAN WORKER: AGE DISCRIMINATION IN EMPLOYMENT 1 (1965), reprinted in LEGISLATIVE HISTORY OF ADEA, supra, at 16. The Secretary’s report, focusing largely on age discrimination in hiring, concluded that age discrimination was prevalent in the workplace. Id. at 1-3. The report found that age discrimination was based on incorrect stereotypes and recommended legislative action to stop these arbitrary and unfair practices. Id. at 6, 21-22 ("The issue of discrimination revolves around the nature of the work and its rewards, in relation to the ability or presumed ability of people at various ages, rather than the people [themselves]." (emphasis added)); see also id. at 22 ("A clear cut and implemented Federal policy ... would provide a foundation for a much needed vigorous, nationwide campaign to promote hiring on the basis of ability rather than age.").

The next serious attempt to prohibit age discrimination in employment occurred during consideration of amendments to the Fair Labor Standards Act (FLSA), the federal minimum wage and hour law. 29 U.S.C. §§ 201-219 (1994). Senator Javits suggested an amendment to FLSA that prohibited age discrimination. H.R. 13712, 89th Cong. (1966) (creating subsection (f) in FLSA to provide substantive prohibition against age discrimination), reprinted in LEGISLATIVE HISTORY OF ADEA, supra, at 42-43. Despite Senator Javits’s success in adding the amendment to the bill on the Senate floor, the conference committee deleted his proposal. Sen. Rep. No. 88-1452, at 78 (1966) (providing supplemental views expressed by Senators Javits, Prousty, Murphy and Griffin concerning FLSA amendments of 1966), reprinted in LEGISLATIVE HISTORY OF ADEA, supra, at 47. Nevertheless, as a compromise to the proponents of the amendment prohibiting age discrimination, Secretary Wirtz was directed to submit proposed legislative recommendations for implementing the suggestions made in his 1965 report to Congress. 42 U.S.C. § 2000e-14 (requiring Secretary of Labor’s specific legislative
The ADEA was enacted to prohibit arbitrary age discrimination. Nevertheless, several commentators believe that the problem of age discrimination is just as widespread now as it was when the ADEA was enacted. See, e.g., 1 Howard C. Eglit, Age Discrimination 1-19 (2d ed. 1995) (finding that research indicates that age bias continues to exist in workplace); Ruth Simonalysis, Age Discrimination: An Exclusive Money Investigation Has Found that Age Discrimination in the Workplace is Pervasive—and Appears to Be Getting Worse, Money, July 1996, at A-17 (stating that problem of age discrimination is rising). A large factor in the rise of age-based decision-making is the “graying” of America. Eglit, supra, at 1-14 (noting that projected growth in older population is expected to raise median age of U.S. population to 36 by year 2000, 42 by year 2030 and 43 by year 2040). Further, reports also indicate that age bias causes not only financial, but also psychological and familial problems. See, e.g., Rick Bragg, Big Holes Where Dignity Used to Be, N.Y. Times, Mar. 3, 1996, at B1 (discussing psychological ramifications of downsizing and layoffs); Rick Bragg, More than Money, They Miss the Pride a Good Job Brought, N.Y. Times, Mar. 5, 1996, at A17 (same).

4. See McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) (providing plaintiffs with burden-shifting paradigm to prove discriminatory intent by circumstantial evidence); see also Texas Dep’t of Community Affairs v. Burdine, 450 U.S. 248 (1981) (clarifying McDonnell Douglas tripartite standard). The McDonnell Douglas evidentiary framework is comprised of three components: (1) the establishment of the plaintiff’s prima facie case; (2) the defendant’s articulation of a legitimate nondiscriminatory reason for the employment action; and (3) the plaintiff’s proof that the employer’s articulated reason was merely a pretext behind which discriminatory intent was disguised. McDonnell Douglas, 411 U.S. at 802-04.

The first stage of the tripartite framework requires a plaintiff to establish a prima facie case. Id. at 802. The McDonnell Douglas Court stated that in order to prove a prima facie case of race discrimination, the plaintiff must establish: (1) that the plaintiff is part of a protected class (under Title VII, a protected class includes race, color, sex, national origin or religion); (2) that the plaintiff applied and was qualified for the position at issue; (3) that the employer rejected the plaintiff; and (4) that the employer kept the position open and continued to seek applicants from persons with plaintiff’s qualifications outside the protected class. Id. In the context of a termination or a failure to promote, the Supreme Court reworked the elements of the McDonnell Douglas prima facie case, requiring the plaintiff to “prove by a preponderance of the evidence that she applied for an available position for which she was qualified, but was rejected under circumstances which give rise to an inference of unlawful discrimination.” Burdine, 450 U.S. at 253.

If the plaintiff meets his or her initial burden of establishing a prima facie case, the court focuses its attention on the second stage of the tripartite framework. Id.; McDonnell Douglas, 411 U.S. at 802. At the second stage, the burden of production (not of proof) shifts to the employer to articulate some legitimate, nondiscriminatory reason for the challenged employment decision. Burdine, 450 U.S. at 254; McDonnell Douglas, 411 U.S. at 802. If the employer fails to produce a legitimate, nondiscriminatory reason for the decision, the analysis ends and the
McDonnell Douglas Corp. v. Green, the Supreme Court created a tripartite framework for the order and allocation of the burdens of proof and production in disparate treatment cases where the plaintiff lacks direct evidence of discriminatory intent.

If the defendant meets his or her burden of production at the second stage of the tripartite framework, the court shifts its focus to the final stage of the tripartite framework. Burdine, 450 U.S. at 255-56. The third stage requires the plaintiff to prove that the proffered, nondiscriminatory reasons for the employment decision were not the true motivating reasons behind the adverse action. Id. at 253, 256. At this stage of the litigation, the "factual inquiry proceeds to a new level of specificity." Id. at 255. More specifically, the court must determine, as between the plaintiff's protected characteristic and the defendant's proffered nondiscriminatory reason, which is the more likely reason for the adverse employment action. United States Postal Serv. v. Aikens, 460 U.S. 711, 716 (1983) (requiring court to determine which party's explanation of employer's motive was more believable). Thus, at the final stage of the tripartite framework, the burden of proving the falsity of the defendant's proffered explanation for the employment action is merged with the plaintiff's ultimate burden of proof on the issue of the defendant's state of mind. Burdine, 450 U.S. at 256 (stating that burden of proving pretext "merges with the ultimate burden of persuading the court that [the plaintiff] has been the victim of intentional discrimination"); see also Aikens, 460 U.S. at 717 (Blackmun, J., concurring) ("Under [the McDonnell Douglas] framework, once a Title VII plaintiff has made out a prima facie case and the defendant-employer has articulated a legitimate, nondiscriminatory reason for the employment decision, the plaintiff bears the burden of demonstrating that the reason is pretextual.").


6. See Louis M. Rappaport, Note, St. Mary's Honor Center v. Hicks: Has the Supreme Court Turned Its Back on Title VII by Rejecting "Pretext-Only," 39 Vill. L. Rev. 123, 130 (1994) (stating that McDonnell Douglas framework allows factfinder to infer intent in disparate treatment case in absence of direct evidence). The Supreme Court labeled the type of case in which the plaintiff attempts to prove discriminatory motivation as "disparate treatment." Robert J. Smith, Note, The Title VII Pretext Question: Resolved in Light of St. Mary's Honor Center v. Hicks, 70 Ind. L.J. 281, 281-82 n.7 (1994). While disparate treatment is the most easily understood type of discrimination, it is not the sole method by which an employer can discriminate against an employee. 1 CHARLES A. SULLIVAN ET AL., EMPLOYMENT DISCRIMINATION § 2.2, at 38 (2d ed. 1988). Courts utilize two theories of liability under the federal antidiscrimination laws—disparate treatment and disparate impact. Id. First, the disparate treatment theory deals with employers who actually treat their employees differently because of their status as a member of a protected group. See International Bd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977) (defining disparate treatment and further noting that disparate treatment is more easily understood than disparate impact); DiBiase v. SmithKline Beecham
Disparate treatment analysis can be divided further into two major subdivisions: systemic disparate treatment and individual disparate treatment. Terri L. Dill, Note, St. Mary's Honor Center v. Hicks: Refining the Burdens of Proof in Employment Discrimination Litigation, 48 Ark. L. Rev. 617, 623 n.36 (1995). Systemic disparate treatment exists when an "employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin." Teamsters, 431 U.S. at 335 n.15.

Conversely, individual disparate treatment exists when an individual was treated differently from those outside the protected class. Dill, supra, at 623 n.36. In either model of disparate treatment, the key element that must be established is the defendant's motivation or subjective intent. See Teamsters, 431 U.S. at 335 n.15 ("Proof of discriminatory motive is critical."). Thus, the issue underlying any disparate treatment case is whether the factors made illegal by the statute motivated the employer's actions. Mack A. Player, Proof of Disparate Treatment Under the Age Discrimination in Employment Act: Variations on a Title VII Theme, 17 Ga. L. Rev. 621, 625-26 (1983) [hereinafter Player, Proof of Disparate Treatment] ("Disparate treatment requires a showing that the plaintiff was treated differently because of his membership in a class protected by the statute."). In addition to its applicability to actions arising under the ADEA and Title VII, the disparate treatment theory is actionable under several federal anti-discrimination statutes, including the Civil Rights Act of 1866, 42 U.S.C. § 1981 (1995) and the Civil Rights Act of 1871, 42 U.S.C. § 1983 (1995). Rappaport, supra, at 126 n.24.

The second method by which employers engage in discriminatory activity is labeled disparate impact discrimination. Id. The disparate impact concept focuses on employment practices that are facially neutral, yet result in an unjustified negative effect on members of the protected class. Teamsters, 431 U.S. at 335 n.15. The Supreme Court held that under the disparate impact theory, proof of discriminatory motive is not necessary. See Griggs, 401 U.S. at 430 n.6 ("Under [Title VII] . . . practices . . . neutral on their face, and even neutral in terms of intent, cannot be maintained if they [are discriminatory].").

While it is now undisputed that the McDonnell Douglas evidentiary framework used in disparate treatment cases applies to ADEA cases, the Supreme Court has not yet addressed the question of whether the disparate impact theory is available to ADEA plaintiffs. Hazen Paper Co. v. Higgins, 507 U.S. 604, 609 (1993) (declining to decide whether employer is liable under ADEA on disparate impact theory). Accordingly, courts and scholars have debated whether the theory is applicable in ADEA cases, and lower courts have reached conflicting decisions. See, e.g., Abbott v. Federal Forge, Inc., 912 F.2d 867, 872-77 (6th Cir. 1990) (applying disparate impact theory to ADEA case); Rose v. Wells Fargo & Co., 902 F.2d 1417, 1423-25 (9th Cir. 1990) (applying disparate impact theory without analysis); Allison v. Western Union Tel. Co., 680 F.2d 1318, 1321-22 (11th Cir. 1982) (same); Geller v. Markham, 635 F.2d 1027, 1031-34 (2d Cir. 1980) (determining that disparate impact theory applied to ADEA because substantive prohibitions of ADEA were modeled after Title VII). But see Ellis v. United Airlines Inc., 73 F.3d 999, 1001 (10th Cir.) (finding that plain language of statute and reasonable interpretation of Congress's intent precluded application of disparate impact theory in ADEA cases), cert. denied, 116 S. Ct. 2500 (1996); DiBiase, 48 F.3d at 732 (Greenberg, J., concurring) (stating that analysis in Hazen Paper suggests preclusion of disparate impact claim under ADEA); EEOC v. Francis W. Parker Sch., 41 F.3d 1073, 1077 (7th Cir. 1994) (declining to apply disparate impact doctrine in ADEA context.
Despite the national crusade against employment discrimination, several commentators suggest that in recent decisions, the Supreme Court has retreated from its earlier pro-plaintiff posture.\(^7\) The most recent deci-


The dominant judicial view in the early years of employment discrimination litigation—that illegal discrimination is presumed to be prevalent and that plaintiffs must be given ample opportunity to prove their cases—has given way in the current conservative climate to a notion that illegal discrimination is a thing of the past.

Lancot, *supra*, at 141; see also Robert Brookins, Hicks, *Lies and Ideology: The Wages of Sin Is Now Exculpation*, 28 Creighton L. Rev. 999, 947 (1995) ("During the last fourteen years, the United States Supreme Court has become increasingly hostile toward Title VII plaintiffs with respect to evidentiary standards."); Matthew D. O'Leary, *Note, St. Mary's Honor Center v. Hicks: The Supreme Court Restricts the Indirect Method of Proof in Title VII Claims*, 13 St. Louis U. Pub. L. Rev. 821, 851 (1993) (noting that *McDonnell Douglas* Court had a "liberal attitude towards protection of plaintiff's rights" and commenting further that "during the 1980's, a more conservative approach to plaintiff's rights in discrimination suits took hold").

The Supreme Court's retreat from its prior pro-plaintiff position is attributed to the conservative Reagan-Bush federal judicial appointees. See *Rossein, supra* note 1, § 1.1, at 1-7 ("[F]ormer President Reagan, through his appointments to the Supreme Court—Sandra Day O'Connor, Antonin Scalia, Anthony Kennedy—and his elevation of William Rehnquist to Chief Justice, accomplished at least temporarily his goal of returning civil rights enforcement to an era when racial minorities and women had limited access to legal protection from job discrimination."); Brookins, *supra*, at 942 ("For eight years, Reagan packed the lower federal courts with federal judges who shared his hostility for civil rights; he also placed three anti-civil rights Justices on the Court."); Timothy B. Tomasi & Jess A. Velona, *Note, All the President's Men: A Study of Ronald Reagan's Appointments to the U.S. Court of Appeals*, 87 Colum. L. Rev. 766, 783 (1987) (noting that Reagan-appointed judges were "extreme" in area of discrimination suits). For a detailed discussion of the Rehnquist Court, see generally *David G. Savage, Turning Right: The Making of the Rehnquist Supreme Court* (1992) (recounting formation of Rehnquist Court and reviewing 1986-87 through 1990-91 Terms).
In particular, commentators point to Justice Scalia as the pinnacle of conservatism on the issue of civil rights. See, e.g., Stephen A. Plass, *The Illusion and Allure of Textualism*, 40 Vill. L. Rev. 93, 110 (1995) (criticizing Justice Scalia's inconsistent use of textualist philosophy to disadvantage individuals in area of civil rights); O'Leary, *supra*, at 852 n.170 (arguing that Justice Scalia's conservative approach restricts "plaintiff's rights in the discrimination context"). While on the United States Court of Appeals for the District of Columbia Circuit, Justice Scalia authored a stinging dissent which showed his bias in favor of restricting plaintiff's rights. He stated:

[W]ithout careful and conscientious fact-finding the anti-discrimination laws can either be frustrated by, or be converted into instruments of, the very evil they are designed to prevent. The court's decision facilitates the latter development, permitting juries to render awards where no solid evidence exists. . . . If this case did not call for a directed verdict, it is difficult to imagine any small business hiring a minority employee which does not, in doing so, commit its economic welfare and its good name to the unpredictable speculations of some yet unnamed jury.


sion sparking discussion and debate by commentators\(^8\) and lawmakers\(^9\) is


8. See, e.g., Jerome McCristal Culp, Jr., Neutrality, the Race Question, and the 1991 Civil Rights Act: The “Impossibility of Permanent Reform”, 45 RUTGERS L. REV. 965, 1008 (1993) (criticizing majority view in Hicks by implying that it symbolized “the radical fringe of the legal establishment”); Eileen Kaufman, Employment Discrimination: Recent Developments in the Supreme Court, 10 Touro L. Rev. 525, 535-37 (1994) (arguing that Hicks could force plaintiffs “to think of any possible reason that the employer could have had for the discharge and then disprove each one” to prevail in McDonnell Douglas-type cases); Juan F. Perea, Ethnicity and Prejudice: Reevaluating “National Origin” Discrimination Under Title VII, 35 WM. & MARL. L. REV. 805, 841-42 (1994) (describing Court’s attitude towards employment discrimination plaintiffs as “persistent[ly] hostile[]”); Marissa F. Bloom, Note, St. Mary’s Honor Center v. Hicks: Racist Defendant Freed by Lies?, 25 U. WEST L.A. L. REV. 271, 295 (1994) (noting that Hicks “will not only frustrate potential legitimate discrimination claims, but it may also discourage victims from coming forward with their claims”); Sherie L. Coons, Comment, Proving Disparate Treatment After St. Mary’s Honor Center v. Hicks: Is Anything Left of McDonnell Douglas?, 19 J. CORP. L. 379, 395-408 (1994) (criticizing Hicks as contradicting established precedent, being inconsistent with judicial and legislative authority and furthering “unsound policy”); Shari Engels, Comment, Problems of Proof in Employment Discrimination: The Need for a Clearer Definition of Standards in the United States and the United Kingdom, 15 COMP. LAB. L.J. 340, 349-50 (1994) (“Hicks will undoubtedly frustrate the efforts of employees attempting to prove disparate treatment. . . . The majority . . . indicated its interest in decreasing the incidence of discrimination litigation.”); O’Leary, supra note 7, at 853 (commenting that “[t]he Court . . . has disregarded the most probative language of and policies behind McDonnell Douglas and Burdine and has substituted merely invocations of standard evidentiary practices”); The Supreme Court 1992 Term: Leading Cases, 107 HARV. L. REV. 144, 947 (1993) (stating that Hicks majority “hinged tenuously on isolated phrases, stripped from their contexts and refashioned into a reading that contradicts both the spirit and the letter of settled case law”); see also Joan Biskupic, High Court ERECTS New Barrier to Job Bias Suits; Employees Required to Furnish Direct Evidence of Discrimination, Which Can Be Hard to Do, WASH. POST, June 26, 1993, at A4 (reporting that Hicks places new barriers on “employees trying to prove illegal job discrimination”); William H. Freivogel, High Court Narrows Bias Test; St. Louis Case Changes 20-Year-Old Precedent, ST. LOUIS POST-DISPATCH, June 26, 1993, at 1A (“Civil rights lawyers . . . said the decision sharply cut back on the legal protection available for two decades.”); Linda Greenhouse, Justices Increase Workers’ Burden in Job-Bias Cases, N.Y. TIMES, June 26, 1993, at 1 (“Ruling in an important civil rights case, a divided Supreme Court today made it substantially harder for employees to prove they suffered discrimination on the job.”); Dick Lehr, High Court Backs off Race-Based Preferences, BOSTON GLOBE, July 11, 1993, at 1 (“[T]he [C]ourt . . . set out requirements making it more difficult to prove discrimination due to race, gender or religious prejudice.”).

Despite some commentators’ negative reaction to the Hicks decision, others viewed the decision in a more positive light and opined that the Hicks decision will have a minimal effect on plaintiff’s rights. See, e.g., Hicks’ Effects on Litigation are Narrow, D.C. Bar Association Panelists Contend, 35 DAILY LAB. REP. (BNA) (Feb. 23, 1994) (reporting that management and plaintiff’s attorneys agreed that Hicks will have narrow effect on employment discrimination litigation); Norma G. Whitis, Note, St. Mary’s Honor Center v. Hicks: The Title VII Shifting Burden Stays Put, 25
Loy. U. Chi. L.J. 269, 290-301 (1994) (agreeing with majority opinion in Hicks); see also Paul F. Mickey, Jr., Battling Sexual Harassment, Legal Times, July 25, 1994, at S33 ("[T]he Court’s redefinition of a plaintiff’s burden of proof . . . does not portend the significant advantage for defendants suggested by many reports."); David G. Savage, Justices Rule Fired Worker Must Prove Bias, L.A. Times, June 26, 1993, at A1 ("Some job bias experts called Friday’s decision a clarification of the rules, while other civil rights advocates branded it a major change in the law.").

Consistent with the more positive view of Hicks, at least one commentator asserted that Hicks merely served to clarify the plaintiff’s burden of persuasion. See, e.g., Michael J. Lambert, Note, St. Mary’s Honor Center v. Hicks: The “Pretext—Maybe” Approach, 29 New Eng. L. Rev. 163, 207 (1994) ("[T]he Hicks decision is not a death knell for Title VII plaintiffs, but merely a clarification of a framework which assists the plaintiff with an inference of discrimination, while correctly insisting that the plaintiff’s ultimate burden is carried only by proving discrimination."). Finally, others scholars are unsure of Hicks’s effect because of the ambiguities left by the majority’s opinion. Howard E. Berkenblit, Note, The Burden of Proof in Title VII Disparate Treatment Actions: St. Mary’s Honor Center v. Hicks, 35 B.C. L. Rev. 349, 484 (1995) ("Though the Court’s decision appears to favor employers, the future of the case is unclear, especially given its ambiguities."). For example, Hicks did not discuss its effect on the defendant’s ability to prevail on pre-trial motions for summary judgment; thus, the circuit courts remain split on this issue. See Thomas Duley, Comment, Summary Judgment and Title VII After Hicks: How Much Evidence Does It Take to Make an Inference?, 28 U.C. Davis L. Rev. 261, 275-76 (1994) (stating that "two interpretations of Hicks have confused courts’ rulings on employers’ summary judgment motions"). The proper legal standard in motions for summary judgment after Hicks is the topic of this Casebrief.

