JURIES WILL DECIDE MORE DISCRIMINATION CASES: AN EXAMINATION OF *REEVES V. SANDERSON PLUMBING PRODUCTS, INC.*

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INTRODUCTION

More employment discrimination cases are going to be decided by juries—at least this should be the effect of the Supreme Court's decision in *Reeves v. Sanderson Plumbing Products*[1] and its 1993 decision in *St. Mary's Honor Center v. Hicks*.[2] The rulings, if faithfully executed by lower courts, discourage judges from discounting plaintiffs' evidence of discrimination and dismissing discrimination cases. The Supreme Court effectively announced this change in *Hicks*, but because *Hicks* was technically a victory for the defendant, many commentators took the view that the decision tilted the judicial scales in discrimination cases in favor of employers accused of discrimination.[3]

As it turns out, *Hicks* was a pyrrhic victory for defendants. *Hicks* appeared to favor employers because the Court held that a plaintiff must do more than offer proof that an employer lied about the reason for an allegedly discriminatory employment decision in order to win a discrimination case.[4] This sounds simple enough, but the standard has proven difficult to apply. Evidence of an employer's inaccurate explanation regarding an employment decision is commonly referred to as pretext evidence, and the federal courts have struggled for years to determine when pretext evidence is sufficient to support a plaintiff's verdict. In *Reeves*, the Court unanimously held that discrimination cases should ordinarily go to a jury when there is evidence an employer offered an inaccurate explanation of its actions.[5] As most courts and commentators have now recognized, this decision is really the flip side of the Court's last visit with this issue in *Hicks*.

Before a jury is the last place employers want to be. Although there is scant firm evidence to cite, it is clearly a widely held belief that juries are far more sympathetic to plaintiffs than to defendants in employment dis-

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1. Reeves v. Sanderson Plumbing Prod., Inc., 530 U.S. 133 (2000).

2. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993).

3. Throughout this Article, employers will be referred to with the assumption they are defendants in a discrimination case. Conversely, "employee" will often be used as a substitute for "plaintiff."

4. *Infra* note 128-34 and accompanying text.

5. *See Reeves*, 530 U.S. at 148.

crimination cases.[6] It is no exaggeration to suggest that, prior to *Reeves*, the two most important tools for a defendant in an employment discrimination suit were summary judgment and judgment as a matter of law.[7] This is because employers could usually offer legitimate non-discriminatory reasons for adverse employment actions.[8] Even in those cases where the plaintiff could offer some evidence the reason was untrue, the plaintiff often did not have sufficient evidence that the non-discriminatory reason offered was a lie specifically intended to cover discrimination. Therefore, employers were often successful on motion for summary judgment.[9] Now the Court has made clear that if a plaintiff has some evidence that a proffered reason for the employment action is untrue, a jury will normally decide the case.

A leading treatise has suggested that the *Reeves* decision "squarely addressed" existing doubts about evidence of pretext.[10] Many academic commentators, however, have suggested that the aftermath of *Reeves* may be more complex.[11] A few have gone so far as to suggest that *Reeves* is

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6. This observation is drawn primarily from my own experience of practicing employment litigation for ten years and from my interaction with the labor and employment bar. There is at least one survey that shows plaintiffs do prevail more often in front of juries. JAMES N. DERTOUZOS ET AL., THE LEGAL AND ECONOMIC CONSEQUENCES OF EMPLOYMENT AT WILL, at vii (1988), *cited (and criticized) in* Deborah C. Malamud, *The Last Minuet: Disparate Treatment After Hicks*, 93 MICH. L. REV. 2229, 2257 n.96 (1995). Also, there is quite a bit of commentary on the importance defendants place on obtaining summary judgment. *See, e.g., Id.* at 2276 ("Summary judgment is an increasingly important tool for disparate treatment defendants."); Frank J. Cavaliere, *The Recent Respectability of Summary Judgment and Directed Verdicts in Intentional Age Discrimination Cases: ADEA Case Analysis Through the Supreme Court's Summary Judgment Prism*, 41 CLEV. ST. L. REV. 103, 104 (1993); Thomas J. Piskorski, *The Growing Judicial Acceptance of Summary Judgment in Age Discrimination Cases*, 18 EMP. REL. L.J. 245, 254 (1992). *See also* Visser v. Packer Eng'g Assocs., 924 F.2d 655, 661 (7th Cir. 1991) (Flaum, J., dissenting) ("[J]urors find it difficult to close their hearts to the plight of the terminated older employee but easy to open the purse strings of his employer.").