9. See Lambert, supra note 8, at 205 (noting that "some lawmakers have voiced outright protest" over Hicks). Several commentators specifically advocated for legislative action to overrule Hicks. See Brookins, supra note 7, at 994 ("In response to Hicks, Congress must amend Title VII, not so much in sweeping language as in minute detail."); Deborah A. Calloway, St. Mary’s Honor Center v. Hicks: Questioning the Basic Assumption, 26 Conn. L. Rev. 997, 1038 (1994) (adopting Justice Souter’s dissenting opinion and calling for legislative reform of Hicks); Rappaport, supra note 6, at 164 (stating that legislative action was in order); see also Overburdened; The Supreme Court Has Made It Too Difficult to Prove Bias. The Congress Must Act, Newsday, July 1, 1995, at 54 ("The Supreme Court has overturned established civil rights law to make it more difficult, if not . . . impossible, for employees to win . . . . When the dominant conservatives last flexed their muscles in this way, Congress passed the Civil Rights Act of 1991 to set things right again. It must do the same now.").

Congress has engaged in several attempts at overruling the Hicks decision. For example, on November 22, 1993, Representative Owens and Senator Metzenbaum introduced the Civil Rights Standards Restoration Act into the House of Representatives and Senate, respectively. S. 1776, 103d Cong., 139 Cong. Rec. S16,948 (1993); H.R. 3680, 103d Cong. (1993). In his opening remarks to the Senate, Senator Metzenbaum stated that this was a case of "deja vu" and that "the Supreme Court is at it again." Id. Senator Metzenbaum explained that "[t]he Civil Rights Standards Restoration Act will overturn Hicks and restore the legal framework Federal courts have used in thousands of cases to resolve claims of intentional discrimination." S. 1776, 139 Cong. Rec. at S16,950. The proposed Act provided:

Sec. 1979A. Standards for Proving Intentional Discrimination in Certain Circumstances:

(a) Standards.—In a case or proceeding brought under Federal law in which a complaining party meets its burden of proving a prima facie case of unlawful intentional discrimination and the respondent meets its burden of clearly and specifically articulating a legitimate, nondiscrimina-
St. Mary's Honor Center v. Hicks. The Hicks decision settled a split among the United States Circuit Courts of Appeals concerning the meaning of the term "pretext" at the third stage of the McDonnell Douglas framework.

Despite the resolution of the meaning of the word "pretext," Hicks left many questions unanswered. Specifically, because of the procedural posture of the Hicks case, the Supreme Court did not address the decision's effect on the plaintiff's evidentiary burden in attempting to defeat a defendant's motion for summary judgment. The plaintiff's burden at

tory explanation for the conduct at issue through the introduction of admissible evidence, unlawful intentional discrimination shall be established where the complaining party persuades a trier of fact, by a preponderance of the evidence, that—

(1) a discriminatory reason more likely motivated the respondent; or

(2) the respondent's proffered explanation is unworthy of credence.

(b) Rule of Construction.—This section shall apply only to those cases and proceedings in which the method of proof articulated in McDonnell-Douglas... and... Burdine... applies and shall not be construed to specify the exclusive means by which the complaining party may establish unlawful intentional discrimination under Federal law.

Id. Despite the resounding criticism of Hicks, the statute was never enacted. Deborah C. Malamud, The Last Minuet: Disparate Treatment After Hicks, 93 Mich. L. Rev. 2229, 2235 n.28 (1995).

An additional legislative response to the Hicks decision was the introduction of two amendments to the Civil Rights Act of 1964 to overrule Hicks. See Employment Discrimination Evidentiary Amendment of 1993, H.R. 2787, 103d Cong. (1993) (introduced by Representative David Mann) (specifying certain evidentiary matters relating to establishment of unlawful employment practices based on disparate treatment); Disparate Treatment Employment Discrimination Amendment of 1993, H.R. 2867, 103d Cong. (1993) (introduced by Representative Alcee Hastings) (amending Civil Rights Act of 1964 in order to establish unlawful employment practices based on disparate treatment).


11. For a discussion of the doctrinal underpinnings of the circuit split prior to Hicks, see infra notes 29-48 and accompanying text.

12. Hicks, 509 U.S. at 534 (Souter, J., dissenting). The Hicks Court held that the trier of fact could find pretext as a matter of law based solely on the plaintiff's proof of the prima facie case and discrediting of the defendant's proffered reason, but further held that in some instances the plaintiff was required to present additional evidence to prove that the real reason for the employment action was discriminatory animus. Id. at 535 (Souter, J., dissenting).

13. Hicks was an appeal from the judge's findings of fact and conclusions of law after a full bench trial on the merits. Id. at 505. The District Court acted as the trier of fact in the bench trial. Id. at 508; see also Jody H. Odell, Comment, Between Pretext Only & Pretext Plus: Understanding St. Mary's Honor Center v. Hicks and its Application to Summary Judgment, 69 Notre Dame L. Rev. 1251, 1276 (1994) ("The holding of St. Mary's Honor Center v. Hicks addressed the burden of proof that the plaintiff must bear at trial.").

14. See Malamud, supra note 9, at 2275-76 ("Because all of the Court's disparate treatment cases, like Hicks, arose after full trial, the Court's jurisprudence offers no guidance as to the pretrial use of McDonnell Douglas-Burdine," (footnote omitted)); Duley, supra note 8, at 275 ("As a result of [the Hicks] Court's inconsistent dicta, the circuit courts remain split on this question [of summary judgment standards] and cite Hicks for contradictory propositions."); Odell, supra note 13, at
this pre-trial stage is critical because discrimination cases frequently hinge on the question of pretext.\textsuperscript{15} As a result of the conflicting interpretations of the meaning of \textit{Hicks}, the circuit courts are split on the question of what evidence is sufficient to create a triable issue of pretext for discrimination at the summary judgment stage.\textsuperscript{16} In an en banc decision, the United States Court of Appeals

1277 ("[T]he federal courts have struggled with an issue that \textit{Hicks} did not directly address: what burden must the plaintiff bear to survive the defendant's motion for summary judgment?"). In fact, the Supreme Court has never considered the \textit{McDonnell Douglas} structure in the context of a summary judgment case. Malamud, \textit{supra} note 9, at 1277 n.152. The Supreme Court granted certiorari in one case that involved summary judgment; the Court, however, later dismissed the case. See Chipollini v. Spencer Gifts, Inc., 814 F.2d 893, 899 (3d Cir.) (en banc) (stating that issue of defendant's intent at discharge is factual question and further that summary judgment is precluded unless defendant can show that plaintiff is unable to "introduce either direct evidence of a purpose to discriminate, or indirect evidence of that purpose by showing that the proffered reason is subject to factual dispute"), \textit{cert. dismissed}, 483 U.S. 1052 (1987). In addition, the Supreme Court declined the opportunity to address the effect of the \textit{Hicks} decision on the standard of summary judgment. See Fisher v. Rutgers, 995 F.2d 216 (3d Cir. 1993), \textit{cert. denied}, 510 U.S. 1042 (1994) (unpublished decision). One of the questions presented to the Court was: "(1) Is there need to clarify standards for summary judgment in 'pretext' employment discrimination cases in light of St. Mary's Honor Center v. Hicks?" Petition for Writ of Certiorari at i, Fisher v. Rutgers, 510 U.S. 1042 (1993) (No. 93-642).

Despite the Court's failure to address the decision's effect on summary judgment, an amicus brief filed in support of the petitioners, St. Mary's Honor Center, advocated the "pretext-plus" position to facilitate the use of summary judgment by the employer. See Brief of the National Association of Manufacturers as Amicus Curiae in Support of Petitioners at 10, St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993) (No. 92-602) (advocating "pretext-plus" rule).

15. Villanueva v. Wellesley College, 930 F.2d 124, 127 (1st Cir. 1991) ("As the first two elements of the \textit{McDonnell-Douglas} model are quite easy to meet, it is not surprising that most cases, like this one, come to rest on the third step."); Visser v. Packer Eng'g Assoc., 924 F.2d 655, 661 (7th Cir. 1991) (Flaum, Bouer & Cuddahy, JJ., dissenting) ("[E]mployers and their counsel may well conclude that . . . cases are won or lost on summary judgment, because jurors find it difficult to close their heart to the plight of the terminated . . . employee but easy to open the purse strings of [his or her] employer."); \textit{see also} \textit{Schlei & Grossman}, \textit{supra} note 2, at 1322 (noting that summary judgment is extremely important stage in litigation); Lancot, \textit{supra} note 7, at 67 n.38 ("The controversy over the "pretext-plus" rule has emerged primarily in motions for summary judgment, perhaps because summary judgment has become the principal procedural battleground for employers seeking to avoid discrimination trials."); Jane E. Cuellar, Comment, \textit{The Age Discrimination in Employment Act: Handling the Element of Intent in Summary Judgment Motions}, 58 \textit{EMORY L.J.} 523, 525-26 (1989) (noting substantial increase in ADEA cases filed, and further commenting that in order to avoid waste of judicial resources, courts utilize their power under Rule 56 of Federal Rules of Civil Procedure); O'Leary, \textit{supra} note 7, at 826 n.41 ("[M]ost disparate treatment cases hinge on this third stage [pretext stage] of the \textit{McDonnell Douglas} inquiry.").

16. \textit{See} Malamud, \textit{supra} note 9, at 2307 (noting that "[t]he circuits have not come to agreement on this issue, and the Supreme Court will inevitably need to resolve it") (footnote omitted); Odell, \textit{supra} note 18, at 1277 (noting in context of summary judgment that "[t]wo alternate standards have been articulated, both of which root themselves in the language of \textit{St. Mary's Honor Center v. Hicks}"). For a
for the Third Circuit recently provided a definitive answer. In Sheridan v.
E.L. DuPont de Nemours and Co., the court re-examined the issue of
the proper method of applying the Hicks standard to motions for summary
judgment. The Third Circuit reaffirmed its earlier holdings, and
concluded that a plaintiff may survive summary judgment if the combination
of the plaintiff's prima facie case and evidence discrediting the employer's
purported reason for the employment decision created a genuine issue of
material fact on the issue of the defendant's true motivation.

Several other cases prior to Sheridan intimatèd that the Third Circuit
adhered to the position that the plaintiff may survive summary judgment if
he or she produces sufficient evidence to raise a genuine issue of material
fact as to the legitimacy of the defendant's reasons for the employment
action. For example, prior to Sheridan, the most recent Third Circuit
case to utilize this approach was Brewer v. Quaker State Oil Refining Co.
In Brewer, however, the court also examined a related question. Specifically,
the Third Circuit addressed the type of evidence that would be sufficient
to discredit the employer's purported reason for acting against the em-
ployee, thus allowing a plaintiff to meet the summary judgment standard
adopted in the Third Circuit. In Brewer, the Third Circuit held that the
plaintiff discredited the defendant's reasons for discharge indirectly by
proffering evidence of generally good evaluations and by questioning the
degree of his performance problems, rather than their existence. The
court found that Brewer's evidence created a genuine issue of material
fact regarding the defendant's motivations in firing him.

discussion of the Court's failure to exercise at least two opportunities to address
the plaintiff's burden at summary judgment, see supra note 14.
17. 100 F.3d 1061 (3d Cir. 1996) (en banc).
18. Id. at 1065 ("We thus turn, this time en banc, to reexamine what DuPont
calls 'this continuing and perplexing problem of interpreting the shifting burden
of Hicks.'"). The Sheridan court addressed the meaning of Hicks with respect to
motions for summary judgment and judgment as a matter of law, because the issue
was raised procedurally by the district court's grant of judgment as a matter of law
to DuPont, after a jury verdict in favor of Sheridan. Id. at 1064. For the facts and
procedural history of Sheridan, see infra notes 92-98 and accompanying text.
19. Sheridan, 100 F.3d at 1071 (following Waldron v. S.L. Indus., Inc., 56 F.3d
491 (3d Cir. 1995); Fuentes v. Perskie, 32 F.3d 759, 764 (3d Cir. 1994)). For a
discussion of Fuentes, see infra notes 81-86 and accompanying text.

In Waldron, the plaintiff challenged the district court's determination that the
Third Circuit requires plaintiffs to demonstrate "both that [his or her] employer's
reasons for terminating [him or her] were false and that the real reason for termi-
nation was discrimination." Waldron, 56 F.3d at 492. For a discussion of Waldron,
see infra note 88 and accompanying text.

20. For a discussion of the Third Circuit's approach to the legal standard ap-
plied to motions for summary judgment and judgment as a matter of law, see infra
at 82-121.
21. 72 F.3d 326 (3d Cir. 1995).
22. Id. at 335.
23. For a detailed analysis of the facts, holding, rationale and dissent in
Brewer, see infra notes 169-96 and accompanying text.
24. Brewer, 72 F.3d at 335.
This Casebrief examines the legal standard applied in deciding motions for summary judgment after the *Hicks* decision, and also focuses on the types of evidence that satisfy the summary judgment standard followed in the Third Circuit. Part II provides an overview of the majority and dissenting opinions in *Hicks*.\(^{25}\) Next, Part III first provides an overview of the Third Circuit’s approach in applying *Hicks* to motions for summary judgment, focusing on the standard adopted in *Sheridan v. E.I. DuPont de Nemours and Co.* and then analyzes the Third Circuit’s approach in *Brewer v. Quaker State Oil Refining Co.*, where the Court explained the method by which a plaintiff may meet the Third Circuit’s standard at summary judgment.\(^{26}\) Part IV examines the likelihood of summary judgment dispositions in the Third Circuit after *Sheridan* and *Brewer*.\(^{27}\) Finally, Part V concludes that the Third Circuit’s approach struck a proper balance between Congress’s ban against discrimination and employers’ concerning regarding speculative claims.\(^{28}\)

### II. *St. Mary’s Honor Center v. Hicks*

#### A. Trend in Lower Courts Prior to *Hicks*

Prior to the Supreme Court’s clarification of the meaning of the word “pretext,” there was a significant split among the circuit courts regarding the plaintiff’s burden at the third stage of the *McDonnell Douglas* tripartite framework.\(^{29}\) Some courts required the plaintiff to show “pretext-only,” some required the plaintiff to show “pretext-plus,” and some adopted a “pretext-maybe” approach.\(^{30}\)

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\(^{25}\) For a discussion of *Hicks*, see infra notes 49-60 and accompanying text.

\(^{26}\) For a discussion of the Third Circuit’s interpretation of *Hicks* at the summary judgment stage, see infra notes 63-120 and accompanying text. For a discussion of *Brewer*, see infra notes 169-96 and accompanying text.

\(^{27}\) For a discussion of the future of summary judgment within the Third Circuit, see infra notes 197-215 and accompanying text.

\(^{28}\) For a discussion of the balance struck by the Third Circuit, see infra notes 216-18 and accompanying text.

\(^{29}\) For the leading article on the circuit court split prior to *Hicks*, see Lanctot, supra note 7, at 57.

\(^{30}\) For circuits adhering to a “pretext-only” approach, see infra notes 32-39. For circuits espousing a “pretext-plus” approach, see infra notes 40-45. For circuits adopting a “pretext-maybe” approach, see infra notes 46-48.

The contours of the three theories are best illustrated by an example: An African American applicant sends his resume to an accounting firm seeking an entry-level position. The applicant was a recent graduate of a prestigious university, achieving high honors in his accounting classes. His resume reflects his high qualifications; however, it does not reflect his race. The hiring partner telephones the applicant and eagerly schedules an interview.

At the interview, however, the applicant detects a distinct shift in the partner’s attitude towards him. The partner seems uninterested in the applicant’s credentials, and the interview lasts only fifteen minutes. Despite the partner’s claims that the applicant is overqualified for the position, the applicant assures the partner that he is seeking an entry-level position. Despite the applicant’s reassurances, the applicant is rejected via a form letter received three days after the interview. The
Prior to Hicks, the United States Courts of Appeals for the Second,\(^3\) Third,\(^2\) Sixth,\(^3\) Eighth,\(^4\) Ninth,\(^5\) Tenth\(^6\) and District of Columbia\(^7\)

applicant called to see why he was not chosen for the job, and the partner informed him that he was overqualified and demanded a high salary. Thereafter, the applicant learned that a white male with similar high qualifications was hired for the position the applicant sought.

Based on this hypothetical, the applicant has enough to make out a prima facie case of discrimination. Further, the applicant can prove that the defendant’s proffered reasons for rejection, namely that he was overqualified and demanded too much money, were untrue. He does not, however, have any other evidence that the partner took his race into account. He has no direct “smoking gun” evidence, no comparative evidence and no statistical evidence. Limited only to the evidence disproving the defendant’s asserted reasons for discharge, is the court mandated to enter judgment for the plaintiff? Prior to St. Mary’s Honor Center v. Hicks, the answer was unsettled. This hypothetical, which is loosely based on Griffin v. Goerge B. Buck Consulting Actuaries, 551 F. Supp. 1385 (S.D.N.Y. 1982), was reprinted from Lanctot, supra note 7, at 59-61.

31. See, e.g., Lopez v. Metropolitan Life Ins. Co., 930 F.2d 157, 161 (2d Cir. 1991) (stating that “[i]t is enough for the plaintiff to show that the articulated reasons were not the true reasons for the defendant’s actions”); Ibrahim v. New York State Dep’t of Health, 904 F.2d 161, 168 (2d Cir. 1990) (requiring only evidence of falsity of defendant’s reasons for acting); Gibson v. ABC, 892 F.2d 1128, 1132 (2d Cir. 1989) (same); Dister v. Continental Group, Inc., 859 F.2d 1108, 1113 (2d Cir. 1988) (same).

32. See Chipollini v. Spencer Gifts, Inc., 814 F.2d 893, 895 (3d Cir. 1987) (en banc) (addressing question of whether employee can defeat summary judgment motion solely based on evidence that defendant’s proffered reasons for dismissal were false). In Chipollini, the Third Circuit clearly adopted the “pretext-only” position by quoting the language in Burdine. Id. at 897. The majority concluded that “to meet its burden on summary judgment, the defendant employer must show that the plaintiff will be unable to introduce either direct evidence of a purpose to discriminate, or indirect evidence of [a purpose to discriminate] by showing that the proffered reason is subject to factual dispute.” Id. at 899 (emphasis added). The court rejected the defendant’s position that in order to defeat a motion for summary judgment, the plaintiff was required to introduce direct evidence showing a discriminatory motive. Id. at 898 (noting that Supreme Court indicated that it is error to require direct evidence of discriminatory intent). The court held:

In the context of the summary judgment motion, however, the court should have considered whether evidence of inconsistencies and implausibilities in the employer’s proffered reasons for discharge reasonably could support an inference that the employer did not act for non-discriminatory reasons, not whether the evidence necessarily leads to that conclusion.

Id. at 900. Chipollini has remained the law within the Third Circuit. See, e.g., Josey v. J.R. Hollingsworth Corp., 996 F.2d 692, 688 (3d Cir. 1993) (following Chipollini, 814 F.2d at 895); Billet v. CIGNA Corp., 940 F.2d 812, 816 (3d Cir. 1991) (“The plaintiff can prove pretext 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.”); Turner v. Schering-Plough Corp., 901 F.2d 335, 342 (3d Cir. 1990) (“In this situation [employer’s motion for summary judgment], the inquiry of the reviewing court is focused; if the record contains evidence supportive of a rational inference that the employer’s reasons are ‘unworthy of credence,’ summary judgment for the employer is improper.”); Siegel v. Alpha Wire Corp., 894 F.2d 50, 53 (3d Cir. 1991) (noting that plaintiff is only required to show that employer’s proffered explanation is false and not that employer acted for discriminatory reasons); White v. Westinghouse Elec.
Co., 862 F.2d 56, 60 (3d Cir. 1988) (allowing plaintiff to survive motion for summary judgment by means of indirect proof that employer's reasons were pretextual); Healy v. New York Life Ins. Co., 860 F.2d 1209, 1214 (3d Cir. 1988) (noting that inquiry on summary judgment is whether evidence in record "could support an inference that the employer did not act for non-discriminatory reasons") quoting Chipollini, 814 F.2d at 895); Spangle v. Valley Forge Sewer Auth., 839 F.2d 171, 174 (3d Cir. 1988) (finding summary judgment proper because plaintiff was unable to rebut defendant's proffered nondiscriminatory reason that plaintiff was unqualified); Sorba v. Pennsylvania Drilling Co., 821 F.2d 200, 203 (3d Cir. 1987) ("[i]f an employee introduces 'evidence of inconsistencies and implausibilities in the employer's proffered reasons for discharge [which] reasonably could support an inference that the employer did not act for non-discriminatory reasons,"' then employer's motion for summary judgment may not be granted) quoting Chipollini, 814 F.2d at 899)); Spangle v. Valley Forge Sewer Auth., 839 F.2d 171, 174 (3d Cir. 1988) (finding summary judgment proper because plaintiff was unable to rebut defendant's proffered nondiscriminatory reason that plaintiff was unqualified); Sorba v. Pennsylvania Drilling Co., 821 F.2d 200, 203 (3d Cir. 1987) ("[i]f an employee introduces 'evidence of inconsistencies and implausibilities in the employer's proffered reasons for discharge [which] reasonably could support an inference that the employer did not act for non-discriminatory reasons,"' then employer's motion for summary judgment may not be granted) quoting Chipollini, 814 F.2d at 899)); Duffy v. Wheeling Pittsburgh Steel Corp., 738 F.2d 1393, 1396 (3d Cir. 1984) ("[A] showing that a proffered justification is pretextual is itself equivalent to a finding that the employer intentionally discriminated.").