7. *See* MERRICK T. ROSSEIN, EMPLOYMENT DISCRIMINATION LAW AND LITIGATION §§ 14.9, 18.4[6] (20th prtg. 2000). *See also* Wallace v. SMC Pneumatics, Inc., 103 F.3d 1394, 1396 (7th Cir. 1997) ("Summary judgment is hardly unknown, or for that matter rare in employment discrimination cases, more than 90 percent of which are resolved before trial, . . . many of them on the basis of summary judgment for the defendant."); DERTOUZOS, *supra* note 6 (noting that most plaintiffs' cases do not make it to a jury).

8. *See, e.g.*, Catherine J. Lanctot, *The Defendant Lies And The Plaintiff Loses: The Fallacy Of the "Pretext-Plus" Rule In Employment Discrimination Cases*, 43 HASTINGS L.J. 57, 137 (1991) (noting that defendants will seldom be unable to offer a non-discriminatory reason for their actions).

9. *See* EDWARD J. BRUNET, MARTIN H. REDISH, & MICHAEL A. REITER, SUMMARY JUDGMENT, FEDERAL LAW & PRACTICE 299-302 (2d ed. 2000) (suggesting, pre-*Reeves*, that the "context of many civil rights claims will be especially hospitable to a defendant's motion for summary judgment" and discussing the effect of the "substantive burden-shifting analysis").

10. BARBARA LINDEMANN & PAUL GROSSMAN, 2000 CUMULATIVE SUPPLEMENT TO EMPLOYMENT DISCRIMINATION LAW 32 (Phillip J. Pfeiffer ed., 2001). *See also* Ann C. McGinley, *¡Viva la Evolucion! Recognizing Unconscious Motive in Title VII*, 9 CORNELL J. L. & PUB. POL'Y 415, 463 (2000) (criticizing *Reeves* but nevertheless calling it "an extremely important case" that "reaffirms the vitality of the indirect method of proof").

11. *See* Catherine J. Lanctot, *Secrets and Lies: The Need for a Definitive Rule of Law in Pretext Cases*, 61 LA. L. REV. 539, 544-46 (2001) (suggesting that *Reeves* creates a "cryptic loophole" and that

hopelessly ambiguous and in need of immediate clarification.[12] While it is true that *Reeves* does not lend itself to summarization in a simple, categorical rule of law, this Article proceeds from the assumption that a unanimous Supreme Court opinion should not, and in fact cannot, be hastily cast aside.

Perhaps the most notable element of the academic commentary is that many authors harbor extreme skepticism about the way some judges treat plaintiffs' evidence in discrimination cases.[13] It is unquestionably true that some courts have used special evidentiary rules to discount the value of plaintiffs' evidence of discrimination, just as the appeals court did in *Reeves*.[14] Thus, while *Hicks* and *Reeves* have largely succeeded in articulating a general standard for evaluating pretext evidence, the actual treatment of pretext evidence still varies greatly among circuits, and among panels within the circuits. The traditional analysis of disparate treatment cases has been based on labels intended to characterize the circuit courts' treatment of pretext evidence. "Pretext-plus" and "pretext-only" have been the most commonly used. A primary purpose of this Article is to consider whether those labels are obsolete, and to suggest that the labels may actually obscure the real lessons of *Reeves*.

This Article will also seek to summarize the older cases and scholarship, to compile a current bibliographic resource for practitioners, and to provide a preliminary assessment of federal case law reacting to the *Reeves* decision. Part I briefly reviews the general standards for summary judgment and judgment as a matter of law. Part II describes the development of the framework federal courts use to analyze employment discrimination claims, and Part III examines the divergence of the circuit courts prior to the Supreme

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"courts will exploit any loopholes provided by the Supreme Court to dismiss what they consider to be unmeritorious discrimination suits"); Trevor K. Ross, Case Note, *Reeves v. Sanderson Plumbing Products: Stemming the Tide of Motions for Summary Judgment and Motions for Judgment as a Matter of Law*, 52 MERCER L. REV. 1549, 1566 (2001) (suggesting that the holding of *Reeves* is clear, but "courts accustomed to routinely granting summary judgment since the Supreme Court's trilogy on the subject may resist wholehearted or immediate implementation" (referring to the *Celotex* trilogy, discussed *infra* Part I)).