33. See, e.g., Fite v. First Tenn. Prod. Credit Ass'n, 861 F.2d 884, 890 (6th Cir. 1988) (applying standard enunciated in Tye); Tye v. Board of Educ., 811 F.2d 315, 319-20 (6th Cir. 1987) ("[P]laintiff may indirectly prove intentional discrimination by showing that the defendants' justifications are untrue and therefore must be a pretext."); Shore v. Federal Express Corp., 777 F.2d 1155, 1157 (6th Cir. 1985) (finding that plaintiff met evidentiary standard by proving that defendant's proffered reason was unworthy of belief). At least one early Sixth Circuit case, however, adhered to the "pretext-plus" rule. See Brooks v. Ashtabula County Welfare Dep't, 717 F.2d 263, 267-68 (6th Cir. 1983) (holding that district court improperly found defendant's reasons unworthy of belief when plaintiff failed to offer "affirmative evidence" of pretext).

34. See Hicks v. St. Mary's Honor Ctr., 970 F.2d 487, 492 (8th Cir. 1992) ("Once plaintiff proved all of the defendants' proffered reasons for the adverse employment actions to be pretextual, plaintiff was entitled to judgment as a matter of law."); rev'd, 509 U.S. 502 (1993); see also Goetz v. Farm Credit Serv., 927 F.2d 398, 400-01 (8th Cir. 1991) (holding that factfinder may use rebutted explanation to find unlawful discrimination); Ingram v. Missouri Pac. R.R., 897 F.2d 1450, 1455 (8th Cir. 1990) (holding defendant liable for intentional discrimination after evidence presented showed that defendant's reasons were untrue); Morgan v. Arkansas Gazette, 897 F.2d 945, 951-52 (8th Cir. 1990) (same); MacDissi v. Valmont Indus., 856 F.2d 1054, 1059 (8th Cir. 1988) ("As a matter of both common sense and federal law, an employer's submission of a discredited explanation for firing a member of a protected class is itself evidence which may persuade the finder of fact that such unlawful discrimination actually occurred."); Washburn v. Kansas City Life Ins. Co., 831 F.2d 1404, 1408 (8th Cir. 1987) (concluding that employer improperly discriminated where reason for employment decision was determined to be unfounded); Dace v. ACF Indus., 722 F.2d 374, 379 (8th Cir. 1983) (noting that inquiry at pretext stage is whether plaintiff was discharged for reasons provided). But see Gray v. University of Ark., 883 F.2d 1394, 1402 (8th Cir. 1989) (affirming summary judgment for defendant despite recognition that defendant's reasons were almost "laughable").

35. See, e.g., Perez v. Curcio, 841 F.2d 255, 257 (9th Cir. 1988) ("Pretext is established by showing either that a discriminatory reason more likely than not motivated the employer or that the employer's explanation is unworthy of credence."); Reynolds v. Brock, 815 F.2d 571, 575 (9th Cir. 1987) (finding that genuine issue of material fact existed regarding defendant's motivation because plaintiff discredited reasons through use of indirect evidence); Miller v. Fairchild Indus., 797 F.2d 727, 732-33 (9th Cir. 1986) (noting that motivation of employer should not be determined at summary judgment because of distinct factual issues involved); Lowe v. City of Monrovia, 775 F.2d 998, 1004 (9th Cir. 1985) (suggesting...
Circuits found pretext as a matter of law if the plaintiff proved his or her prima facie case and proved that the employer’s articulated reasons for termination were false. These circuits adhered to the “pretext-only” position, which favors plaintiffs. Conversely, the United States Courts of Appeals for the First, Fourth and Eleventh Circuits, as well as various others, held that summary judgment is precluded by plaintiff’s establishment of prima facie case, modified by 784 F.2d 1407 (1986).

36. See, e.g., Drake v. City of Fort Collins, 927 F.2d 1156, 1160 (10th Cir. 1991) (noting that plaintiff’s ultimate burden is to prove that proffered reasons were not true reasons for employment action); Furr v. AT&T Tech. Inc., 824 F.2d 1537, 1549 (10th Cir. 1987) ("The critical question for the jury is whether it believes the defendant’s proffered reasons for the employment decision."). But see EEOC v. Flasher Co., 986 F.2d 1312, 1321 (10th Cir. 1992) (adhering to "pretext-plus" rule).

37. See, e.g., Bishopp v. District of Columbia, 788 F.2d 781, 789 (D.C. Cir. 1986) ("Defendant’s explanation for its decision was unworthy of credence as a matter of law. Such a blatantly pretextual defense carries the seeds of its own destruction."); King v. Palmer, 778 F.2d 878, 881 (D.C. Cir. 1985) ("Burdine makes it absolutely clear that a plaintiff who establishes a prima facie case of intentional discrimination and who discredits the defendant’s rebuttal should prevail.").

38. Lambert, supra note 8, at 171-72; J. Hagood Tighe, Note, The Refined Pretext-Plus Analysis: Employees’ and Employers’ Respective Burdens After Hicks, 46 S.C.L. Rev. 333, 340 (1995). Under this approach, the actual reason for the action, even if embarrassing or "politically incorrect" rather than discriminatory, remained unimportant and the defendant would have lost. Id. (illustrating "pretext-only" rule with hypothetical that if employer chose not to hire plaintiff because she or he was red-headed, but employer was embarrassed and articulated different reason, employer would still be liable).

39. See Lancot, supra note 7, at 140 ("As [the] . . . ‘pretext-plus’ rule indicates, plaintiffs in ‘pretext-plus’ jurisdictions are unfairly harmed by a rule that has no basis in legal doctrine."); Smith, supra note 6, at 286 (noting that "pretext-only" rule is "pro-plaintiff" approach).

"Pretext-only" circuit courts did not require additional evidence beyond proof of falsity because of language in Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981). Burdine stated that the plaintiff may prove discrimination "either directly by persuading the court that the discriminatory reason more likely motivated the employer or indirectly by showing that the employer’s proffered explanation is unworthy of credence." Id. This language clearly equates proof of pretext with proof of discrimination. Odell, supra note 13, at 1259. In St. Mary’s Honor Center v. Hicks, however, Justice Scalia discounted this language, characterizing it as "dictum." Hicks, 509 U.S. at 517. Commentators suggest, however, that Justice Scalia’s approach to this language in Burdine was erroneous. See, e.g., O’Leary, supra note 7, at 841 ("The dissent’s conclusion that the Court [in Burdine] intended that plaintiffs succeed in a discrimination claim if they are able to discredit the reasons of the employer by a preponderance of the evidence stands out as the better reasoning.").

40. See, e.g., Morgan v. Massachusetts Gen. Hosp., 901 F.2d 186, 191 (1st Cir. 1990) ("[T]he appellant cannot prove pretext solely by contesting the objective veracity of appellee’s action."); Medina-Munoz v. R.J. Reynolds Tobacco Co., 896 F.2d 5, 9 (1st Cir. 1990) ("[W]hen . . . the employer has articulated a presumptively legitimate reason for discharging an employee, the latter must elucidate specific facts which would enable a jury to find that the reason given was not only a sham, but a sham intended to cover up the employer’s real motive: age discrimination."); Freeman v. Package Mach. Co., 865 F.2d 1391, 1396 (1st Cir. 1988) (noting that plaintiff carries burden to prove that defendant’s reasons for terminating
plaintiff were false and to prove that they were "pretexts aimed at masking age discrimination"); Keyes v. Secretary of Navy, 853 F.2d 1016, 1026 (1st Cir. 1988) ("[I]t was plaintiff's burden not only to show that the defendant proffered reasons for hiring someone else were apocryphal, but that those reasons were pretexts aimed at masking sex or race discrimination"); Menzel v. Western Auto Supply Co., 848 F.2d 327, 330 (1st Cir. 1988) (noting that plaintiff's casting doubt on reason for termination is insufficient to sustain plaintiff's appeal); White v. Vathally, 732 F.2d 1037, 1043 (1st Cir. 1984) ("Merely casting doubt on the employer's articulated reason does not suffice to meet the plaintiff's burden of demonstrating discriminatory intent.").

Despite case law indicating that the First Circuit adheres to the "pretext-plus" theory, there is contrary authority within the circuit that suggests the court was moving towards a "pretext-maybe" approach. See Cuello-Suarez v. Puerto Rico Elec. Power Auth., 988 F.2d 275, 280 (1st Cir. 1993) (stating that "[t]here is no absolute rule that a plaintiff must adduce additional evidence"); Connell v. Bank of Boston, 924 F.2d 1169, 1172 n.3 (1st Cir. 1991) ("We do not suggest that the plaintiff must, necessarily, offer affirmative evidence of age animus in addition to rebutting the employer's evidence. Rather, the evidence as a whole, whether direct or indirect, must be sufficient for a reasonable factfinder to infer that the employer's decision was motivated by age animus."); see also Villanueva v. Wellesley College, 930 F.2d 124, 128 (1st Cir. 1991) ("[T]he plaintiff must introduce evidence that the real reason for the employer's action was discrimination . . . but need not necessarily] adduce evidence in addition to that comprising the prima facie case and the rebuttal of defendant's justification in order to prevail either at the summary judgment stage or at trial."); Connell, 924 F.2d at 1182 (Bownes, J., concurring in part and dissenting in part) ("The requirement that a plaintiff rebut an employer's articulated reasons and also directly prove age discrimination is contrary to the express teaching of [Burdine].").

41. See, e.g., Duke v. Uniroyal, Inc., 928 F.2d 1413, 1417 (4th Cir. 1991) ("[T]he plaintiff must then prove that the reason given was a mere pretext for discrimination and that age was a more likely reason for the employment action."); Holder v. City of Raleigh, 867 F.2d 823, 828 (4th Cir. 1989) ("[A] finding that the reasons proffered by the defendants were, in some general sense, 'unworthy of credence' does not of itself entitle plaintiff to prevail . . . . The reason for their lack of credence must be the underlying presence of proscribed discrimination." (citation omitted)); Goldberg v. B. Green & Co., 836 F.2d 845, 849 (4th Cir. 1988) ("[Plaintiff] cannot avoid summary judgment in this case simply by refuting [defendant's] non-age-related reasons for firing him."); Lovelace v. Sherwin-Williams Co., 681 F.2d 230, 243 (4th Cir. 1982) (noting that plaintiff must prove that discrimination is real reason for acting because "[w]ithout benefit of the presumption [of discrimination], age simply exists on this evidence as one of any number of possible reasons—including poor business judgment by the employer . . . for the demotion").

Despite the cases adhering to the "pretext-plus" rationale, some Fourth Circuit cases adhered to the "pretext-only" approach. See, e.g., Monroe v. Burlington Indus., 784 F.2d 568, 572 (4th Cir. 1986) (holding that plaintiff successfully proved discrimination by proving that defendant's reason was not credible).

42. See, e.g., Smith v. Goodyear Tire & Rubber Co., 895 F.2d 467, 471 (11th Cir. 1989) (adhering to "pretext-plus" rationale); Hawkins v. Ceco Corp., 883 F.2d 977, 982 n.3 (11th Cir. 1989) ("[M]erely establishing pretext, without more, is insufficient to support a finding of racial discrimination."); Clark v. Huntsville City Bd. of Educ., 717 F.2d 525, 529 (11th Cir. 1983) ("[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."). But see Sparks v. Polot Freight Carriers, 830 F.2d 1554, 1564 (11th Cir. 1987) (reversing summary judgment for defendant and stating that "[t]he implausibility
opinions in the Sixth Circuit, demanded a more stringent showing to meet the pretext requirement. In these "pretext-plus" jurisdictions, a plaintiff was required to prove not only that the defendant's proffered reason was false, but also that the real reason for the defendant's action was discriminatory animus. Thus, these circuit courts compelled the plaintiff to introduce additional evidence of discrimination independent from that used to establish the prima facie case and refute the defendant's proffered nondiscriminatory reasons for the employment action. Finally, the United States Court of Appeals for the Seventh Circuit adopted the middle approach that allowed a trier of fact to infer pretext solely based on the prima facie case and refutation of the defendant's articulated reason, but did not require the finding of discrimination. This position lies be-


44. Lanctot, supra note 7, at 87; Dill, supra note 6, at 629-30; Odell, supra note 13, at 1258.

45. See White v. Vathally, 732 F.2d 1037, 1042 (1st Cir. 1984) (noting that plaintiff cannot meet his or her "burden of proving pretext" simply by refuting or questioning the defendant's articulated reasons); Odell, supra note 13, at 1258 ("[I]n a 'pretext-plus' jurisdiction, the plaintiff cannot prevail merely by disproving the employer's reason.").

46. See, e.g., Visser v. Packer Eng'g Assoc., 924 F.2d 655, 657 (7th Cir. 1991) (en banc) ("If the employer offers a pretext—a phony reason—for why it fired the employee, then the trier of fact is permitted, although not compelled, to infer that the real reason was age."); Holzman v. Jaymar-Ruby, Inc., 916 F.2d 1298, 1302 (7th Cir. 1990) ("The fact that [defendant's] witnesses may have appeared less than truthful about at least two key factors . . . raised the reasonable inference that [defendant] was trying to hide some factor in its decision to fire [plaintiff]."); Shager v. Upjohn Co., 913 F.2d 398, 401 (7th Cir. 1990) ("If the only reason an employer offers for firing an employee is a lie, the inference that the real reason was a forbidden one, such as age, may rationally be drawn. . . . It is important to understand however that the inference is not compelled."); Benzies v. Illinois Dep't of Mental Health & Developmental Disabilities, 810 F.2d 146, 148 (7th Cir. 1987) ("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."). Despite the cases propounding the "pretext-maybe" approach, some Seventh Circuit cases adhered to a "pretext-plus" approach. See, e.g., North v. Madison Area Ass'n for Retarded Citizens-Developmental Ctrs. Corp., 844 F.2d 401, 407 (7th Cir. 1988) (requiring plaintiff to show that "but for" discrimination, he would not have been discharged); Friedel v. City of Madison, 832 F.2d 965, 975 (7th Cir. 1987) ("[P]laintiffs must allege and support not only pretext, but also that the [defendant's] actions were a pretext for discrimination.").

47. See Lanctot, supra note 7, at 114-35. Professor Lanctot did not draw the "pretext-may" distinction in her discussion of the circuit split prior to the Hicks decision. Id. Subsequent to Hicks, however, several commentators created this third tier of the pretext analysis. Malamud, supra note 9, at 2906 n.251 ("The
between the pure "pretext-only" and "pretext-plus" approaches, and was adopted by a narrow majority of the Supreme Court in *St. Mary's Honor Center v. Hicks*. 48

B. *St. Mary's Honor Center v. Hicks*

In *St. Mary's Honor Center v. Hicks*, a Title VII case alleging racial discrimination, the Supreme Court resolved the circuit split as to what a plaintiff must show in order to prove pretext once a defendant sets forth a nondiscriminatory reason for the employment action. 49 The United States District Court for the Eastern District of Missouri applied a "pretext-leading study [of the pretext stage of McDonnell Douglas] . . . fails to distinguish between important variants of the polar positions]." See, e.g., *id.* (failing to distinguish between "what I call the 'judgment for plaintiff always permitted' position and the 'judgment for the plaintiff required' position"); O'Leary, *supra* note 7, at 829 n.60 (finding it essential to break "pretext-only" courts down further to include "pretext-maybe"); Smith, *supra* note 6, at 288 n.43 (noting that "pretext-plus" appears to be misnomer and that more appropriate term ought to be "pretext-maybe"). The "pretext-maybe" approach is crucial to understanding the rationale behind the circuit courts that allow a plaintiff to survive summary judgment by proving a prima facie case and producing sufficient evidence to discredit the defendant's proffered nondiscriminatory reason. See *id.* at 295 (stating that approach reflects ability of trier of fact to infer intentional discrimination solely from prima facie evidence and proof of pretext). Thus, while Professor Lanctot fails to differentiate between courts that have held that evidence of pretext compels a plaintiff's verdict and those that have held that it creates merely a permissive inference, this Casebrief employs the term "pretext only" for the former position and the "pretext-maybe" for the latter.

48. See *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 519 (1993). Unlike "pretext-only," the "pretext-maybe" approach requires a finding of a "pretext for discrimination." See, e.g., *Holder v. City of Raleigh*, 867 F.2d 823, 827 (4th Cir. 1989) ("[S]howing that the employer dissembled is not necessarily the same as showing 'pretext for discrimination' . . . . [and] finding that the reasons proffered by defendants were, in some general sense, 'unworthy of credence' does not of itself entitle plaintiff to prevail." (quoting *Pollard v. Rea Magnet Wire Co.*, 824 F.2d 557, 559-60 (7th Cir. 1987) (citations omitted)); O'Leary, *supra* note 7, at 831 (noting that ultimate inquiry under "pretext-maybe" analysis is whether plaintiff proved to factfinder's satisfaction that employer intentionally discriminated). Yet, unlike "pretext-plus," the "pretext-maybe" approach permits the court to find that the employer's reasons were a pretext for discrimination solely on the basis of the plaintiff's prima facie case and his or her rebuttal of the defendant's nondiscriminatory reasons. See, e.g., *Visser*, 924 F.2d at 657 (noting that trier of fact is permitted to infer discriminatory motive when plaintiff proves pretext); *Shager*, 913 F.2d at 401 (explaining that proof that employer lied may allow inference that employer wanted to hide real, discriminatory reason).


Melvin Hicks sued his employer, St. Mary's Honor Center, under Title VII, alleging that St. Mary's demoted and subsequently terminated him because of his race. *Hicks*, 509 U.S. at 505. The Supreme Court decided to hear *Hicks* with the intent to resolve the circuit courts' split. *Id.* at 512. Justice Scalia stated:

Panic will certainly not break out among the courts of appeals, whose divergent views concerning the nature of the supposedly "stable law in this Court" are precisely what prompted us to take this case—a diver-
plus" rationale and found that the plaintiff, Melvin Hicks, did not meet his evidentiary burden of proving that the employer's proffered reasons for termination were a pretext for discrimination. Applying a "pretext-only" standard, the Eighth Circuit reversed, finding that the plaintiff's proof that the employer's reasons were untrue satisfied the inquiry.

The Supreme Court held that the ultimate question is whether discrimination motivated the defendant to fire the plaintiff. The Court further explained that a factfinder could find pretext based solely on the prima facie case and discrediting of the defendant's articulated reasons, but was not compelled as a matter of law to do so. Adopting a "pretext-

50. See Hicks, 509 U.S. at 508 (stating that district court concluded plaintiff had not proven termination was racially motivated). The district court found that while Hicks proved that the defendant's proffered reasons were not the real reasons for his demotion and discharge, he failed to prove that his race was the determining factor in the decision-making process. Hicks, 756 F. Supp. at 1252. The district court found that: (1) the plaintiff was the only supervisor disciplined for violations committed by his subordinates; (2) similar and even more serious violations were committed by some of the plaintiff's co-workers, yet the defendants either disregarded the infractions or treated them more leniently; and (3) the supposed "final confrontation" between the plaintiff and his supervisor was fabricated. Id. at 1250-51. The court concluded, however, that "although [the respondent] has proven the existence of a crusade to terminate him, he has not proven that the crusade was racially—rather than personally motivated." Id.

51. Hicks, 970 F.2d at 492. The Eighth Circuit found that "[o]nce [plaintiff] proved all of [the defendants'] proffered reasons for the adverse employment actions to be pretextual, [plaintiff] was entitled to judgment as a matter of law." Id. The court of appeals reasoned:

Because all of the defendants' proffered reasons were discredited, defendants were in a position of having offered no legitimate reason for their actions. In other words, defendants were in no better position than if they had remained silent, offering no rebuttal to an established inference that they had unlawfully discriminated against plaintiff on the basis of his race.

Id. at 492. This reasoning has been rejected by commentators and the Supreme Court. See Hicks, 509 U.S. at 511 (implicitly rejecting Eighth Circuit's reasoning); Lanctot, supra note 7, at 109-10 (noting that nonrebuttal theory is inconsistent with Burdine's express statement that "[t]he defendant need not persuade the court that it was actually motivated by the proffered reasons" (quoting Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981))).

52. Hicks, 509 U.S. at 510.

53. Id. at 513. The majority began its analysis by positing the following hypothetical to illustrate the potential for unfair results under the "pretext-only" approach:

Assume that 40% of a business' work force are members of a particular minority group, a group which comprises only 10% of the relevant labor market. An applicant, who is a member of that group, applies for an opening for which he is minimally qualified, but is rejected by a hiring officer of that same minority group, and the search to fill the opening continues. The rejected applicant files suit for racial discrimination under Title VII, and before the suit comes to trial, the supervisor who conducted the company's hiring is fired.
maybe” approach, the Court combined attributes of the “pretext-only” and “pretext-plus” rules. In creating an approach resembling the “pretext-plus” position, the Court emphasized twice that the plaintiff must show “both that the reason was false, and that discrimination was the real reason” for the employer’s actions. The Court’s approach also resembled the “pretext-only” position, as the Court stated that a plaintiff may, in some instances, prove that discrimination was the employer’s true motivation.

The Court reluctantly addressed portions of the Burdine decision to support its interpretation of the meaning of the word “pretext” at the third stage of McDonnell Douglas. The Court first found support from language in Burdine which stated that the third stage of the inquiry required the plaintiff to show by a preponderance of the evidence that the legitimate reasons offered by the defendant were a pretext for discrimination. The majority interpreted the highlighted language to mean that a reason cannot be proved to be “a pretext for discrimination” unless it is shown both that the reason was false and that discrimination was the real reason. The majority also addressed the language in Burdine that stated that when the employer has met its burden of production, “the factual inquiry proceeds to a new level of specificity.” The majority understood this sentence to refer to the fact that the inquiry proceeds from the generalized factors that establish a prima facie case to the specific proofs and rebuttals of discriminatory motivation the parties have introduced.

Next, the majority addressed the language in Burdine which stated that “[the plaintiff] may succeed in [persuading the court that the defendant intentionally discriminated] 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.” While admitting that this language could have no other meaning but that the falsity of the employer’s explanation is alone enough to compel judgment for the plaintiff, the majority characterized this language as “dictum” that contradicted numerous other passages in Burdine, as well as the classic law of presumptions. Finally, the majority concluded its discussion by stating that any confusion created by Burdine was eliminated in United States Postal Service Board of Governors v. Aikens, 460 U.S. 711 (1983). Hicks, 509 U.S. at 518. The majority found support for its interpretation of Burdine in language in Aikens which stated that the ultimate question is discrimination ‘vel non.’ The majority interpreted this passage to mean that it was not enough to disbelieve the employer; rather, the factfinder must believe the plaintiff’s proof of intentional discrimination.}

54. Hicks, 509 U.S. at 519; Dill, supra note 6, at 631 (discussing Hicks and naming subtopic heading as “The Hicks Compromise”); O’Leary, supra note 7, at 833 (introducing analysis of Hicks with title, “St. Mary’s v. Hicks: The Supreme Court Adopts the Pretext-Maybe View”).

55. Hicks, 509 U.S. at 512 n.4, 515. The Court continued: “It is not enough . . . to disbelieve the employer; the factfinder must believe the plaintiff’s explanation of intentional discrimination.” Id. at 519.
simply by establishing a prima facie case and discrediting the defendant’s articulated reason.\textsuperscript{56} In a vigorous dissent, Justice Souter attacked the majority’s position and rationale.\textsuperscript{57} The dissenters argued that the Eighth Circuit properly applied the “pretext-only” standard.\textsuperscript{58} The dissent criticized the ambiguity in the majority’s approach, noting that the Court gave “conflicting signals about the scope of its holding.”\textsuperscript{59}

\textsuperscript{56} Id. at 512. The Court stated: “The factfinder’s disbelief of the reasons put forward by the defendant may, together with the elements of the prima facie case, suffice to show intentional discrimination.” \textit{Id.} at 511. Thus, the Court disagreed with the Eighth Circuit’s opinion only to the extent that it held that the rejection of the defendant’s proffered reasons compels judgment for the plaintiff. \textit{Id.} In a manner consistent with this interpretation of the opinion, Justice Scalia explained that “rejection of the defendant’s proffered reasons, will permit the trier of fact to infer the ultimate fact of intentional discrimination, and the Court of Appeals was correct when it noted that, upon such rejection, ‘no additional proof of discrimination is required.”’ \textit{Id.} at 511 (quoting Hicks, 970 F.2d at 493) (emphasis added). The Court explained:

\textit{[T]he Court of Appeals’ holding that rejection of the defendant’s proffered reasons compels judgment for the plaintiff disregards the fundamental principle of Rule 301 that a presumption does not shift the burden of proof, and ignores our repeated admonition that the Title VII plaintiff at all times bears the “ultimate burden of persuasion.”}

\textit{Id.} Despite the Court’s rejection of the Eighth Circuit’s ultimate conclusion, the majority concurred with the court of appeals’s reasoning that upon the rejection of the defendant’s proffered reasons, “no additional proof of discrimination is required.” \textit{Id.} (quoting Hicks, 970 F.2d at 493). No additional proof is required only when no evidence of legitimate nondiscriminatory reasons is offered by the defendant, or the rejection of the proffered reasons and the evidence set forth establishing the prima facie case is “enough at law to sustain a finding of discrimination.” \textit{Id.} at 512 n.4.

At least one commentator suggested that as a matter of legal analysis, the Supreme Court decided \textit{Hicks} correctly because it refuted the Eighth Circuit’s conclusion that if the defendants’ proffered reasons were discredited, defendants were “in a position of having offered no legitimate reason for their actions.” See Smith, \textit{supra} note 6, at 296 n.95 (“The majority’s approach for allowing a defendant to rebut the presumption raised by the prima facie case with a false reason complies with the Federal Rules of Evidence.”). The Eighth Circuit based its “pretext-only” approach on reasoning referred to as the “nonrebuttal theory.” Lanctot, \textit{supra} note 7, at 110; O’Leary, \textit{supra} note 7, at 835 n.102. The nonrebuttal theory treats a presumption rebutted by a lie as if it had never been rebutted at all, thus allowing for a finding that the defendants did not meet their burden of production at stage two of the \textit{McDonnell Douglas} paradigm. Lanctot, \textit{supra} note 7, at 109-10. Professor Lanctot argued, however, that the nonrebuttal theory is inconsistent with \textit{Burdine} and Rule 301 of the Federal Rules of Evidence. She explained that “by producing \textit{evidence} (whether ultimately persuasive or not) of nondiscriminatory reasons, petitioners sustained their burden of production, and thus placed themselves in a better position than if they had remained silent.” \textit{Id.} at 110.

\textsuperscript{57} Hicks, 509 U.S. at 532-33 (Souter, J., dissenting).

\textsuperscript{58} \textit{Id.} (Souter, J., dissenting). The dissent would have allowed 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 employers’ reason for the employment action was not true. \textit{Id.} (Souter, J., dissenting).

\textsuperscript{59} \textit{Id.} at 585 (Souter, J., dissenting); see also Odell, \textit{supra} note 13, at 1267 (noting that majority opinion can arguably be read to support two alternate posi-
confusing signals would lead to a larger number of summary judgments for employers. 60

III. PRE-TRIAL DISPOSITION MOTIONS FOR SUMMARY JUDGMENT AFTER HICKS: THE THIRD CIRCUIT'S POSITION

The application of the Supreme Court's decision in Hicks to motions for summary judgment presents two distinct issues. First, the Court's ambiguity left open the question of whether the "pretext-only" or "pretext-plus" standard applies to motions for summary judgment. 61 Second, the Court failed to articulate the types of evidence by which a plaintiff can establish that he or she has created a genuine issue of material fact as to whether the employer's articulated nondiscriminatory reasons for the action were the real reasons or a mask for discrimination. 62 Because the issues are intimately related, yet raise analytically different questions, this Part will discuss each issue separately.

A. General Legal Standard at Summary Judgment: "Pretext-Only" or "Pretext-Plus"?

As foreseen by Justice Souter in his stinging dissent, 63 the majority's use of ambiguous language in the Hicks decision caused a divergence among the circuit courts regarding the legal standard that plaintiffs must satisfy at summary judgment. 64 After Hicks, a minority of circuit courts

60. Hicks, 509 U.S. at 535. In support of the contention that the majority sent "conflicting signals" in its opinion, the dissent first pointed to language in the majority opinion that suggested that a plaintiff may win on the ultimate issue of discrimination by establishing a prima facie case and proving the falsity of the employer's reasons, but noted that proof of falsity does not compel a court to reach that conclusion. Hicks, 509 U.S. at 535 (Souter, J., dissenting). Next, the dissent directed its attention to the majority's statement that "[i]t's not enough . . . to disbelieve the employer," and contended that this language suggested that proof of the falsity of the employer's reasons will not suffice to sustain judgment for the plaintiff. Id. (Souter, J., dissenting) (pointing to two examples in which majority stated that plaintiff must show "both that the reason was false, and that discrimination was the real reason").

61. See Anderson v. Baxter Healthcare Corp., 13 F.3d 1120, 1123 (7th Cir. 1994) (summarizing possible interpretations of Hicks and noting that Hicks is not entirely clear on which of two possible rules it adopted); Ellis v. NCNB Tex. Nat'l Bank, 842 F. Supp. 243, 249 (N.D. Tex. 1994) ("This Court concedes that the por-
followed a more stringent approach that is akin to the “pretext-plus” approach espoused by the district court in *Hicks*. Specifically, the First, Second and Fifth Circuits required the plaintiff not only to produce

tions of language that tend to compete with one another in the *St. Mary's* decision are not immediately reconcilable."); see also Odell, *supra* note 13, at 1277 (noting that two alternative interpretations root themselves in language of *Hicks*).

In *Anderson*, the Seventh Circuit cited *Hicks* for the proposition that a factfinder may infer unlawful discrimination if it believes the plaintiff's prima facie evidence of discrimination and disbelieves the employer's proffered reasons. *Anderson*, 13 F.3d at 1123. Thus, the plaintiff, by establishing a prima facie case and producing evidence contesting the employer's reason for the discharge, creates a triable issue of discrimination and summary judgment is not appropriate. *Id.*

65. For a discussion of the “pretext-plus” approach, see *supra* notes 40-45 and accompanying text. In *Sheridan*, the majority distinguished the major cases adopting a “pretext-plus” view. *Sheridan* v. E.I. DuPont de Nemours and Co., 100 F.3d 1061, 1068 n.7 (3d Cir. 1996) (en banc) (arguing that three of four major cases actually held that plaintiffs failed to meet their burden, rather than squarely addressing whether prima facie case and discrediting of employers' reason could, in any circumstances, have been sufficient to prove discrimination).

66. Woods v. Friction Materials, Inc., 30 F.3d 255, 260 n.3 (1st Cir. 1994) (rejecting argument that "once evidence of pretext is proffered, that evidence along with the prima facie case will at all times shield the plaintiff from adverse summary judgment"); *LeBlanc* v. Great Am. Ins. Co., 6 F.3d 836, 842-43 (1st Cir. 1993) (same); Goldman v. First Nat'l Bank of Boston, 985 F.2d 1113, 1117 (1st Cir. 1993) (same) (citing *Connell* v. Bank of Boston, 924 F.2d 1169, 1172 n.3 (1st Cir. 1993)).

In *LeBlanc*, the First Circuit addressed the issue of the proper standard for summary judgment motions in the context of an action brought under the ADEA. *LeBlanc*, 6 F.3d at 842. The court stated that the proper summary judgment standard after *Hicks* required “not only ‘minimally sufficient evidence of pretext,’ but evidence that overall reasonably supports a finding of discriminatory animus.” *Id.* at 843 (quoting *Goldman*, 985 F.2d at 1117). Judged by this standard, the First Circuit affirmed the district court's grant of summary judgment to the defendant because the court stated that the plaintiff's evidence, taken as a whole, failed to raise a genuine issue of material fact regarding a discriminatory animus on the part of the employer. *Id.* at 844.

67. *See, e.g.*, McLee v. Chrysler Corp., 38 F.3d 67 (2d Cir. 1994) (removing employment discrimination case by writ of mandamus when district judge refused to follow circuit courts "pretext-plus" rule at summary judgment); Woroski v. Nashus Corp., 31 F.3d 105, 108 (2d Cir. 1994) (affirming summary judgment because plaintiff could not raise genuine issue as to whether defendant's decision was pretextual). *But see* EEOC v. Ethan Allen, Inc., 44 F.3d 116, 120 (2d Cir. 1994) (“A finding of pretextuality allows a juror to reject a defendant's proffered reasons for a challenged employment action and thus permits the ultimate inference of discrimination.”).

68. *See, e.g.*, Armstrong v. City of Dallas, 997 F.2d 62, 66-67 (5th Cir. 1993) (affirming district court's grant of summary judgment for defendant because plaintiff could not establish that defendant's reasons for termination were a "pretext for discrimination"); Moore v. Eli Lilly & Co., 990 F.2d 812, 816 (5th Cir. 1993) (affirming summary judgment in favor of defendant because plaintiff failed to create genuine issue of fact regarding whether defendant's proffered reason was pretextual).

For the leading example of the Fifth Circuit's approach, see *Bodenheimer v. PPG Industries, Inc.*, 5 F.3d 955 (5th Cir. 1993). The Fifth Circuit confronted the question of the proper standard for summary judgment in a pretext employment discrimination case in the context of an age discrimination claim. *Id.* at 959. The
evidence that raises a genuine issue of material fact regarding whether the defendant’s reasons are worthy of credence, but also required the plaintiff to introduce evidence from which the ultimate finding of discrimination may be inferred.69

Despite the consensus that Hicks made it more difficult for plaintiffs to prevail at trial,70 the majority of circuit courts that have addressed the issue of Hicks’s effect on motions for summary judgment allow plaintiffs to survive summary judgment more easily by applying the language in Hicks which is favorable to plaintiffs.71 Specifically, the Fourth,72 Sixth,73 Seventh, and Ninth Circuit held that the standard enunciated in Hicks similarly applied to motions for summary judgment. Id. Because Hicks required a finding of pretext for discrimination, the court found that Bodenheimer would be required at trial to show that PPG’s proffered reasons were a pretext for unlawful discrimination. Id. Thus, because the same standard applied to summary judgment, the court found that Bodenheimer was required at summary judgment to produce sufficient evidence to establish that PPG’s reasons were pretexts for age discrimination. Id. Based on the plaintiff’s proffered evidence and the heightened standard, the Fifth Circuit held that the grant of summary judgment to the defendant was proper. Id.

Despite the consensus that the Fifth Circuit initially adopted the “pretext-plus” rationale at summary judgment, a recent en banc decision of the Fifth Circuit suggests the contrary. See Rhodes v. Guiberson Oil Tools, 82 F.3d 615 (5th Cir. 1996) (finding plaintiff’s evidence sufficient to support denial of defendant’s motion for summary judgment), cert. denied, 502 U.S. 868 (1996); see also 34 Courts Struggle with Summary Judgment in Disparate Treatment Cases, Judge Says, Gov’t Empl. Rel. Rep. (Warren, Gorham & Lamont) 367 (Mar. 11, 1996) [hereinafter Struggle with Summary Judgment] (remarks of United States District Court Judge Joseph E. Irenas) (noting that Fifth Circuit “seems to have moved somewhat” away from “pretext-plus” standard due to influence of Rhodes).

69. Karen W. Kramer, Note, Overcoming Higher Hurdles: Shifting the Burden of Proof After Hicks and Ezold, 63 Geo. Wash. L. Rev. 404, 416-17 (1995). See, e.g., Woods, 30 F.3d at 260 (noting that evidence of pretext alone will not always shield plaintiff from summary judgment because finding of discrimination depends on particular facts of case); LeBlanc, 6 F.3d at 843 (“[T]he plaintiff cannot avert summary judgment if the record is devoid of adequate direct or circumstantial evidence of discriminatory animus on the part of the employer.”); Bodenheimer, 5 F.3d at 958 (“In particular, because Bodenheimer would be required to prove at trial, through a preponderance of the evidence, that PPG’s proffered reasons are a pretext for age discrimination, he must now produce sufficient evidence to establish that PPG’s reasons were pretexts for age discrimination.” (emphasis added)).

70. See also Odell, supra note 13, at 1277 (discussing lower courts’ struggle to interpret the impact of Hicks). For a discussion of the negative response to the Hicks decision, see supra notes 7-9 and accompanying text.

71. Kramer, supra note 69, at 417; Whitis, supra note 8, at 282 (suggesting that it will be more difficult for defendants to win summary judgment).

72. For an example of the Fourth Circuit’s approach, see Mitchell v. Data General Corp., 12 F.3d 1310, 1317 (4th Cir. 1993) (explaining that plaintiff could be defeated by motion for summary judgment in one of two ways: by failing to establish prima facie case or “by failing to show a genuine factual dispute over the employer’s legitimate nondiscriminatory explanation” (emphasis added)). Despite its pronounced “pretext-only” slant, authority exists within the Fourth Circuit in which a “pretext-plus” analysis at summary judgment was adopted. See, e.g., Lofton v. Marsh, 1994 WL 18787, at *2 (4th Cir. July 1, 1994) (holding that district court correctly held that plaintiff must produce evidence suggesting that articulated reasons were pretext for discrimination); Bailey v. South Carolina Dep’t of Soc. Servs.,
enth, 74 Eighth, 75 Ninth, 76 Tenth, 77 Eleventh 78 and District of Columbia 79 Circuits adopted this “pretext-only” view based on the language in Hicks in which the majority recognized that the trier of fact is entitled to infer dis-

851 F. Supp. 219, 221 n.3 (D.S.C. 1993) (interpreting Hicks as having “changed the focus of the final prong of the ‘shifting burdens’ analysis at the summary judgment stage from whether the plaintiff can establish that the defendant’s proffered reason is pretextual to simply whether the plaintiff can show evidence sufficient for the factfinder to conclude that the defendant’s adverse employment decision was wrongfully based on an impermissible factor such as race or gender.” (citing LeBlanc, 6 F.3d at 899)). Commentators have suggested, however, that the Fourth Circuit follows the “pretext-only” rule at summary judgment. Odell, supra note 13, at 1278 n.139.

73. See, e.g., Manzer v. Diamond Shamrock Chems. Co., 29 F.3d 1078 (6th Cir. 1994) (holding that plaintiff must introduce evidence beyond what was required to establish prima facie case, but plaintiff must only show defendant’s explanation is more likely than not pretextual).

74. For an example of the Seventh Circuit’s approach, see Anderson v. Baxter Healthcare Corp., 13 F.3d 1120, 1124 (7th Cir. 1994), which holds that “[f]or summary judgment purposes, the non-moving party . . . has a lesser burden. He must only produce evidence from which a rational factfinder could infer that the company lied about its proffered reasons for dismissal.”

75. For an example of the Eighth Circuit’s enunciation, see Shaw v. HCA Health Services of Midwest, Inc., 79 F.3d 99, 100 (8th Cir. 1996) (“The jury was entitled, although not required, to conclude from the evidence that the reasons given by the hospital were a pretext for discrimination.”); Harvey v. Anheuser-Busch, Inc., 38 F.3d 968, 971 (8th Cir. 1994) (holding that plaintiff must show that employer’s pretext is “unworthy of credence” to survive summary judgment); Gaworski v. ITT Commercial Fin. Corp., 17 F.3d 1104, 1109 (8th Cir. 1994) (“If elements of prima facie case are present, and there exists sufficient evidence for a reasonable jury to reject the defendant’s proffered reasons for its actions, then the evidence is sufficient to allow the jury to determine whether intentional discrimination has occurred, and we are without power to reverse the jury’s finding.”) (affirming district court’s denial of judgment notwithstanding verdict).

76. For an example of the Ninth Circuit’s approach, see Wallis v. J.R. Simplot Co., 26 F.3d 885, 890 (9th Cir. 1994) (stating that when evidence of pretext is lacking, summary judgment is appropriate); Washington v. Garrett, 10 F.3d 1421, 1433 (9th Cir. 1993) (as amended on denial of rehearing Jan. 26, 1994) (stating that “[i]f a plaintiff succeeds in raising a genuine factual issue regarding the authenticity of the employer’s stated motive, summary judgment is inappropriate, because it is for the trier of fact to decide which story is to be believed”).

77. For an example of the Tenth Circuit’s reasoning, see Durham v. Xerox Corp., 18 F.3d 836, 839-40 (10th Cir. 1994) (“Although a prima facie case combined with disproof of the employer’s explanations does not prove intentional discrimination as a matter of law, it may permit the factfinder to infer intentional discrimination, and preclude summary judgment for the employer.”).

78. For an example of the Eleventh Circuit’s approach, see Hairston v. Gainesville Sun Publishing Co., 9 F.3d 913, 921 (11th Cir. 1993) (adopting “pretext-only” position).

79. For an example of the position taken in the District of Columbia Circuit, see Barbour v. Merrill, 48 F.3d 1270, 1277 (D.C. Cir. 1993) (“According to Hicks, a plaintiff need only establish a prima facie case and introduce evidence sufficient to discredit the defendant’s proffered nondiscriminatory reasons; at this point, the factfinder, if so persuaded, may infer discrimination.”).
crimination from the plaintiff's proof of a prima facie case and showing of pretext, without more. 80

The Third Circuit has identified the legal standard that a plaintiff must meet to survive summary judgment through a series of cases subsequent to the Hicks decision. In Fuentes v. Perskie, 81 a Title VII national origin discrimination case, the Third Circuit first squarely confronted the question of the proper standard for granting summary judgment in a claim arising under Title VII in the wake of the Hicks decision. 82

The United States District Court for the District of New Jersey granted summary judgment for the defendant based on the plaintiff's insufficient evidence of pretext. 83 On appeal, the Third Circuit focused its analysis on the application of Hicks to the plaintiff's evidentiary burden in resisting summary judgment. 84 The Third Circuit held that a plaintiff who makes out a prima facie case may defeat a motion for summary judgment by either

80. Armbruster v. Unisys Corp., 32 F.3d 768, 783 (3d Cir. 1994) (citing St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 511) (noting that plaintiff must show both prima facie case and evidence of pretext, without more)); Waldron v. S.L. Indus., Inc., 849 F. Supp. 996, 1005 n.11 (D.N.J. 1994) (explaining that most circuits that adopted pro-plaintiff standard relied on Hicks language explaining that factfinder's disbelief of defendant, together with the elements of the prima facie case, may suffice to show intentional discrimination); Odell, supra note 13, at 1278-79 (noting that courts adhering to this rule rely upon "suspicion of mendacity" language found in Part II of Hicks); see also Kramer, supra note 69, at 417 (noting that many circuits have applied Hicks narrowly); Tighe, supra note 38, at 358 (noting that EEOC advanced this argument in its amicus curiae brief in Hicks).