12. David J. Turek, Comment, *Affirming Ambiguity:* Reeves v. Sanderson Plumbing Products, Inc. *and the Burden-shifting Framework of Disparate Treatment Cases*, 85 MARQ. L. REV. 283, 285, 301 (2001) (suggesting that "the practical effect of *Reeves* has been negligible because the case simply affirms the split that existed between the circuits after *Hicks*"); Ryan Vantrease, Note, *The Aftermath of* St. Mary's Honor Center v. Hicks *and* Reeves v. Sanderson Plumbing Products, Inc.*: A Call for Clarification*, 39 BRANDEIS L.J. 747, 768-71 (2001) (finding the *Reeves* holding ambiguous and calling on the Supreme Court to "review and revise its holding in *Hicks* and *Reeves*").

13. *See* Leland Ware, *Inferring Intent from Proof of Pretext: Resolving the the Summary Judgment Confusion in Employment Discrimination Cases Alleging Disparate Treatment*, 4 EMP. RIGHTS & POLICY J. 37, 63 (2000) (suggesting that *Reeves* "does not address the underlying problem—the reluctance and doubt that greet claims asserted by civil rights plaintiffs"); Lanctot, *supra* note 10, at 546 (noting the "antipathy of lower courts to circumstantial proof of disparate treatment claims").

14. Reeves v. Sanderson Plumbing Prod., Inc., 197 F.3d 688, 693-94 (5th Cir. 1999). *See also infra* notes 265-69 and accompanying text.

Court's decision in *Hicks*. Parts IV and V discuss the *Hicks* decision and consider the subsequent reactions of the circuit courts of appeal. Part VI examines the *Reeves* decision in more detail, and Part VII assesses the impact of *Reeves* and *Hicks* on motions for judgment as a matter of law in recent employment discrimination cases.

I. THE SIGNIFICANCE OF JUDGMENT AS A MATTER OF LAW

Arguably the most important battle in a discrimination case revolves around whether the case should be decided as a matter of law or fact. In an employment case, the defendant desperately wants judgment as a matter of law so it can avoid the fact-finder, especially the feared jury. The plaintiff, obviously, must survive the motion for judgment to get to the jury. As stated above, it is commonly assumed that a jury tends to sympathize with the plaintiff. Whether this belief is well founded or not is debatable, but what cannot be denied is that defendants in discrimination cases place great emphasis on it and often assume that if the case goes to a jury, the question is how much they will lose, not whether. Therefore, much of a defendant's efforts are directed toward getting the case decided as a matter of law. A court is entitled to grant judgment as a matter of law at several points in a case's life. When it happens, it usually occurs before trial when the court awards summary judgment. A court may also grant judgment as a matter of law (commonly called JMOL) after a plaintiff presents his case or after a jury returns a verdict. The standards are the same no matter when the court considers the question.[15]

A motion for summary judgment asks the court to grant judgment to either plaintiff or defendant as a matter of law when there is "no genuine issue as to any material fact."[16] Despite its current prevalence, a summary judgment motion was not always such a powerful option for employers.[17] Prior to three landmark cases decided by the Supreme court in 1986, *Celotex v. Catrett*,[18] *Anderson v. Liberty Lobby*,[19] and *Matsushita Electric v. Zenith Radio Corp.*,[20] summary judgment was a difficult motion to press upon a court. Most courts were inclined to send issues to the jury and reluctant to decide any issue of

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15. *See, e.g., Reeves*, 530 U.S. at 149-51 (discussing the standards for judgment as a matter of law, particularly in employment cases).

16. FED. R. CIV. P. 56.

17. William L. Kandel, *Rule 56 After* Celotex *and* Liberty Lobby: *The Increased Availability of Summary Judgment*, 12 EMP. REL. L.J. 491, 491-92 (1986-87).

18. Celotex v. Catrett, 477 U.S. 317 (1986).

19. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).

20. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986).

potentially material fact.[21] This was especially true for claims, including employment discrimination, that involved "nebulous questions of motivation and intent."[22] After the "*Celotex* trilogy" more defendants in employment discrimination cases began receiving judgment as a matter of law, preventing their cases from reaching a jury.[23] Roughly six years later, by the time of *Hicks,* the tables had turned in the employer's favor in many jurisdictions.[24]

Like a motion for summary judgment, judgment as a matter of law circumvents the normal order of a case.[25] Usually after both parties have been heard, the court will consider and evaluate all the evidence presented and make a factual determination. If a plaintiff seeks legal rather than equitable remedies, factual determinations are made by a jury rather than a judge in almost every discrimination case where a plaintiff has requested a jury trial.[26] With a judgment as a matter of law, on the other hand, a court is entitled to grant a motion effectively ending the case any time after the plaintiff has finished presenting evidence. If the employer is unable to obtain a summary judgment before the trial begins, the employer can make a motion for judgment as a matter of law immediately after the plaintiff presents her case, after the defense presents theirs, or even after the jury returns a verdict.

As with summary judgment, when a court considers a motion for judgment as a matter of law it is supposed to use a standard weighted against the party asking for the judgment. The basic maxim is that the court must view *all* the evidence presented in the light most favorable to the non-moving party.[27] The court may not draw its own conclusions as to the persuasiveness of the evidence, and all reasonable inferences from the evidence must be drawn in favor of the non-moving party.[28] Finally, the court must disregard any evidence favorable to the moving party that the jury is not required to believe.[29]

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21. WILLIAM W. SCHWARZER ET AL., THE ANALYSIS AND DECISION OF SUMMARY JUDGMENT MOTIONS: A MONOGRAPH ON RULE 56 OF THE FEDERAL RULES OF CIVIL PROCEDURE 3-9 (1991).

22. Thornbrough v. Columbus and Greenville R.R., 760 F.2d 633, 640 (5th Cir. 1985). *See also* Lanctot, *supra* note 8, at 66 n.31.

23. Jeffery A. Van Detta & Dan R. Gallipeau, *Judges and Juries: Why are So Many ADA Plaintiffs Losing Summary Judgment Motions, and Would They Fare Better Before a Jury? A Response to Professor Colker*, 19 REV. LITIG. 505, 510 n.9 (2000).

24. *See* Ann C. McGinley, *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 B.C. L. REV. 203 (1993).

25. FED. R. CIV. P. 50.

26. *See* BARBARA LINDEMANN & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 976, 1469-70, 1839-40 (Paul W. Cane, Jr. ed., 1996).

27. FED. R. CIV. P. 50. *See also Reeves*, 530 U.S. at 149-51.

28. *Reeves*, 530 U.S. at 150.

29. *Id.* at 151.

II. THE DEVELOPING BURDENS OF PROOF AND PRODUCTION IN DISCRIMINATION CASES

Most discrimination cases lack a smoking gun.[30] There is seldom direct evidence that an employer intentionally discriminated by, for example, stating "we don't want blacks working here." Cases that contain direct evidence of discrimination do not pose the same procedural challenges to the court as circumstantial evidence cases.[31] With direct evidence the plaintiff proves at least a prima facie discrimination case, which means the employer must refute the evidence, raise a viable defense, or lose.[32] By contrast, most discrimination cases are decided based on indirect, *i.e.*, circumstantial, evidence of discrimination.[33] It is for these cases that the Supreme Court, in *McDonnell Douglas v. Green* and its progeny, developed what has become the primary scheme of proof used in employment discrimination cases.[34]

A. McDonnell Douglas Corp. v. Green

McDonnell Douglas arose after the company laid Green off and then refused to rehire him. Following the layoff, Green and civil rights groups protested McDonnell Douglas. These protests included illegal efforts to prevent anyone from entering the workplace by blocking entrance roads and

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30. *See* U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 716 (1983) (noting that direct discrimination cases are unusual); Louis 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, 130-31 (1994); Susan J. Schleck, Note, *Title VII—Burden of Proof—Employee Has Ultimate Burden of Proof in a Title VII Case to Show Discriminatory Intent Even if Employer's Reasons For Dismissal are Pretextual*—St. Mary's Honor Center v. Hicks, 25 SETON HALL L. REV. 696, 698 (1994) (citing *Aikens*, 460 U.S. at 716, and Miguel Angel Mendez, *Presumptions of Discriminatory Motive in Title VII Disparate Treatment Cases*, 32 STAN. L. REV. 1129, 1130 (1980)).

31. LINDEMANN & GROSSMAN, *supra* note 26, at 39-40.

32. *See id.* at 40-41. *Cf.* Price Waterhouse v. Hopkins, 490 U.S. 228, 271 (1989) ("[T]he entire purpose of the *McDonnell Douglas* prima facie case is to compensate for the fact that direct evidence of discrimination is hard to come by. That the employer's burden in rebutting such an inferential case of discrimination is only one of production does not mean that the scales should be weighted in the same manner where there *is* direct evidence of intentional discrimination.").