81. 32 F.3d 759 (3d Cir. 1994).

82. Id. at 761-62. In Fuentes, a casino employee brought suit against his employer, the Chairman of the New Jersey Casino Control Commission ("Commission"), for national origin discrimination under Title VII after he was denied a position within the Commission. Id. at 761-63. The Commission, an agency of the State of New Jersey, employed Fuentes on May 18, 1987 as Director of Affirmative Action and Planning. Id. at 762. From the commencement of his position until 1990, Fuentes reported directly to the then-Chairman of the Commission, Walter Read. Id. Until his retirement in 1990, Read was at all times satisfied with Fuentes's performance. Id. Furthermore, Commissioner David Walters consistently commended Fuentes for the turnaround of his division. Id.

On August 20, 1990, Governor James Florio appointed the defendant, Steven Perskie, as Chairman of the Commission to replace Read upon his retirement. Id. Soon after his commencement as Commissioner, Perskie and his assistant, Joseph Papp, developed a "reorganization plan" to reduce staffing and accommodate the declining budget. Id. The plan called for the elimination of two divisions, including Fuentes's division. Id. The primary functions of Fuentes's department were transferred to a subdivision entitled the Affirmative Action/Equal Employment Opportunity Unit. Id. A vacancy for the chief of this subdivision existed, and Fuentes applied for the position, along with 25 other candidates. Id. After consideration, Fuentes was not chosen for the position. Id.

83. Id. at 763. The district court concluded that Fuentes failed to adduce sufficient evidence to enable a factfinder reasonably to conclude that the defendants' numerous reasons for their failure to hire Fuentes were a pretext for discrimination. Id.

84. Id. (citing Hicks, 509 U.S. 502 (1993)). Judge Becker stated that the inquiry after Hicks was "whether the plaintiff ultimately persuades the factfinder that the employment decision was caused by bias." Id.
(1) discrediting the employer's proffered reasons, either circumstantially or directly, or (2) adducing evidence, whether circumstantial or direct, that discrimination was more likely than not a motivating or determinative cause of the adverse employment action.85 Furthermore, the court adopted the "pretext-only" standard and stated that if the plaintiff came forth with sufficient evidence to discredit the defendant's proffered reasons, the plaintiff need not also come forward with additional evidence beyond his or her prima facie case to avoid summary judgment.86

In addition to the Third Circuit's recent affirmation of the Fuentes standard in Sempier v. Johnson & Higgins Co.87 and Waldron v. S.L. Industries, Inc.,88 the application of the "pretext-only" rule was formally recog-

85. Id. (emphasis added). The court relied upon the language in Hicks which says that the factfinder may infer from the combination of the plaintiff's prima facie case and its own rejection of the defendant's proffered nondiscriminatory reasons that the employer unlawfully discriminated against the plaintiff and was merely trying to conceal it. Id. (citing Hicks, 509 U.S. at 502); Ezold v. Wolf, Block, Schorr & Solis-Cohen, 983 F.2d 509, 523 (3d Cir. 1992) (stating plaintiff must show that defendant's seemingly valid reason is actually cover up of discrimination).

86. Fuentes, 32 F.3d at 764 (citing Anderson v. Baxter Healthcare Corp., 13 F.3d 1120, 1122 (7th Cir. 1994); Washington v. Garrett, 10 F.3d 1421, 1433 (9th Cir. 1993)).

87. 45 F.3d 724 (3d Cir. 1994), cert. denied, 115 S. Ct. 2611 (1995). In Sempier, a top corporate executive brought suit against Johnson & Higgins ("J & H"), an insurance brokerage and employee benefits consulting firm, for age discrimination in violation of the ADEA and the New Jersey Law Against Discrimination for making effective a resignation letter that Sempier previously executed at the command of J & H. Id. at 726.

The United States District Court for the District of New Jersey granted J & H's summary judgment motion on the ADEA claim and dismissed the remaining pendant claims because it concluded that Sempier had not produced sufficient evidence to allow a jury to find that J & H's alleged nondiscriminatory reasons were a pretext for discrimination. Id. at 727. On appeal, the Third Circuit reversed and found that Sempier met his burden of producing evidence upon which a trier of fact could find discrimination. Id.

Reviewing Fuentes and Hicks, the court stated that the plaintiff could create a genuine issue of material fact regarding the defendant's motivations for discharge by merely discrediting the employer's reasons, either directly or circumstantially. Id. (citing Fuentes, 32 F.3d at 764). The court agreed with Fuentes and held that if the plaintiff produces sufficient evidence of pretext, he need not produce additional evidence beyond his prima facie case to proceed to trial. Id. at 731. The court found: Sempier's attack on J & H's stated reasons for his discharge leaves us with the paradigmatic case in which each party has produced testimony and evidence that conflicts on the ultimate issue—whether Sempier was discharged for poor performance or because of his age. The resulting conflict must be resolved by a jury and cannot be resolved on summary judgment. Thus, the summary judgment entered in favor of J & H must be reversed. Id. at 732-33.

88. 56 F.3d 491 (3d Cir. 1995). The answer to the "pretext-only" question was addressed and seemingly resolved in Waldron. In Waldron, the plaintiff, Reed Waldron, brought suit against S.L. Waber, Inc. ("Waber"), for age discrimination under the ADEA and the New Jersey Law Against Discrimination. Id. at 499. In August 1991, at age 63, Waldron was discharged, allegedly because his position was being eliminated and his duties were distributed between two new positions. Id.
nized by the Third Circuit in *Sheridan v. E.I. DuPont de Nemours and Co.*

In *Sheridan*, the Third Circuit reaffirmed *Fuentes*, and held that a court must deny summary judgment or judgment as a matter of law to a defendant if a plaintiff presents a prima facie case and sufficient evidence to discredit the employer's proffered nondiscriminatory reason for the employment action. In *Sheridan*, the plaintiff sued her former employer, E.I. DuPont de Nemours and Co. ("DuPont"), for sex discrimination, retaliation and constructive discharge in violation of Title VII. The case

Kevin Woznicki, Vice-President of Sales and Marketing, allegedly told Waldron that he was not suited for either of the newly-created positions because he failed to pursue key accounts. *Id.* After he was terminated, Waldron was replaced with a 32-year-old male. *Id.*

The United States District Court for the District of New Jersey granted summary judgment for Waber based on the assumption that after *Hicks*, the Third Circuit would require an ADEA plaintiff at summary judgment to prove both that his employer's reasons for terminating him were false and that the real reasons were discriminatory. *Id.* at 495. The Third Circuit stated: "The district court in this case noted that we had not yet ruled on this issue, but predicted that we would side with those courts of appeals that had required plaintiffs at summary judgment to produce evidence of "pretext-plus." *Id.* n.11 (quoting Waldron v. S.L. Industries, Inc., 849 F. Supp. 996, 1004 n.11 (D.N.J. 1994), rev'd, 56 F.3d 491 (3d Cir. 1995)). The Third Circuit confirmed that "[r]ecent decisions of this court, including *Fuentes v. Perskie* . . . and *Sempier v. Johnson & Higgins* . . . have established that [the district court's] prediction was inaccurate." *Id.* at 492. The court clearly proclaimed that it joined those of its sister circuit courts who have interpreted *Hicks* to require "pretext-only" at summary judgment. *Id.* at 495. Applying the "pretext-only" standard, the court reversed the district court's judgment because it determined that under that standard, Waldron provided sufficient evidence upon which a reasonable jury could determine that Waber's proffered justifications for its decision to terminate Waldron's employment were unworthy of credence. *Id.* at 504.


90. *See Sheridan*, 100 F.3d at 1072 (noting that district court must determine whether plaintiff has cast sufficient doubt upon employer's proffered reasons to permit reasonable factfinder to conclude that employer's reasons are incredible, and citing *Fuentes* in stating, "our previous cases have explained in detail the plaintiff's burden in this regard.").

91. *Id.* at 1063. Specifically, Sheridan alleged that DuPont (1) discriminated against her on the basis of sex when it failed to promote her to the position of Manager of Restaurants; (2) retaliated against her for complaining about the sex discrimination by placing her on probation and instituting disciplinary action against her; and (3) created unbearable working conditions when it removed her from her supervisory position, which resulted in her constructive discharge from DuPont. *Id.*

The plaintiff, Barbara Sheridan, had worked at the Hotel DuPont in Wilmington, Delaware since 1979. *Id.* At the time her employment ceased, she was one of five head captains at the hotel, holding the position of Head Captain at the hotel's Green Room. *Id.* at 1072. She reached this position in 1989, after several promotions within the hotel. *Id.*
proceeded to a six-day trial, in which the jury found against Sheridan with respect to her discriminatory failure to promote and retaliation claims, but in her favor on the constructive discharge claim. After both parties moved for judgment as a matter of law, the district court granted judgment in DuPont's favor on the plaintiff's constructive discharge claim.

The record showed that Sheridan received numerous commendations for her job performance. For example, in May 1989, Sheridan received an "Employee of the Quarter Award" for outstanding work. She also received merit raises in May 1990 and February 1991, and an accomplishment award in December 1990. Further, in July 1990, the hotel's Personnel and Administrative Services Division awarded Sheridan a "Way to Go" award for "going beyond the call of duty." As a further tribute to her high performance, in October, 1990, Sheridan received the second-highest performance evaluation. Similarly, in January 1991, DuPont asked Sheridan to appear in a company video.

Despite evidence of an unblemished performance record, DuPont presented evidence that Sheridan's performance began to deteriorate in early 1991. First, in February 1991, Ed Barba, the Green Room Manager at that time, listed "corrective measures" that Sheridan was required to implement in the Green Room. For example, Sheridan was required to insure that: (1) customers were evenly distributed among the waitstaff in the Green Room, (2) she abided by the hotel's grooming policy and (3) she refrained from lounging in the Green Room while on break. Second, the Manager of Restaurants testified that he met with Sheridan in the summer of 1991 to discuss alleged complaints that Sheridan asked members of her waitstaff to engage in personal errands on her behalf. Third, in October 1991, the Manager of Restaurants testified that he met with Sheridan to discuss performance problems, including her persistent tardiness and failure to adhere to the hotel's grooming policy. Finally, the Manager of Restaurants placed Sheridan on probation because she allegedly did not correct the problems he pointed out to her. The Manager also testified that Sheridan's activities only got worse when she was on probation.

Prior to trial, the United States District Court for the District of Delaware denied summary judgment to DuPont, finding that Sheridan produced sufficient evidence for a factfinder to decide in her favor on all three counts. Specifically, the district court first found with respect to the sex discrimination claim, that Sheridan presented a prima facie case of discrimination and sufficient evidence to permit a factfinder to believe that DuPont's reasons for failing to promote Sheridan were pretexts for discrimination. Furthermore, with respect to the retaliation claim, the court held that Sheridan presented adequate evidence that her supervisors fabricated evidence of poor performance in retaliation for her complaints of sexual discrimination. Finally, with respect to the constructive discharge claim, the court concluded that "if plaintiff's version of the facts were accepted by a trier of fact, it would be reasonable for the trier of fact to conclude that resignation was plaintiff's only option." (quoting Sheridan v. E.I. DuPont de Nemours and Co., No. 93-46, 1994 WL 828309, at *9 (D. Del. July 14, 1994), rev'd, 100 F.3d 1061 (3d Cir. 1996)).

The jury returned special interrogatories on each count. First, with respect to the discriminatory failure to promote claim, the jury found that the plaintiff was not qualified for the position of Manager of Restaurants. Thus, the jury found in DuPont's favor on the plaintiff's first count. Similarly, the jury found no evidence of retaliation and found against the plaintiff on the second count. Conversely, the jury did find for the plaintiff on her constructive discharge claim and awarded Sheridan $17,500 in compensatory damages, over and above lost wages. The jury further awarded $18,072 in lost wages, after deducting $33,000 for the plaintiff's failure to mitigate her damages. The jury did not award punitive damages.
The Third Circuit reversed the district court's order granting judgment as a matter of law to DuPont on Sheridan's constructive discharge claim. Shortly thereafter, however, the court vacated its decision in order to rehear the case en banc. On November 14, 1996, the Third Circuit issued its en banc decision, which once again reversed the district court's granting of judgment as a matter of law to DuPont. Writing for the majority, Chief Judge Sloviter stated that the court "could not hold that Sheridan failed to present sufficient evidence to withstand DuPont's motion for judgment as a matter of law."  

Prior to its ultimate holding, the court discussed the legal standard to be applied in assessing whether a plaintiff has put forth sufficient evidence of pretext to survive a defendant's motion for summary judgment or judgment as a matter of law. The court began by explaining that *Hicks* held that the elements of the prima facie case and disbelief of the defendant's proffered non-discriminatory reasons are the threshold findings beyond which a jury is permitted, but not required to draw an inference of discrimination. From this interpretation of *Hicks*, the majority in *Sheridan* reaffirmed its earlier decisions that addressed *Hicks's* application to motions for summary judgment. Because *Hicks* does not compel plaintiffs to present additional evidence proving the employer's discriminatory motive in order to prevail, the court held that a plaintiff may always survive summary judgment by presenting a prima facie case and sufficient evidence casting doubt upon whether the defendant's proffered reasons were the true reasons behind the employment decision.

Nevertheless, the court found that even if the jury could have reasonably rejected DuPont's legitimate reasons for discharging the plaintiff, "the court [was] still left searching the record for evidence that gender played a determinative role in defendant's conduct." *Id.* (quoting *Sheridan*, 1994 WL 828309, at *9).

94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.* at 1074. Specifically, Sheridan pointed to: (1) the proximity between her complaints of sex discrimination and DuPont's dissatisfaction with her job performance, (2) evidence of her positive performance evaluations and rewards for accomplishments and (3) evidence impeaching defense witnesses' credibility. *Id.* at 1065-67. The court's explanation of the meaning of *Hicks* confirms that the Third Circuit adopted the "pretext-maybe" interpretation of *Hicks*. For a discussion of the "pretext-maybe" position, see *supra* notes 54-56 and accompanying text.

98. *Sheridan*, 100 F.3d at 1066-67. The court reviewed its earlier decisions in *Fuentes*, *Sempier*, *Waldron* and *Brewer*. *Id.*. Each of these cases discussed the application of *Hicks* to motions for summary judgment. For a discussion of *Fuentes*, see *supra* notes 81-86, *infra* notes 162-68 and accompanying text. For a discussion of *Sempier*, see *supra* note 87. For a discussion of *Waldron*, see *supra* note 88. For a discussion of *Brewer*, see *infra* notes 169-96 and accompanying text.

100. *Sheridan*, 100 F.3d at 1072 ("Once the court is satisfied that the evidence meets the threshold requirement [articulated in *Sheridan*], it may not pretermit the jury's ability to draw inferences from the testimony, including the inference of unlawful discrimination drawn from an unbelievable reason proffered by the employer."). Essentially, the court recognized that an inference of discrimination *may*
The court bolstered its holding by attacking the arguments made by DuPont and the dissent. First, the court attacked DuPont's argument that there was an inconsistency between the legal standard adopted by the court and Hicks's requirement that the ultimate burden of discrimination remain with the plaintiff. The court explained that the majority in Hicks explicitly answered the defendant's claim of inconsistency by explaining that discrimination (which must be proven by the employee) may be satisfied by discrediting the employer's nondiscriminatory reasons.

Next, the court criticized the dissent's position and rationale. The court attacked the dissent's suggestion that Fuentes impermissibly continued to give weight to the presumption of discrimination created by the plaintiff's prima facie case, even after the presumption is rebutted by the defendant's legitimate nondiscriminatory explanation for the employment action. The court explained that the Supreme Court's decision in Texas Department of Community Affairs v. Burdine held that the facts constituting the prima facie case retain evidentiary value, despite the fact that the presumption of discrimination drops from the case.

Additionally, the court attacked the dissent's concern that plaintiffs will survive summary judgment by discrediting the employer's reasons, even where the employer provided a false, but otherwise legitimate reason for the employment decision. Unpersuaded by the dissent's arguments, the court found that the employee is entitled to know the real reason for the personnel decision, even if the real reason is not warranted in some cases where the plaintiff clearly shows that the employer did not rely on the proffered legitimate nondiscriminatory reason for its employment decision. Id. The court acknowledged that the negative inference stemming from a pretextual explanation can be great, because "[r]esort to a pretextual explanation is, like flight from the scene of a crime, evidence indicating consciousness of guilt, which is, of course, evidence of illegal conduct." Id. at 1069 (quoting Binder v. Long Island Lighting Co., 57 F.3d 193, 200 (3d Cir. 1995)). In light of the powerful inference that may stem from proof that the defendant is not being truthful as to its true motivation, the court reasoned that Hicks allows plaintiffs to present the question of discriminatory motive to the jury once the plaintiff meets the threshold requirement of proving a prima facie case and sufficient evidence of pretext. Id.

101. Id.
102. Id. (citing St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 511 (1993)). For a discussion of the facts, procedural history, holding and rationale of Hicks, see supra, notes 49-60 and accompanying text.
103. Sheridan, 100 F.3d at 1069.
104. Id.
106. Id. For a discussion of the components of the tripartite framework for disparate treatment employment discrimination cases, see supra notes 4-6 and accompanying text.
107. Sheridan, 100 F.3d at 1070. An example of a nondiscriminatory reason that an employer would perhaps wish to hide from the court and the plaintiff is where the employer chooses another candidate over the plaintiff because the employer wishes to engage in nepotism. Id.
discriminatory. The majority took the position that if the employer chose to continue to lie to the plaintiff and to the court, an adverse inference from the employer's action was warranted. The court concluded its discussion of the legal issues in the case by cautioning that a court should not "pretermit the jury's ability to draw . . . an inference of intentional discrimination drawn from an unbelievable reason proffered by the employer."1

Judge Alito filed the only dissenting opinion in Sheridan. Primarily, he disagreed with majority's test for determining whether a defense mo-

108. Id. The court also rejected another of the dissent's hypotheticals. Id. Specifically, the dissent presented the hypothetical where an employee claims multiple grounds for discrimination, i.e., where a woman sues under the ADA and Title VII, but the evidence shows only that she was discriminated against because of her membership in one of the protected classes. Id. at 1070. Under the majority's approach, the plaintiff would survive summary judgment on both claims. Id. In response, the court explained:

We see no reason to engage in a dialogue of speculation as to how to treat such a case, divorced from a factual record, particularly because the situation presented by the dissent was not the case in Hicks, where the plaintiff claimed race discrimination, was not the case in Fuentes, where the plaintiff claimed national origin discrimination, nor is it the case before us now, where Sheridan claims only sex discrimination.

109. Id. The court explained:

The persistence in maintaining that the employment action was taken because the plaintiff was unqualified or the position was being eliminated due to a reduction in force when the employer knows the real reason is nepotism would violate the spirit if not the language of Rule 11 of the Federal Rules of Civil Procedure. The dissent gives no reason why a plaintiff alleging discrimination is not entitled to the real reason for the personnel decision, no matter how uncomfortable the truth may be to the employer. Surely, the judicial system has little to gain by the dissent's approach.

110. Id. at 1072. In addition to determining the proper interpretation of the legal standard applied to defense motions for summary judgment and judgment as a matter of law after Hicks, the court addressed two other issues. Id. at 1075-78. First, the court addressed whether DuPont was entitled to a new trial after the court's reversal of judgment as a matter of law in favor of DuPont. Id. at 1075. The court determined that a remand to the district court was proper. Id. at 1076. On remand, the district court was required to determine whether, in light of the court's formal adoption of the "pretext-only" approach, the jury's verdict for the plaintiff "was against the weight of the evidence and would effect a miscarriage of justice." Id.

The second issue addressed by the court was whether the district court properly dismissed Sheridan's former advisor, Jacques Amblard, as a defendant on the ground that individual employees may not be held liable under Title VII. Id. at 1077. The court concluded that recent congressional action indicated that individuals should not be held liable under Title VII. Id. at 1078. Specifically, Congress's failure to provide the amount of damages payable by individuals in the amendments to the Civil Rights Act of 1991 was "most significant." Id. at 1077. This was especially true in light of the comprehensive, sliding-scale damage scheme created in the Act. Id.

111. Id. at 1078 (Alito, J., dissenting).
tion for summary judgment or judgment as a matter of law should be granted in an employment discrimination case governed by *Hicks*. Judge Alito disagreed with the majority's premise that under *Hicks*, proof of the elements of the prima facie case and proof of pretext are always enough to survive a defense motion for summary judgment or judgment as a matter of law. Judge Alito argued that the majority's blanket rule is analytically unsound because proof that is sufficient to justify disbelief of the employer's explanation for the employment action will not always be enough to justify a finding that discrimination was the determinative cause of the challenged action.

To illustrate his point, the dissent pointed out that where the plaintiff's prima facie case is weak, strong evidence in the record shows that the defendant acted for a reason other than the discriminatory reason alleged by the plaintiff (or the nondiscriminatory reason produced by the defendant), and no other direct or indirect evidence of a discriminatory motive exists, summary judgment for the defendant is warranted. Under the

112. *Id.* (Alito, J., dissenting).