33. This Article will limit discussion of discrimination cases to disparate treatment cases. Disparate treatment cases are those in which the plaintiff alleges he or she is treated differently because of such things as race, religion, color, sex or national origin. Such cases require proof of discriminatory intent. John F. Smith III, *Employer Defenses in Employment Discrimination Litigation: A Reassessment of Burdens of Proof and Substantive Standards Following Texas Department of Community Affairs v. Burdine*, 55 TEMP. L.Q. 372, n.3 (1982). This Article will not discuss disparate impact cases. These cases involve facially neutral policies or practices that have a discriminatory effect. Such cases do not require a showing of discriminatory intent. *Id.*

34. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

attempting to chain entrances shut.[35] Green alleged that McDonnell Douglas' decision not to rehire him was because of his race. However, there was no direct evidence that McDonnell Douglas refused to rehire Green because of his race. The Supreme Court accepted the case and used its decision to establish rules to govern the scheme of proof in circumstantial discrimination cases.[36] The Supreme Court set up a three-part scheme for presenting proof of discrimination claims.[37] Under the first step, a plaintiff must show evidence to support each element of a prima facie case.[38] A common prima facie case (and the one used in *McDonnell Douglas*) requires evidence that: (1) plaintiff was a member of the protected class; (2) that he sought and was qualified for the job in question; (3) he was rejected: and (4) the position remained open or was filled by someone outside the protected class.[39] The Court held that Green met his burden of showing evidence to support each element of the prima facie case.[40]

Once the plaintiff establishes the prima facie case, an inference arises in his favor that discrimination has occurred. The reason for this presumption is straightforward. The Supreme Court has noted that people usually act in a rational manner—particularly in the business setting.[41] If legitimate reasons for not hiring an applicant are eliminated then it may be concluded that the true reason was discriminatory (at least absent further explanation).[42]

Once the prima facie case is established, the burden shifts to the employer under the second part of the test. The employer must articulate a legitimate and non-discriminatory reason for the action it took.[43] In *McDonnell Douglas*, the employer's burden was met when the company explained that Green was

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35. *McDonnell Douglas*, 411 U.S. at 794-96.

36. *Id.* at 800-07.

37. *Id.* at 802-04. Although courts and scholars have often used "scheme of proof" and "test" interchangeably in describing the *McDonnell Douglas* framework, the Court in *McDonnell Douglas* used neither term. Imprecise description of the standard may have helped perpetuate ambiguity by suggesting different ways of applying *McDonnell Douglas*. "Scheme of proof" arguably comes closer to describing the intended effect of the three-part shifting of presumptions. *See* Texas Dept. of Cmty. Affairs v. Burdine, 450 U.S. 248, 255 n.8 (1981) (suggesting that the *McDonnell-Douglas* scheme "is intended progressively to sharpen the inquiry into the elusive factual question of intentional discrimination"); *Aikens*, 460 U.S. at 716 (citing *Burdine* and holding that the *McDonnell Douglas* framework is intended to govern presentation of proof, not finding of fact). On the other hand, the term "test" implies active evaluation of the evidence. The Supreme Court's decisions have sometimes indicated that the *McDonnell Douglas* framework is a "way to evaluate the evidence," *see, e.g.*, Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978), but *Reeves* has made clear that evaluation in the sense of weighing or testing the evidence is the exclusive province of the fact-finder. *Reeves*, 530 U.S. at 153.

38. *McDonnell Douglas*, 411 U.S. at 802.

39. *Id.*

40. *Id.*

41. *Furnco*, 438 U.S. at 577.