113. *Id.* at 1079 (Alito, J., dissenting). The dissent began by analyzing the nature of the "presumption" of discrimination that arises when the plaintiff establishes a prima facie case. *Id.* (Alito, J., dissenting). Judge Alito explained that the presumption shifts the burden of producing a legitimate, nondiscriminatory reason for the employment action to the defendant. *Id.* (Alito, J., dissenting). Furthermore, once the defendant meets his or her production burden, the legally mandated presumption of discrimination drops from the case. *Id.* The dissent characterized this position as the "bursting bubble" theory of presumptions which is codified in Rule 301 of the Federal Rules of Evidence. *Id.* at 1080-82 (Alito, J., dissenting) (citing 3 JOHN W. STRONG ET AL., MCCORMICK ON EVIDENCE § 341 (4th ed. 1992)). From this premise, the dissent stated, "the majority's blanket rule barring summary judgment or judgment as a matter of law is unsound." *Id.* at 1083 (Alito, J., dissenting). The dissent bolstered its conclusion by explaining once a presumption is destroyed, the proponent of the presumption is not guaranteed that his or her case will proceed to the trier of fact. *Id.* (Alito, J., dissenting).

114. *Id.* at 1083 (Alito, J., dissenting). The dissent explained, "[u]nless this relationship invariably holds true, ... the majority's blanket test is wrong." *Id.* (Alito, J., dissenting).

115. *Id.* at 1086 (Alito, J., dissenting). In order to provide this example, the dissent reviewed the types of evidence of discrimination that may exist in the record in a disparate treatment case. *Id.* (Alito, J., dissenting). The dissent grouped the types of evidence used to establish discrimination into four categories. *Id.* (Alito, J., dissenting).

First, the dissent pointed to the facts establishing a prima facie case of discrimination. *Id.* at 1084 (Alito, J., dissenting). While the dissent recognized that the probative force of these facts may be strong, oftentimes, the inference of discrimination that can be derived from these facts is weak. *Id.* (Alito, J., dissenting). The dissent maintained that the inference of discrimination to be gleaned from these facts varies depending upon the circumstances of each case. *Id.* (Alito, J., dissenting). The dissent posited that the possibility of variation should preclude the use of the majority's blanket rule. *Id.* (Alito, J., dissenting).

The second type of evidence presented by the plaintiff to prove discrimination is the inference drawn from the factfinder's ruling out of the employer's explanation for the employment action. *Id.* (Alito, J., dissenting). The dissent explained, however, that the degree to which this inference is justified is inversely propor-
majority's approach, however, the court would be compelled to deny summary judgment if the plaintiff produced sufficient evidence that the defendant's explanation was not credible.\textsuperscript{116} To the dissent, the majority improperly equated an employer's failure to tell the truth with discrimination in every discrimination case without allowing courts to assess the overall strength of the plaintiff's case individually.\textsuperscript{117} In place of the blanket functional to the degree to which the record contains evidence of a third possible explanation for the employer's actions. \textit{Id.} (Alito, J., dissenting). In his dissent, Judge Alito posited the following example to explain his reasoning:

For example, if it is certain that an employee was discharged for either reason "a" or reason "b" and no other, and if reason "b" can be ruled out [by the employee's evidence], then obviously it may be inferred that the real reason for the discharge was "a." But if an employee was discharged for either reason "a," reason "b," or reason "c," then ruling out reason "b" does not necessarily permit a strong inference that reason "a" [i.e., discrimination] was the real reason. \textit{Id.} (Alito, J., dissenting).

To illustrate this point, the dissent pointed to the situation in which the plaintiff challenges a single employment decision under multiple discrimination statutes. For example, a person may contend that he or she did not get a promotion because of (1) gender and (2) disability. \textit{Id.} (Alito, J., dissenting). In this instance, if the record contains evidence of disability discrimination, rejection of the employer's reasons will not permit a strong inference that the real reason is gender discrimination. \textit{Id.} (Alito, J., dissenting).

The third type of evidence that is often used to prove discrimination is related to the second piece of evidence discussed by the dissent. \textit{Id.} at 1086 (Alito, J., dissenting). The dissent explained that a factfinder may draw an adverse inference against the defendant if it believes that the defendant lied about its true reasons for the adverse employment decision. \textit{Id.} (Alito, J., dissenting). The adverse inference is drawn because the factfinder may equate a pretextual explanation to evidence of flight from a scene of a crime. \textit{Id.} at 1069. Both indicate consciousness of guilt, or illegal motive in the case of a discrimination charge. \textit{Id.} Nevertheless, the dissent pointed out that the strength of this inference varies depending upon the other evidence in the record. \textit{Id.} at 1086 (Alito, J., dissenting).

Finally, the fourth category of information that the plaintiff may present to prove discrimination is any other relevant evidence of discrimination on the ground asserted. \textit{Id.} (Alito, J., dissenting). The dissent explained that additional evidence such as stray remarks should always be considered in determining whether a defense motion for summary judgment or judgment as a matter of law should be granted. \textit{Id.} (Alito, J., dissenting). The dissent argued, however, that the court's earlier decision in \textit{Fuentes} does not always allow for a consideration of this type of evidence. \textit{Id.} (Alito, J., dissenting).

\textsuperscript{116} \textit{Id.} at 1086-87 (Alito, J., dissenting).

\textsuperscript{117} \textit{Id.} (Alito, J., dissenting). The dissent provided the following example: A man with a disability applies for a promotion, but the promotion is given to a woman without a disability. The plaintiff establishes a prima facie case of gender discrimination by showing that he is a man, he was qualified for the job, he applied, but it was given to a woman. There is no other evidence of gender discrimination against men; indeed, there is evidence that the decisionmaker was a man and that the great majority of the employees in the job category at issue were men. The employer says that the woman was chosen because her qualifications were better, but the plaintiff shows that his explanation is full of holes. In addition and most important, there is strong, direct evidence that the decisionmaker was biased against the plaintiff because of his disability. Among other
rule provided by the majority, the dissent suggested a different test that would “avoid analytical difficulties that the majority's test created.”118 Under the dissent's test, an employer's motion for summary judgment or judgment as a matter of law is improper if "a rational trier of fact could find, based on the record, that discrimination on the ground alleged was the determinative cause of the challenged employment action."119 Applying this test, the dissent agreed with the district court judge's analysis of the record.120

B. Quantum of Evidence Required to Survive Summary Judgment in the Third Circuit

Through Fuentes, Sempier, Waldron and Sheridan, the Third Circuit adopted the "pretext-only" position that allows a plaintiff to survive summary judgment if the plaintiff articulates a prima facie case and produces sufficient evidence showing that the employer's articulated reasons for the things, there is testimony that, when the decisionmaker learned that the plaintiff had applied for the promotion, the decisionmaker made insulting and derogatory remarks about the plaintiff's disability.

Is there enough evidence in this case to convince a rational trier of fact that the promotion decision was based on gender discrimination? I think not, and if I am right, then the majority's blanket test is disproven. Id. at 1086-87 (Alito, J., dissenting) (citations omitted).

118. Id. at 1088 (Alito, J., dissenting). The dissent points to two major analytical difficulties presented by the majority's test. Id. (Alito, J., dissenting). First, the dissent disagrees with Fuentes, where the court stated that a plaintiff need not specifically discredit each possible legitimate nondiscriminatory reason for the employment action in order to survive summary judgment. Id. (Alito, J., dissenting). The dissent pointed out that in Fuentes, the court first states that, when an employer asserts that the challenged action was taken for several reasons, the evidence "must allow a factfinder reasonably to infer that each of the employer's proffered nondiscriminatory reasons was either a post hoc fabrication or otherwise did not actually motivate the employment action." Id. (Alito, J., dissenting) (quoting Fuentes v. Perskie, 32 F.3d, 759, 764 (3d Cir. 1994)). In Fuentes, the court qualified this statement by adding that the plaintiff need only to cast doubt on "a 'fair number' of the reasons presented by the defendant. Id. (Alito, J., dissenting) (quoting Fuentes, 32 F.3d at 764 n.7). The dissent argued that the standard articulated in Fuentes was uncertain and unworkable. Id. (Alito, J., dissenting).

According to the dissent, a second analytical difficulty was presented by the Fuentes opinion. Id. (Alito, J., dissenting). The dissent explained that under Fuentes, in order to survive summary judgment, a plaintiff must either: (1) discredit the defendant's proffered reasons for the adverse employment action or (2) adduce additional evidence, either circumstantial or direct, proving that discrimination was more likely than not a motivating factor in the defendant's employment decision. Id. (Alito, J., dissenting). The dissent argued that a plaintiff should be able to satisfy his or her summary judgment burden by combining some evidence from each of the two categories presented by the Fuentes opinion. Id. (Alito, J., dissenting). The dissent also contended that a more flexible test would allow for such considerations. Id. (Alito, J., dissenting).

119. Id. (Alito, J., dissenting).

120. Id. (Alito, J., dissenting).
adverse employment action are unworthy of credence. Nevertheless, Sheridan did not address the related issue of how a plaintiff satisfies his or her burden of establishing that the defendant's nondiscriminatory reasons are "unworthy of credence." More specifically, the Third Circuit has grappled with the issue of whether the plaintiff is required to specifically rebut the existence or truth of the employer's proffered reasons, provided other evidence casts doubt upon the veracity of the employer. The Third Circuit provided its most comprehensive treatment of this issue in Brewer v. Quaker State Oil Refining Co. The court, however, decided Brewer against a backdrop of conflicting Third Circuit precedent.

1. Third Circuit Cases Holding that Plaintiff's Evidence Did Not Create a Genuine Issue of Material Fact on the Issue of Pretext

Despite cases to the contrary, the Third Circuit has held that the only method by which a plaintiff may establish pretext is to attack as untrue or nonexistent, the employer's reasons for acting. The leading case espousing this view is Healy v. New York Life Insurance Co. The plaintiff, William Joseph Healy, sued his former employer, New York Life Insurance Co. ("New York Life"), for discharging him in violation of the ADEA. The

121. For a discussion of the Third Circuit's legal standard, see supra notes 82-110 and accompanying text.
122. Fuentes, 32 F.3d at 765; see also Sheridan, 100 F.3d at 1072 ("The district court must determine whether the plaintiff has cast sufficient doubt upon the employer's proffered reasons to permit a reasonable factfinder to conclude that the reasons are incredible, and our previous cases have explained the plaintiff's burden in this regard." (citing Fuentes, 32 F.3d at 764-65)).

For a discussion of Fuentes, see supra notes 82-87 and accompanying text. Because the Third Circuit adhered to the "pretext-only" position prior to Hicks, an overview of Third Circuit case law in this area necessitates an examination of cases prior to Hicks, as well as the Third Circuit's decision in Brewer v. Quaker State Oil Ref. Co., 72 F.3d 326 (3d Cir. 1996).

123. Compare infra notes 126-50 and accompanying text (discussing cases in which Third Circuit did not permit plaintiff to survive summary judgment without specifically refuting existence or truth of defendant's reason), with infra notes 151-68 and accompanying text (discussing cases holding that plaintiff was permitted to survive summary judgment without specifically refuting existence or truth of defendant's reason).

124. 72 F.3d 327 (3d Cir. 1996).

125. For cases holding that plaintiff's evidence did not create a genuine issue of material fact on the issue of pretext, see infra notes 126-50 and accompanying text. For cases holding that plaintiff's evidence did not create a genuine issue of material fact on the issue of pretext, see infra notes 151-68 and accompanying text.

126. 860 F.2d 1209 (3d Cir. 1988).

127. Id. at 1213. William Joseph Healy was 56 years old when the company discharged him after 25 years of service. Id. at 1210. Healy, along with seven others, was chosen for discharge on February 25, 1986. Id. at 1212.

Healy had several positions within the company; his tenure with the company, however, came with his position as Vice-President of Marketing. Id. at 1210. This position was a high-level position that required substantial management authority. Id. Throughout his tenure in the position of Vice-President of Marketing, Healy received generally favorable evaluations. Id. at 1211. His supervisor noted some
United States District Court for the District of New Jersey granted summary judgment to the employer, concluding that Healy failed to meet his summary judgment burden because he did not submit “specific facts . . . to rebut or undermine the evidence presented by the company.”

On appeal, New York Life submitted several weaknesses that, in its opinion, rendered Healy incapable of assuming the higher-level combined position he sought within the company. Healy rebutted these specific shortcomings by arguing that his evaluations showed that he was competent in his lower-level position and by pointing out that New York Life promoted him after an evaluation that the company used to argue that he was not competent for the higher-level job. Adopting the district court’s rationale, the Third Circuit rejected both of Healy’s arguments because his evidence did not suggest that weaknesses did not exist, nor that his faults were immaterial in evaluating his probable performance in a more demanding job.

The Third Circuit further elaborated on its rationale in Healy in Turner v. Schering-Plough Corp. In Turner, a discharged employee brought suit against his former employer, alleging that the employer violated the

problems, however, with Healy’s ability to handle multiple tasks simultaneously. Id.

128. Id. at 1213.
129. Id. at 1214-15. Specifically, the defendants pointed to Healy’s (1) failure to delegate responsibilities; (2) tendency to focus too narrowly on certain job responsibilities without taking it upon himself to broaden his responsibilities; and (3) failure to identify important future problems or objectives and how to deal with them. Id.
130. Id. at 1215.
131. Id. The court found that this evidence did not cast doubt upon the defendant’s legitimate business reasons. Id. at 1220. The court reasoned that proposition A, namely that Healy was qualified for a lower-level position, could feasibly co-exist with proposition B, namely that Russell’s job demanded more initiative and responsibility than Healy could offer. Id.

One year later, the Third Circuit applied this reasoning in the analogous case of Fowle v. C & C Cola, 868 F.2d 59 (3d Cir. 1989). Judge Seitz affirmed the district court’s grant of summary judgment to the defendant, C & C Cola, because the plaintiff’s evidence was insufficient to raise a genuine issue of material fact regarding the defendant’s reasons for discharging plaintiff William Fowle. Id. at 61. Fowle sued his former employer for age discrimination under the ADEA for C & C Cola’s failure to place him in the position of Vice-President, Director of Marketing after C & C Cola was sold to Shasta Beverages. Id. The defendant asserted that it did not award Fowle with the position he wanted because the company perceived him as lacking leadership and management skills. Id. at 64. In response, Fowle sought to show that the employer’s proffered reasons were “unworthy of credence” by relying on positive written performance evaluations of Fowle in his job as Product Line Manager. Id. The court rejected this evidence and found that “Fowle’s written job assessments during his time as a Product Line Manager while positive, do not address the leadership ability or management skills required by the [desired] position.” Id. at 67. Thus, the court rejected the argument that general performance evaluations were inconsistent with the company’s decision not to promote him. Id.

132. 901 F.2d 335 (3d Cir. 1990).
ADEA by demoting him, eliminating his new job and terminating his employment because of his age. The United States District Court for the District of New Jersey granted summary judgment to the employer on each of Turner's claims.

Writing for the majority, Judge Stapleton affirmed the district court on all of the ADEA claims except for the plaintiff's discharge claim. Significantly, however, the court affirmed the district court's grant of summary judgment on the plaintiff's first two claims because the plaintiff did not rebut the defendant's specific reasons for taking action against the plaintiff with proof that the reasons were false.

First, the court addressed Turner's demotion. In response to the defendant's asserted reasons for the demotion, Turner introduced

133. Id. at 337. The plaintiff, William Turner, climbed the Schering corporate ladder until he reached the title of Manager of Distribution Services. Id. at 338. In 1982, Turner began to receive negative performance evaluations and was demoted to the position of Manager of Logistics Services. Id. at 338-39. The 1983 evaluation stressed Turner's negative performance in areas of leadership, decision-making, organization and planning of own and other's work, and interpersonal skills. Id. at 339. Evidence showed that Turner was disappointed by the demotion, but that he was not surprised that it occurred. Id. While Turner disagreed with the management style of his supervisor, LaHood, nowhere in the record did Turner dispute the specific allegations of performance deficiencies and operational problems LaHood identified in his deposition testimony and in memos related to Turner's performance. Id.

Turner's new position of Manager of Logistics Services required less responsibility in areas of personal management, yet the job responsibilities included management of transportation of Schering's products from the manufacturing site to the distribution centers, as well as management of distribution requirements planning and logistics planning. Id. at 339. Turner's overall performance in this position was very good. Id. at 340. LaHood reviewed Turner's performance as good or very good in several areas relevant to personal management, including leadership, organization and planning of work of his own and his subordinates, development of subordinates, relationships with co-workers and achieving results through co-workers. Id. In addition, Turner received regular salary increases during his tenure in this position. Id. Furthermore, while in this position, Turner attended training programs to allay some of the problems encountered as Manager of Distribution Services. Id. Eventually, however, Schering eliminated Turner's new position, and he was discharged without consideration for another job within the company. Id. Schering contended that Turner's job was eliminated because the three functions that reported to Turner—transportation, distribution requirements planning and logistics planning—each had a more direct relationship with functions in other departments. Id. Thus, the functions previously entrusted to Turner were divided among three other managers in three different departments. Id.

134. Id. at 337.

135. Id.

136. Id.

137. Id. at 338-39. The defendant proffered that it decided to demote Turner because of performance deficiencies reflected in negative performance evaluations. Id. at 339. Specifically, from 1976 to 1982, the defendant graded Turner as good or better in several areas relevant to personnel management and deemed Turner to have overall value to the company. Id. at 343. Additionally, however, not everything in these reviews were favorable. Id. In 1979, Grimaldi, Turner's
favorable performance reviews in his earlier position.  

Relying on Healy, the court rejected the plaintiff's argument and recognized that Turner had not offered any evidence tending to show that serious and unattended problems did not exist within his jurisdiction or that other criticisms at the time of the demotion were unjustified. Further, the court came to a similar conclusion with respect to the plaintiff's attempts at discrediting the defendant's reasons for eliminating Turner's position as Manager of Logistics.

The Third Circuit revisited the issue of the quantum of pretext evidence required to withstand summary judgment in Billet v. CIGNA Corp. The plaintiff, Lewis H. Billet, brought an age discrimination action against his former employer, CIGNA Corporation and Connecticut General Life Insurance Company (“Connecticut General”). After the jury was unable to reach a verdict, the district court granted Connecticut General’s motion for directed verdict on which it had reserved decision.

former supervisor, stated that “there has to be an improvement in [Turner’s] patience and tolerance when he first faces adverse situations,” and that “there must be a reduction in the level of irritation.” Id. Turner argued that the inconsistency between Grimaldi’s positive performance evaluations and LaHood’s negative evaluations raised a material issue of fact as to whether performance was really the reason for Turner’s demotion. Id. at 343-44.

Id. at 343.

The court noted that Turner’s affidavit showed merely that Turner disagreed with LaHood’s managerial strategies. Id. The court stated: “[i]n the context of the specific, substantial, and undisputed performance deficiencies contemporaneously documented by LaHood as he made his evaluations of Turner, the Grimaldi performance views are not sufficient to create a material dispute of fact concerning LaHood’s sincerity.” Id. The court recognized that the Grimaldi evaluations did nothing but show that he had a higher opinion of Turner’s overall performance. Id. Furthermore, the court explained that “[i]n the context of the specific evidence of performance difficulties... this [overall good performance] is not enough to preclude summary judgment. Id. (citing Healy v. New York Life Ins. Co., 860 F.2d 1209, 1220 (3d Cir. 1988)).

Id. Thus, the court concluded that the company’s rationale involved reorganizing managerial reporting relationships according to function. Id. Turner asserted, however, that the reorganization was based on other reasons because Schering knew who held the affected positions and that some of the persons who lost their jobs were selected because of poor performance rather than because of “reporting relationships.” Id. The court rejected Turner’s reasoning, stating that “[t]he rationale Schering offers for its decision to eliminate his position is wholly consistent with the philosophy underlying its massive reorganization.” Id. Furthermore, the court noted that “Turner point[ed] to a bewildering array of factors, none of which addresse[d] the reasons Schering [said] caused it to eliminate this position.” Id.

940 F.2d 812 (3d Cir. 1991).

Id. at 814. Lewis Billet joined Connecticut General, a subsidiary of CIGNA Corp., in 1955. Id. He continued his employment until November 1, 1988, when his supervisor advised him “that his position as sales manager for the Philadelphia group sales office was being eliminated” and that his employment with Connecticut General would terminate effective January 31, 1989. Id.

Id. Connecticut General moved for a directed verdict at the close of Billet’s case, but the court declined to decide the motion until the defendant

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Writing for the majority, Judge Greenberg agreed with the district court’s disposition of the case. 144 Although Billet attempted to rebut the specific instances of misconduct cited by Connecticut General 145 by point-presented its case. Id. at 815. Subsequently, Connecticut General renewed its motion for a directed verdict at the close of all the evidence, but the court again reserved decision on this motion. Id. On November 15, 1990, the district court submitted the case to the jury. Id. One day later, however, the foreman reported that the jury was deadlocked and unable to return a verdict in favor of either party. Id. The court dismissed the jury after the parties could not agree as to whether a majority verdict was feasible, and the court granted Connecticut General’s motion for a directed verdict. Id.

144. Id. at 825 (“Considering all of the evidence and viewing it in the light most favorable to Billet, we find that he did not create a jury question on the issue of the bona fides of Connecticut General’s articulated reasons for this termination to show them to be pretextual.”).

145. Id. at 822-25. Connecticut General’s nondiscriminatory reasons for discharge included: (1) a poor evaluation of Billet in 1988; (2) his forging of a supervisor’s signature to obtain a company automobile; (3) his interrupting of a sales staff meeting while intoxicated; (4) problems with the underwriting department; (5) his disregard for company policy with respect to closing procedures of an office; and (6) complaints by Deanna Clendennon, a female coworker, alleging that Billet harassed and embarrassed her. Id. at 818-21.

First, the court addressed the 1988 performance review. Id. at 818. Billet’s supervisor for that year, Joseph Botta, gave him an overall score of four, with one representing the highest evaluation and five the lowest. Id. In this evaluation, Billet received a three, a performance described as “poor or very poor,” in the sales category. Id. Furthermore, Billet received a rating of five in human resources management. Id. This review stated that training was nonexistent in Billet’s division, that his salespeople gave out unauthorized quotes and that he inappropriately handled the closing of the Harrisburg office. Id. The review also noted Billet’s insubordination on the job, inability to take direction from supervisors and improper behavior at a training conference in Southbury, Connecticut. Id. at 818-19. Billet received a warning for his poor evaluation and was placed on probation for 90 days, during which he was given a list of improvements to make and goals to meet. Id. at 819.

Second, the defendants pointed to an incident involving Billet forging his supervisor’s signature in order to obtain a company car. Id. In order to replace his automobile, Billet was required to get the signature of his supervisor, Botta. Id. Billet circumvented this requirement, however, by signing Botta’s name and printing it without Botta’s knowledge or permission. Id. In response to his unauthorized actions, Botta reprimanded Billet with a misconduct probation memorandum. Id.

Third, Connecticut General pointed to what the court referred to as the “Southbury incident” as further proof of Billet’s misconduct. Id. Specifically, at a meeting during a sales training conference in Southbury, Connecticut, Botta and Billet exchanged words. Id. Testimony alleged that Billet, intoxicated and carrying a liquor bottle, yelled and insulted Botta in front of others. Id.

Fourth, Connecticut General cited several complaints from the underwriting department, specifically (1) an incident in January 1988 where Billet’s office renewed a contract with Murray Industries without underwriting’s approval; (2) an instance where a policy was sold to Wilco Trading Company at a rate 14% below the authorized rate; and (3) an occasion when Billet sold a group health insurance policy to Riddle Memorial Foundation, making unauthorized changes to the agreement. Id. at 820.

Fifth, Connecticut General presented Billet’s handling of the closing of the Harrisburg office as a failure to follow direction. Id. at 821. The company policy
ing to his spotless thirty-two-year career and a positive general performance evaluation, the Third Circuit rejected Billet's arguments. The court held that Billet did not meet his summary judgment burden because he did not deny that the incidents occurred. Rather, Billet attempted to show pretext by disagreeing with Connecticut General's right to take the incidents seriously. The court further relied on Healy and Turner and stated that "prior good evaluations alone cannot establish that later unsatisfactory evaluations are pretextual."

instructed that no employee in the closing office was to be notified of layoff or closing, until the day selected for the announcement of the closing. Billet neglected to follow the company policy, informing the head of the Harrisburg office orally and by letter about the company's plan. Examples of Billet's failure to follow orders were presented by Connecticut General, including the proffer of Billet's complaints about certain projects, failure to put the sale of CIGNA's dental health plan as "a high priority" and failure to fill out certain required slotting forms.

Billet argued that this evidence showed pretext because his spotless career remained intact prior to the five-month period in which the specific instances of conduct occurred, making Connecticut General's alleged reasoning for Billet's termination implausible. Furthermore, he argued that his receipt of a positive performance evaluation, just four months prior to termination, made his termination suspect. Billet also attempted to explain each incident by saying that: (1) Connecticut General exaggerated the magnitude of the underwriting problems; (2) the company never gave him an opportunity to explain his version of the Southbury incident; (3) he owed the Harrisburg office proper notice because he used to work with them; (4) the Clendennon incident occurred because of her concern with his management style; and (5) the automobile incident was innocent because he was merely completing Botta's paperwork, by signing his name on an authorization form, in Botta's absence.

In each instance, the court noted that there was no factual dispute as to whether the incidents occurred. Furthermore, at several points in the court's opinion, Judge Greenberg noted that the facts were undisputed. See, e.g., id. ("These undisputed facts and incidents were put forth by Connecticut General.") (emphasis added); id. at 820 ("In support of [its] claim, Connecticut General cites to the following incidents, the facts of which are not generally disputed."); id. at 830 ("Billet cannot overcome the simple fact that he had some involvement in each cited incident.").

In light of the amount of objective evidence regarding problems with Billet's performance, the court found that Billet's claim of pretext was implausible and affirmed the district court's entry of summary judgment. In sum, we do not find that Billet submitted sufficient evidence of inconsistencies or implausi-
2. Third Circuit Cases Holding that Plaintiff's Evidence Created a Genuine Issue of Material Fact on the Issue of Pretext

In several cases, the Third Circuit held that the plaintiff created a genuine issue of material fact regarding the credibility of the defendant's articulated reasons without specifically disproving the existence of the reasons for discharge.\(^{151}\) In *Josey v. John R. Hollingsworth Corp.*,\(^{152}\) a Title VII race discrimination case decided prior to *Hicks*, the plaintiff survived summary judgment by introducing circumstantial evidence that the Third Circuit found sufficient for a jury to find that the defendant ("Hollingsworth") did not rely on the proffered nondiscriminatory reason for discharge.\(^{153}\) The United States District Court for the Eastern District of Connecticut General's proffered reasons for his termination to support an inference that Connecticut General did not act for legitimate reasons.\(^{154}\)

\(^{151}\) See, e.g., *Fuentes v. Perskie*, 32 F.3d 759 (3d Cir. 1994) (stating plaintiff must demonstrate lack of credibility of defendant’s proffered reasons by showing their weaknesses and inconsistencies); *Josey v. John R. Hollingsworth Corp.*, 996 F.2d 692 (3d Cir. 1993) (noting that on different occasions, courts have found that factors, including the defendant's credibility, could raise inference of pretext that would make summary judgment for defendant inappropriate); *Chipollini v. Spencer Gifts, Inc.*, 814 F.2d 893 (3d Cir. 1987) (finding circumstantial evidence casted doubt on employer's proffered reasons and ruled that pretext question would turn on defendant's credibility).

\(^{152}\) 996 F.2d 692 (3d Cir. 1993).

\(^{153}\) Id. at 639. The plaintiff, Ted Josey, sued his former employer, John R. Hollingsworth Corp. ("Hollingsworth") for race discrimination under Title VII. \(Id.\) at 635. Josey, an African-American male, began working for Hollingsworth in 1976. \(Id.\) He eventually became the Assistant Manager of Quality Assurance in 1987. \(Id.\) In December 1986, Josey became interested in replacing Robert Kirby, the Manager of Quality Assurance, who made known his plans to retire. \(Id.\) Kirby was one of 13 original shareholders of the company. \(Id.\) He obtained his shares after the original family owners sold the company to him and another 12 of the "key and trusted employees." \(Id.\) All of the shareholders were caucasian. \(Id.\)

After Josey's promotion to Assistant Manager of Quality Assurance, the Vice-President of the company instructed Kirby to train Josey to succeed him in the manager's position. \(Id.\) Other employees and shareholders of the company were not pleased with the Vice-President's choice of replacement, and Josey received racially offensive messages. \(Id.\) In response to his treatment, Josey requested a leave of absence from the company until Kirby retired; however, his request was denied. \(Id.\) Contemporaneously with these developments, Hollingsworth passed a company policy of giving job preferences to shareholder employees when layoffs occurred. \(Id.\)

Hollingsworth terminated Josey after determining that there was no reason to retain him because the person that he was supposed to replace, Robert Kirby, decided not to retire. \(Id.\) at 636. Hollingsworth stated that Josey's services were no longer needed and that there was no other position in which the company could use Josey at the salary he was receiving from the company. \(Id.\) Nonetheless, the company paid Les Horvath, Josey's replacement, a higher salary than the company paid Josey. \(Id.\) In addition, shortly after Josey's termination, in the summer of 1988, Kirby announced that he would retire at the end of the year. \(Id.\) In response, the company eliminated Horvath's position and named him as Kirby's replacement. \(Id.\)
Pennsylvania, however, granted summary judgment to the defendant on the pretext issue.154

The Third Circuit's opinion, written by Judge Rodriguez, examined Hollingsworth's legitimate nondiscriminatory reasons for discharging Josey.155 Hollingsworth stated that Josey was discharged for economic reasons and that the company legitimately selected another employee over Josey because of a company policy preferring shareholders over nonshareholders when layoffs were necessary.156

The Third Circuit found that Josey's proffer of evidence created a genuine issue of material fact regarding whether Hollingsworth acted for its stated reasons or for a discriminatory reason.157 Furthermore, the court impliedly endorsed the difference between requiring the plaintiff to show that the defendant's proffered reason did not exist and requiring proof that the employer did not act for the reason despite its existence.158 The court accepted the defendant's articulated reason for discharge—namely, that Hollingsworth was experiencing economic difficulties.159 Yet, the Third Circuit found it necessary to go beyond the determination of whether economic problems existed, because without a more searching

154. Id. (noting that "Josey failed to meet his evidentiary burden once the company proffered a legitimate reason for his dismissal").

155. Id. at 638.

156. Id.

157. Id. at 641. The court pointed out that Josey's evidence at summary judgment need only show inconsistencies and implausibilities in Hollingsworth's reasons that could lead to the conclusion that the company did not act for its stated reasons. Id. at 638. Furthermore, the court reminded the parties that the factfinder could conclude, from circumstantial evidence, that Hollingsworth's proffered reasons for dismissal were pretextual. Id. at 641.

158. Id. at 638. The court cited several cases in which plaintiffs satisfied the summary judgment standard by relying on factors such as the defendant's credibility, the timing of an employee's dismissal and the employer's treatment of the employee, instead of attempting to show that the defendant's purported reason for acting was false. Id. at 639; see McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804 (1973) (holding that employer's treatment of plaintiff may be relevant to showing of pretext); Weldon v. Kraft, Inc., 896 F.2d 793, 799 (3d Cir. 1990) (stating that if factfinder "credit[ed plaintiff's] testimony regarding the harshness of the treatment he received... it could conclude... [the employer's] explanations were pretextual."); White v. Westinghouse Elec. Co., 862 F.2d 56, 58-59 (3d Cir. 1988) (holding that timing of employee's dismissal raised genuine issue of material fact that employer's purported reasons for terminating him were pretextual); Chipollini v. Spencer Gifts, Inc., 814 F.2d 893, 901 (3d Cir. 1986) (holding that defendant's dubious credibility created issue of pretext).

159. Hollingsworth, 996 F.2d at 639. The Third Circuit stated that proof of the existence of the defendant's reason is not the court's stopping point of analysis. Id. ("A company's need to reduce its workforce, however, does not absolve it from an examination of its motives in dismissing a particular employee."). The court reasoned that the district court was required to "take a closer look" at the proffered reason to see if Hollingsworth's prior contact with Josey was consistent with its explanation for its actions. Id. at 640.
examination, an employer could hide behind the existence of problems and discriminate freely.\footnote{160}{Id. ("The statute could never be enforced in difficult economic times if a financial explanation for termination created a veil of immunity behind which employers were free to discriminate.").}

In addition to decisions prior to Hicks,\footnote{161}{For a discussion of Josey, see supra notes 152-60 and accompanying text.} the Third Circuit has reaffirmed a more lenient approach to the plaintiff's presentation of rebuttal evidence of pretext.\footnote{162}{See, e.g., Fuentes v. Perskie, 32 F.3d 759, 764 (3d Cir. 1994) (stating that to avoid summary judgment, plaintiff must provide evidence from which factfinder could reasonably infer that each of employer's proffered reasons was either a post hoc justification or did not motivate the employment decision).} Specifically, the Third Circuit engaged in an expansive explanation of the quantum of evidence required to discredit the employer's reasons for the employment action in Fuentes.\footnote{163}{Id. For a discussion of the facts, holding and rationale of Fuentes, see supra notes 82-87 and accompanying text.} Rejecting two extreme positions outright,\footnote{164}{Fuentes, 32 F.3d at 764. The court refused to adopt the position that the plaintiff can avoid summary judgment simply by arguing, without any supporting evidence, that the employer is lying. Id. In addition, the court repudiated the notion that the plaintiff must adduce evidence directly contradicting the defendant's proffered legitimate nondiscriminatory reason for the failure to hire. Id.} the court adopted a middle approach: a
plaintiffs evidence rebutting the employer’s proffered reasons must allow a reasonable factfinder to infer that each of the employer’s nondiscriminatory reasons was either a post hoc fabrication (a lie) or otherwise did not actually motivate the employment action.\textsuperscript{165}

The court emphasized that a plaintiff will not discredit the employer’s proffered reason merely by showing that the decision was wrong or mistaken.\textsuperscript{166} Rather, the court stated that “the plaintiff must demonstrate such weaknesses, implausibilities, inconsistencies, incoherences or contradictions in the employer’s proffered legitimate reasons for its action that a reasonable factfinder could rationally find them unworthy of credence, and hence infer that the employer did not act for [the asserted] non-discriminatory reasons.”\textsuperscript{167} Despite the court’s lenient approach, the Third Circuit affirmed the district court’s entry of summary judgment.\textsuperscript{168}

\textsuperscript{165.} \textit{Id.} The court articulated its reasoning by stating:

\begin{quote}
We do not hold that, to avoid summary judgment, the plaintiff must cast doubt on each proffered reason in a vacuum. If the defendant proffers a bagful of legitimate reasons, and the plaintiff manages to cast substantial doubt on a fair number of them, the plaintiff may not need to discredit the remainder. That is because the factfinder’s rejection of some of the defendant’s proffered reasons may impede the employer’s credibility seriously enough so that a factfinder may rationally disbelieve the remaining proffered reasons, even if no evidence undermining those remaining rationales in particular is available.
\end{quote}

\textit{Id.} at 764-65 n.7.

Elsewhere in the opinion, the court restated the plaintiff’s burden of persuasion at summary judgment stating:

\begin{quote}
To avoid summary judgment, the plaintiff must point to some evidence from which a factfinder could reasonably conclude that the plaintiff satisfied the criterion that the decision-makers disapproving of him relied upon (e.g., by showing that others no more qualified than he under that criterion were not treated adversely), or that the decision-makers did not actually rely upon that criterion.
\end{quote}

\textit{Id.} at 767. In \textit{Sheridan}, Judge Alito criticized the standard set forth by the majority in \textit{Fuentes}. For a discussion of the dissent’s position with the respect to \textit{Fuentes}, see \textit{supra} notes 111-20 and accompanying text.

\textsuperscript{166.} \textit{Fuentes}, 92 F.3d at 765. The plaintiff cannot discredit the employer’s reason by showing it was incorrect because “the factual dispute at issue is whether discriminatory animus motivated the employer, not whether the employer is wise, shrewd, prudent, or competent.”\textsuperscript{\textit{Id.} (quoting Ezold v. Wolf, Block, Shorr & Solis-Cohen, 983 F.2d 509, 551-33 (3d Cir. 1993); Villaneuva v. Wellesley College, 930 F.2d 124, 131 (1st Cir. 1991)).}

\textsuperscript{167.} \textit{Id.} (quoting Josey v. John R. Hollingsworth Corp., 996 F.2d 632, 638 (3d Cir. 1993); \textit{Ezold}, 983 F.2d at 581)). The court emphasized that the burden of casting doubt on an employer’s articulated reason is “a difficult burden on the plaintiff” because the standard “arises from an inherent tension between the goal of all discrimination law and our society’s commitment to free decision-making by the private sector in economic affairs.”\textsuperscript{\textit{Id.} (quoting \textit{Ezold}, 983 F.2d at 581)}

\textsuperscript{168.} \textit{Id.} at 767. After setting forth the legal standards applicable to the case, the court applied the law to the facts before it. \textit{Id.} at 765-67. The defendant’s legitimate non-discriminatory reasons for not hiring Fuentes consisted of four perceived faults: (1) lack of leadership qualities; (2) absence of management ability; (3) lack of interpersonal skills; and (4) unprofessional conduct. \textit{Id.} at 765-66. The court declined to go into each justification in detail and instead found that Fuen-
3. **The Third Circuit's Most Recent Application: Brewer v. Quaker State Oil Refining Corp.**

Within the past year, the Third Circuit articulated its position on the acceptable methods of discrediting the employer's proffered reasons for dismissal at summary judgment in *Brewer v. Quaker State Oil Refining Corp.* 169 The plaintiff, Judson C. Brewer, sought to recover under the ADEA for his termination from Quaker State Oil Refining Corp. ("Quaker State"). 170 The United States District Court for the Western District of Pennsylvania granted summary judgment to Quaker State. 171 "Quaker State" did not throw enough doubt on any of those explanations so that a rational trier of fact could reject the proffered reasons. *Id.* at 766.

169. 72 F.3d 326 (3d Cir. 1995).

170. *Id.* at 328. Brewer worked for Quaker State as a sales representative from 1968 to March 1992. *Id.* At the time of his discharge, Brewer was 53 years old. *Id.*

During his tenure with the company, Brewer worked in Pittsburgh, Pennsylvania, and Detroit, Michigan. *Id.* at 328-29. While in Pittsburgh, supervisors Bruce Drummond and Michael O'Donnell encountered several problems with Brewer's performance. *Id.* Specifically, Brewer's clients complained that they did not have enough contact with him, their sales representative, and that Brewer failed to adequately supply them with oil. *Id.* at 329. In response to the negative evaluations, O'Donnell placed Brewer on a 90-day probation. *Id.* After his probationary period, Brewer was transferred to Detroit. *Id.*

Brewer was supervised by District Manager Paul Pfauzer in Detroit. *Id.* In 1990, Pfauzer gave Brewer acceptable performance ratings, but criticized him for poor planning. *Id.* Despite Pfauzer's urging that Brewer "needed to work more closely with his client accounts and set higher standards for himself," Brewer received a sales bonus for exceeding the company's sales quota for that year. *Id.*

In 1991, Pfauzer continued to show dissatisfaction with Brewer's work performance and suggested that Brewer needed to be more efficient, to follow-up with requests both from his customers and from management and to improve the timeliness and completeness of his sales reports. *Id.* In August 1991, Brewer received marginal or unacceptable ratings in all categories of his formal evaluation. *Id.* Specifically, Pfauzer criticized Brewer for performing poorly in areas of client communications and organization. *Id.* As a direct response to the negative evaluation, Brewer was placed on a 90-day probation for his performance deficiencies. *Id.* Despite these problems, Brewer was the only person to receive a bonus in the Detroit region in 1991 for exceeding his sales quota. *Id.* After the 1992 evaluation, Brewer's overall performance average for 1987 to 1991 was rated to be 2.9 out of a possible 5, with 5 being the highest score. *Id.*

After the 90-day probation in 1992, Pfauzer still remained unsatisfied with Brewer's misprocessing of orders and failure to advise his accounts of credit problems. *Id.* Although Brewer saw these complaints as "nitpicking" and a result of "petty misunderstandings," Pfauzer sought and received approval to terminate Brewer. *Id.* Brewer was discharged on March 9, 1992, and this lawsuit ensued. *Id.* Brewer sought relief not only under the ADEA, but also under Michigan's antidiscrimination statute, the Elliot-Larsen Civil Rights Act. *Id.* at 328.

171. *Brewer v. Quaker State Oil Ref. Co.*, 874 F. Supp. 672, 687 (W.D. Pa.), *rev'd*, 72 F.3d 326 (3d Cir. 1995). The court found that while Brewer's evidence of good sales performance was "somewhat contradictory" with his resulting termination, it did not create a triable issue of fact regarding Quaker State's motivation. *Id.* at 686.
The Third Circuit began its analysis in Brewer with a careful review of the earlier Third Circuit decision in Fuentes172 and the Supreme Court's decision in Hicks.173 To determine whether Brewer provided sufficient evidence to meet the Fuentes standard, the Third Circuit reviewed Brewer's evidence of discrimination, finding it sufficient to create weaknesses, contradictions and implausibilities in Quaker State's proffered reasons for discharge.174

First, the court found Brewer's own testimony disputing the significance of his performance problems persuasive, despite the fact that Brewer contested the extent, rather than the existence, of the problems.175 Second, Brewer provided evidence that he had succeeded in selling oil for nearly twenty-five years and that for the last five years, Quaker State rated Brewer "fully acceptable" in his evaluations.176 Additionally, Quaker State's Executive Vice-President of Sales stated that sales volume was extremely important in evaluating an employee.177 Thus, the court stated that a factfinder could find it implausible that Quaker State would have fired Brewer for such minor deficiencies when he was successful in the sole area identified by Quaker State as "the best simple measure" for evaluating an employee.178

172. Brewer, 72 F.3d at 330-31. For a detailed discussion of Fuentes, see supra notes 81-86, 163-68 and accompanying text.

173. Brewer, 72 F.3d at 330-31. For a discussion of Hicks, see supra notes 49-60 and accompanying text.

The Third Circuit, relying on Hicks and Fuentes, stated that the plaintiff, at summary judgment, must provide sufficient evidence, either direct or indirect, so that a jury could find that the defendant did not rely on the stated reasons in terminating the plaintiff. Id. at 331 (citing St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 511 (1992); Fuentes, 32 F.3d at 763-64). Furthermore, the Third Circuit noted that Fuentes required the plaintiff to produce evidence of weaknesses, inconsistencies, implausibilities and contradictions in the defendant's reasons for termination. Id. at 331-32 (noting that inquiry is "'limited to whether the employer gave an honest explanation of its behavior.'") (quoting McCoy v. LOGN Continental Broad. Co., 957 F.2d 368, 373 (7th Cir. 1992)).

174. Id.

175. Id. at 332. The court found this evidence persuasive because Brewer provided specific examples of Pfauser's misplaced criticisms. Id.

176. Id. at 331.

177. Id. at 332. In addition, Quaker State's counsel also acknowledged this fact at oral argument before the Third Circuit. Id. The Third Circuit cited Kiliszewski v. Overseas Transportation Co., 818 F. Supp. 128, 132 (W.D. Pa. 1993), in which the court precluded summary judgment, despite evidence of poor time management skills, because the plaintiff performed well in the traditional role of a salesperson. Id.

178. Brewer, 72 F.3d at 331-32 (3d Cir. 1996). The Third Circuit distinguished the recent case of Ezold v. Wolf, Block, Schorr & Solis-Cohen, 983 F.2d 509 (3d Cir. 1993), in which the court found that the district court improperly denied the defendant's motion for summary judgment. Brewer, 72 F.3d at 332. In Ezold, the defendant's proffered reason for denying partnership to the plaintiff, Nancy Ezold, was that she was deficient in the area of legal analysis. Ezold, 983 F.2d at 512. Despite her admitted deficiencies in legal analysis, Ezold excelled in other areas of her job. Id. at 528. The court found that summary judgment was improp-
Next, the Third Circuit noted that Quaker State's actions in awarding Brewer with consistent annual bonuses for meeting and exceeding the company's sales quota contradicted the company's contentions that Brewer was a poor employee. Thus, the court reasoned that a reasonable factfinder could view Quaker State's belated reliance on these criticisms as proof that the proffered reasons were not the real reasons behind Brewer's termination. After examining all of Brewer's evidence, the Third Circuit found that the district court incorrectly granted summary judgment and reversed and remanded the case for trial.

The Third Circuit distinguished Ezold from the present case on its facts. Ezold, 72 F.3d at 332. In Ezold, the plaintiff suffered deficiencies in the one area deemed critical by the employer—legal analysis—despite evidence that she performed well in other areas of her job that were not deemed to be critical to the job. Ezold, 72 F.3d at 332. In contrast, the Third Circuit found that Brewer's slight problems in a few aspects of the job paled beside his consistently excellent sales performance, an aspect of his job that was deemed "critical" by his employers.

The court found that a reasonable factfinder could view Quaker State's belated reliance on these criticisms as evidence that tended to prove pretext. Ezold, 72 F.3d at 332 ("It is also questionable why a company would fire the only salesperson to receive consecutive annual bonuses in response to the same organizational deficiencies that the employer had tacitly accepted for over two decades."). The court found that a reasonable factfinder could view Quaker State's belated reliance on these criticisms as evidence that tended to prove pretext. Ezold, 72 F.3d at 332 ("It is also questionable why a company would fire the only salesperson to receive consecutive annual bonuses in response to the same organizational deficiencies that the employer had tacitly accepted for over two decades."). The court found that a reasonable factfinder could view Quaker State's belated reliance on these criticisms as evidence that tended to prove pretext. Ezold, 72 F.3d at 332 ("It is also questionable why a company would fire the only salesperson to receive consecutive annual bonuses in response to the same organizational deficiencies that the employer had tacitly accepted for over two decades."). The court found that a reasonable factfinder could view Quaker State's belated reliance on these criticisms as evidence that tended to prove pretext. Ezold, 72 F.3d at 332 ("It is also questionable why a company would fire the only salesperson to receive consecutive annual bonuses in response to the same organizational deficiencies that the employer had tacitly accepted for over two decades."). The court found that a reasonable factfinder could view Quaker State's belated reliance on these criticisms as evidence that tended to prove pretext. Ezold, 72 F.3d at 332 ("It is also questionable why a company would fire the only salesperson to receive consecutive annual bonuses in response to the same organizational deficiencies that the employer had tacitly accepted for over two decades."). The court found that a reasonable factfinder could view Quaker State's belated reliance on these criticisms as evidence that tended to prove pretext. Ezold, 72 F.3d at 332 ("It is also questionable why a company would fire the only salesperson to receive consecutive annual bonuses in response to the same organizational deficiencies that the employer had tacitly accepted for over two decades."). The court found that a reasonable factfinder could view Quaker State's belated reliance on these criticisms as evidence that tended to prove pretext. Ezold, 72 F.3d at 332 ("It is also questionable why a company would fire the only salesperson to receive consecutive annual bonuses in response to the same organizational deficiencies that the employer had tacitly accepted for over two decades."). The court found that a reasonable factfinder could view Quaker State's belated reliance on these criticisms as evidence that tended to prove pretext. Ezold, 72 F.3d at 332 ("It is also questionable why a company would fire the only salesperson to receive consecutive annual bonuses in response to the same organizational deficiencies that the employer had tacitly accepted for over two decades."). The court found that a reasonable factfinder could view Quaker State's belated reliance on these criticisms as evidence that tended to prove pretext. Ezold, 72 F.3d at 332 ("It is also questionable why a company would fire the only salesperson to receive consecutive annual bonuses in response to the same organizational deficiencies that the employer had tacitly accepted for over two decades."). The court found that a reasonable factfinder could view Quaker State's belated reliance on these criticisms as evidence that tended to prove pretext. Ezold, 72 F.3d at 332 ("It is also questionable why a company would fire the only salesperson to receive consecutive annual bonuses in response to the same organizational deficiencies that the employer had tacitly accepted for over two decades.").

Furthermore, the Third Circuit stated that this evidence of consistently rewarding Brewer, despite behavior that later was deemed unacceptable directly discredited Quaker State's nonsales-related reasons for firing him.

In addition to the evidence of good sales performance, positive evaluations and Brewer's own testimony regarding the extent of the criticisms, Brewer alleged that certain statements made by Quaker State's CEO, as well as the personnel manager, evidenced pretext. Ezold, 72 F.3d at 333. First, the personnel manager, Wanda Weaver, wrote a memorandum to Pfau summarizing Brewer's performance for the last 15 years, and noted that "Judd is 53 years old, which presents another problem." Ezold, 72 F.3d at 333. The Third Circuit determined that this statement could be interpreted by a factfinder in two ways, thus the evidence was probative of discrimination.

Next, Brewer produced evidence that in March 1990, Jack Corn, CEO of Quaker State, discussed two new executives in the company newsletter. Ezold, 72 F.3d at 333. He stated that the mid-40s group "was the age group [of the] future." Ezold, 72 F.3d at 333. The Third Circuit recognized that this statement was "a stray remark" made by a nondecision-maker, made almost two years prior to Brewer's termination. Ezold, 72 F.3d at 333. Despite this fact, however, the court determined that Corn's statement "may provide some relevant evidence of discrimination." Ezold, 72 F.3d at 333. (noting that statement should not be given signifi-
Judge Roth wrote a strong dissenting opinion which focused on the issue of whether Brewer's evidence of good performance evaluations and sales bonuses met the summary judgment standard articulated in *Fuentes*. Judge Roth concluded that the district court correctly found that the specific reasons provided were an adequate basis for discharge, despite Brewer's acknowledged sales record. Specifically, Judge Roth found that Brewer did not cast substantial doubt upon Quaker State's proffered reasons because he did not allege that the reasons given by Quaker State were untrue.

In support of this contention, the dissent evaluated the strength of Brewer's evidence in light of Quaker State's contentions that Brewer failed to maintain adequate supplies for his clients or complete paperwork in a timely fashion. The dissent illustrated that it is not inconsistent or implausible to fire a good salesman for nonsales-related reasons. In addition, the dissent pointed to several cases, including *Turner* and *Healy*, for the concept that evidence of overall good performance will not alone raise an inference of discrimination.

The dissent strengthened its reasoning by distinguishing *Waldron v. S.L. Industries, Inc.* and *Sempier v. Johnson & Higgins*, three cases in which employees survived summary judgment by relying on evidence of good performance to show pretext. Brewer, 72 F.3d at 337 (Roth, J. dissenting). Judge Roth explained that in the trio of cases above, the employers relied on poor performance as a reason for termination.
The dissent recognized that at some level, discharging an effective employee may seem inherently contradictory. Further, the dissent conceded that a foolish decision can render the proffered reason weak, inconsistent or improbable. The dissent found, however, that Quaker State was not foolish to fire a good salesperson who failed to meet his customer's needs and consistently neglected his duties.

Next, the dissent attacked the majority's assertion of a contradiction in Brewer's termination and the company's recognition that sales performance was a critical area in evaluating a salesperson. The dissent explained that despite the importance of a salesperson's job, unless sales performance was the sole basis for employment decisions, it was not contradictory to fire a salesperson for causes unrelated to his sales expertise. The dissent concluded that the proper inquiry was whether Brewer's good sales performance was inconsistent with his reasons for termination. Finding that no contradiction was present, Judge Roth concluded that the employer's actions did not raise the inference of pretext.

explained: "Had Quaker State relied on poor sales performance as its reason for discharge, I would confidently join the majority in finding that reason rebutted and hence a reasonable inference of pretext." Id. (Roth, J., dissenting). In Brewer's case, Quaker State terminated him because of specific failures and omissions rather than generally inadequate performance. Id. (Roth, J., dissenting).

190. Brewer, 72 F.3d at 337 (Roth, J., dissenting).
191. Id. (Roth, J., dissenting). The dissent cited Fuentes, in which the Third Circuit stated that "a decision foolish, imprudent, or incompetent by comparison to the employer's usual mode of operation can render it implausible, inconsistent, or weak." Id. (Roth, J., dissenting) (quoting Fuentes v. Perskie, 32 F.3d 759, 765 n.8 (3d Cir. 1994)).
192. Id. at 338 (Roth, J., dissenting).
193. Id. (Roth, J., dissenting). In discounting the existence of any contradiction, Judge Roth explained that "Proposition A, that Brewer was fired despite good sales figures, simply does not contradict Proposition B, that sales volume is 'extremely important in evaluating a salesperson.'" Id. (Roth, J., dissenting).
194. Id. at 335 (Roth J., dissenting). The dissent criticized the majority's use of descriptive terms such as "extremely important" and the "best simple measure," because while they show that sales volume was one very important factor to the company, they do not show that sales volume is the only important factor to the company. Id. (Roth J., dissenting). The dissent claimed that "absent this final alternative, Brewer could have had more than acceptable sales numbers and still be fired for cause without contradiction." Id.
195. Id. (Roth, J., dissenting).
196. Id. at 339 (Roth, J., dissenting). Judge Roth criticized the majority for adopting the posture of a "super-personnel department" in holding that job performance cannot and should not be categorized, but instead should be evaluated overall. Id. (Roth J., dissenting). The dissent found that a salesperson's job is easily segregated into the sales role and into the clerical role and that selling is not the only thing that the job of a salesperson entails. Id. (Roth J., dissenting). The dissent explained: [The majority] attempt[ed] to establish a general ideal of "performing the job" such that any contrary reason given by the employer conflicts with that ideal. . . . The majority defines the essence of a sales position and evaluates Brewer's performance against that standard. I would save
IV. A LOOK AHEAD: Plaintiff's Burden at Summary Judgment in the Third Circuit

A. Third Circuit Culture

Because each discrimination case presents unique factual situations, predicting the outcome of each case remains difficult. Nonetheless, the Third Circuit's application of *Hicks* to motions for summary judgment provides some guidance to attorneys practicing within the Third Circuit. Despite fears concerning the negative impact that *Hicks* would have on plaintiffs, the Third Circuit's application of *Hicks* to pretrial dispositive motions favors employees. Moreover, recent precedent in the Third Circuit indicates that the court will be less likely to grant a defendant's motion for summary judgment. Inevitably, the Third Circuit's application of this court the task of redefining Brewer's job description to include only those requirements that he could meet.

*Id.* (Roth, J., dissenting).

197. See *Healy v. New York Life Ins. Co.*, 860 F.2d 1209, 1214 (3d Cir. 1988) ("We note preliminarily that each ADEA case must be judged on its own facts."); see also Gregory C. Parlman & Jonathan E. Hill, *Third Circuit Law on Summary Judgment in the Area of Employment Discrimination*, 20 Seton Hall L. Rev. 786, 787 (1990) (assessing tendency of Third Circuit to grant summary judgment after Supreme Court's trilogy of summary judgment cases favoring liberal use of summary judgment). The commentators observed that: "Third Circuit courts have not been uniform in their application of the Supreme Court's more receptive attitude toward the use of summary judgment under Rule 56 of the Federal Rules of Civil Procedure." *Id.*

198. For a discussion of the reaction by courts and commentators to the *Hicks* decision, see *supra* note 61-196 and accompanying text.

199. See *Struggle with Summary Judgment*, *supra* note 68, at 367 (remarks of United States District Court Judge Joseph E. Irenas) (noting that courts are split on issue of level of proof needed for plaintiff to survive summary judgment, but Third Circuit's approach favors plaintiffs).

200. For a discussion of Third Circuit precedent indicating the court's trend to disfavor granting a defendant's summary judgment motion, see *supra* notes 151-68 and accompanying text. For a detailed discussion of the Third Circuit's tendency to grant summary judgment to employers prior to *Hicks*, see generally Parlman & Hill, *supra* note 197, at 803 (concluding that in cases involving high-level executives, Third Circuit is more inclined to grant defendant's motions for summary judgment, but in other instances, Third Circuit applies more stringent summary judgment standard and permits summary judgment only in limited circumstances); see also Samuel Issacharoff & George Loewenstein, *Second Thoughts About Summary Judgment*, 100 Yale L.J. 73 (1990) (assessing lower court's interpretation of trilogy of Supreme Court cases enunciating liberal summary judgment standard).

The Third Circuit's approach after *Hicks* allows cases to go to trial more readily because of the recognition that resolution of issues of fact are for the factfinder, not the judge. *See, e.g.*, Sheridan v. E.I. DuPont de Nemours & Co., 100 F.3d 1061, 1071 (3d Cir. 1996) ("The role of determining whether the inference of discrimination is warranted must remain with the province of the jury, because a finding of discrimination is at bottom a determination of intent."); Brewer v. Quaker State Oil Ref. Co., 72 F.3d 326, 351 (3d Cir. 1995) ("On summary judgment, it is not the court's role to weigh the disputed evidence and decide which is more probative."); Sempier v. Johnson & Higgins, 45 F.3d 724, 731 (3d Cir. 1995) (same).
tion of *Hicks* to motions for summary judgment provides advantages to plaintiffs in two ways: (1) by adopting the "pretext-only" standard and (2) by allowing plaintiffs to argue based on *Brewer* that they met the "pretext only" standard with the presentation of indirect evidence.201

**B. Analysis of the Third Circuit's Reasoning**

The Third Circuit's analysis on both issues presented in this Casebrief is sound. First, the Third Circuit's "pretext-only" position is consistent with *Hicks*.202 Because *Hicks* recognized that a factfinder is entitled to infer discrimination from the plaintiff's proof of a prima facie case and a showing of pretext without anything more, there will always be a genuine issue of material fact as to the employer's motivation.203 Thus, once the plaintiff satisfies this threshold burden, summary judgment on behalf of the defendant would be improper.

In addition, the Third Circuit's approach in *Brewer* as to the quantum of evidence necessary to establish pretext is consistent with *Fuentes*204 and *Hicks*.205 In *Fuentes*, the Third Circuit explicitly stated that to avoid summary judgment, the plaintiff must produce evidence that would allow a factfinder to find that the employer's reasons were either a lie or otherwise did not motivate the employment action.206 Thus, the *Fuentes* court's use of the disjunctive allowed the *Brewer* court to recognize that disproving the existence or truth of the employer's asserted reason is one method, but not the exclusive way, that a plaintiff can show that the employer was motivated by discrimination rather than the proffered nondiscriminatory rea-
The majority opinion in Brewer made the distinction between proving that the employer is lying about the existence or truth of the proffered reason and proving that the employer is lying about the fact it relied on that reason in making an adverse employment decision. While evidence of the former may serve to establish the latter, Fuentes stated that the latter is the true inquiry in pretext employment discrimination cases.

C. Practice Pointers

Brewer provides good precedent for plaintiff’s attorneys because the Third Circuit recognized that while Fuentes requires plaintiffs to demonstrate weaknesses, inconsistencies or contradictions in the defendant’s proffered reasons, plaintiffs can meet their burden indirectly by introducing evidence independent from the employer’s articulated reasons for discharge. Under Brewer, the plaintiff is not required to specifically rebut the existence or truth of the employer’s proffered reasons in order to survive summary judgment, provided other evidence casts doubt upon the veracity of the employer. Thus, a plaintiff’s lawyer can utilize Brewer to argue that summary judgment is improper, even if the truth or existence of the employer’s proffered reasons is not disputed.

Despite the pro-plaintiff slant provided by recent Third Circuit precedent, defense attorneys are not foreclosed from attaining summary judgment under the proper circumstances. Fuentes clarified that in order to...

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207. See Brewer v. Quaker State Oil Ref. Corp., 72 F.3d 326, 331 (3d Cir. 1996) (stating that plaintiff also may survive summary judgment by producing “some evidence, direct or circumstantial, from which a factfinder could reasonably . . . believe that an invidious discriminatory reason was more likely than not a motivating or determinative cause of the employer’s action.”) (citing Fuentes, 32 F.3d at 763-64).

208. Id.

209. Fuentes, 32 F.3d at 763-64. For a discussion of Fuentes, see supra notes 81-86, 162-68 and accompanying text.

210. See id. (holding that to defeat a motion for summary judgment, plaintiff may either “[discredit] the proffered reasons, either circumstantially or directly, or [adduce] evidence, whether circumstantial or direct, that discrimination was more likely than not a motivating or determinative cause of the adverse employment action.”).

211. Id. (noting plaintiff must demonstrate that reasonable factfinder could rationally find employer’s proffered reasons “unworthy of credence”).

212. Plaintiff’s lawyers can also use other Third Circuit precedent espousing this view. For a discussion of this precedent, see supra notes 151-68 and accompanying text.

213. See Fuentes, 32 F.3d at 765 (noting that summary judgment standard “places a difficult burden on the plaintiff”); Shannon P. Duffy, U.S. Courts in Pa. Willing to Dismiss Age Cases; Plaintiffs Must Rebut Employer’s Stated Reason for Termination, LEGAL INTELLIGENCER, Feb. 26, 1996, at S5 (noting that many cases survive summary judgment motions and further that “when plaintiffs are required to point to evidence of ‘pretext,’ they have a significant burden that sometimes cannot be overcome”).

In Fuentes, the Third Circuit rejected the position that a defendant is never entitled to summary judgment in employment discrimination cases. See Fuentes, 32
survive summary judgment, the plaintiff is required to produce something more than proof that the proffered reason is wrong.\textsuperscript{214} \textit{Fuentes} required plaintiffs to present evidence that casts doubt upon the truthfulness, rather than the accuracy or wisdom, of the proffered reasons.\textsuperscript{215} Thus, \textit{Fuentes} does not foreclose the employer's attorney from attaining summary judgment when arguing that the plaintiff's evidence does not tend to show the employer's untruthfulness, but instead demonstrates nothing more than incorrectness in the employer's overall judgment of the plaintiff's capabilities.

V. CONCLUSION

Congress enacted federal anti-discrimination legislation in order to eliminate arbitrary discrimination in the workplace.\textsuperscript{216} In the eyes of some commentators and lawmakers, the recent Supreme Court decision in \textit{Hicks} eviscerated this laudable goal.\textsuperscript{217} In the wake of \textit{Hicks}, the Third Circuit revived the "pretext-only" standard at summary judgment and struck the proper balance between Congress's ban against discrimination in employment and employers' concerns regarding speculative claims.\textsuperscript{218}

\textit{Alison M. Donahue}

\textsuperscript{214} See \textit{Struggle with Summary Judgment}, supra note 68, at 367 (remarks of Judge Joseph E. Irenas) (stating that \textit{Fuentes} "was still trying to carve out some area between having just proof that the proffered reason is wrong and requiring direct proof of discriminatory animus."). For a discussion of \textit{Fuentes}, see supra notes 81-86, 162-68 and accompanying text.

Judge Irenas further noted that the Third Circuit rejected the position that summary judgment is never an appropriate adjudicatory tool in employment discrimination cases. \textit{Struggle with Summary Judgment}, supra note 68, at 367.

\textsuperscript{215} \textit{Struggle with Summary Judgment}, supra note 68, at 367 (remarks of Judge Joseph E. Irenas).

\textsuperscript{216} For a discussion of the purpose of the ADEA and Title VII, see \textit{supra} notes 2-3.

\textsuperscript{217} For a discussion of the criticism surrounding the \textit{Hicks} decision, see \textit{supra} notes 12-15.

\textsuperscript{218} See \textit{Fuentes}, 92 F.3d at 764 (noting that Third Circuit standard lies between two extreme positions). \textit{But see} \textit{Duley}, supra note 8, at 297 (noting that "pre-
text-plus” rule at summary judgment “allows summary judgment to eliminate purely speculative claims and gives the substantive law substance”).