42. *Id.*

43. *McDonnell Douglas*, 411 U.S. at 802.

rejected because of his participation in an illegal demonstration.[44] Once the non-discriminatory reason is set forth, the employer has rebutted the prima facie case. Under the third part of the *McDonnell Douglas* scheme the plaintiff, in order to prevail, must then show evidence that the employer's offered reason for the action was merely a pretext for discrimination.[45] Because Green was not given the opportunity to make this showing to the trial court, the Court remanded the case to give him this chance.[46]

B. Furnco Construction v. Waters

The next significant case in which the Court addressed the *McDonnell Douglas* scheme of proof was *Furnco Construction v. Waters*.[47] In *Waters*, the employer was a company that manufactured oven bricks and hired employees on a job-by-job basis. It hired only the bricklayers it needed while a job lasted.[48] Furnco had a practice of hiring only bricklayers that its supervisors knew and did not usually take applications.[49] This practice resulted in Furnco refusing employment to a number of well-qualified black candidates who applied (including Waters).[50] The court of appeals held that Waters and his co-plaintiffs had established a prima facie case that Furnco failed to adequately rebut.[51] The court rejected Furnco's argument that white applicants fared no better than black applicants.[52] The court ruled that it was not enough that some whites might fare as badly as black applicants. Furnco's hiring practices must fairly consider the qualifications of minority applicants.[53]

On review, the Supreme Court agreed that the plaintiffs had made out a prima facie case by showing they were in the protected class, they applied for and were qualified for the jobs, despite their qualifications they were rejected, and the employer continued to seek applicants.[54] However, the Court held that the court of appeals had improperly placed an added burden on Furnco's obligation to refute the prima facie case. The Court held the employer is not required to show its non-discriminatory reason is the fairest one. It is only required to show that it *has* a non-discriminatory reason.[55] The court of

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44. *McDonnell Douglas*, 411 U.S. at 803.
45. *Id.* at 804-05.
46. *Id.* at 807.
47. Furnco Constr. Corp. v. Waters, 438 U.S. 567 (1978).
48. *Id.* at 569-570.
49. *Id.*
50. *See id.*
51. *Id.* at 573.
52. *Id.* at 574.
53. *Id.* at 576.
54. *Id.* at 575-76.
55. *Id.* at 577-78.

appeals did not have authority to dictate that Furnco use a non-discriminatory practice that would have enabled Furnco to consider and hire more minority candidates.[56] Therefore, the case was remanded for application of the proper standard. Of course, the Court reiterated, the plaintiffs would have the opportunity to demonstrate the proffered reason was pretext for discrimination.[57]

C. Texas Department of Community Affairs v. Burdine

In *Texas Department of Community Affairs v. Burdine*, the Court focused on the employer's burden in the second step.[58] Burdine worked for the Department as a field services coordinator. After her supervisor resigned, Burdine applied for his position.[59] The position would have been a promotion for her. However, the position remained open for several months after she applied. The Department eventually hired a male for the job, and Burdine was subsequently terminated when the Department reorganized.[60] She was eventually rehired and assigned to another division where she received benefits equal to those of the position she had been denied, but Burdine brought an action against the Department claiming she was denied the promotion and discharged because of her gender.

The Department denied it discriminated and explained that Burdine was terminated, along with other employees, in an effort to streamline its operations.[61] On review of the trial court's decision in favor of the Department, the Court of Appeals for the Fifth Circuit held that the Department failed to meet its burden of offering a non-discriminatory reason for its action in terminating Burdine. The court ruled that the Department had to do more than merely articulate a non-discriminatory reason for its action. It must prove, by a preponderance of the evidence, that its actions were not discriminatory.[62]

The Supreme Court reversed the decision of the court of appeals holding that the employer's burden was only to articulate a non-discriminatory reason. The employer, the Court held, was not required to prove that reason by a preponderance of the evidence.[63] In other words, the employer is not required to produce evidence sufficient to persuade the court. The second step, the

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56. *Furnco*, 438 U.S. at 578.
57. *Id.*
58. Texas Dept. of Cmty. Affairs v. Burdine, 450 U.S. 248 (1981).
59. *Id.* at 250.
60. *Id.* at 250-51.
61. *Id.* at 251.
62. *Id.* at 252.
63. *Id.* at 259-60.

Court explained, was merely a procedural step and was not intended to shift the plaintiff's overriding obligation to persuade the trier of fact that her employer discriminated against her.[64] However, the Court included some important language in the opinion that subsequently caused much misdirection by lower courts. Regarding what a plaintiff must do after a non-discriminatory reason is offered, the Court stated:

> The plaintiff retains the burden of persuasion. She now must have the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision. This burden now merges with the ultimate burden of persuading the court that she has been the victim of intentional discrimination. She may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer *or indirectly by showing that the employer's proffered explanation is unworthy of credence.*[65]

The "unworthy of credence" clause in this quotation was the basis for many courts' subsequent holdings that a plaintiff is entitled to judgment as a matter of law if the plaintiff shows the employer's proffered explanation is untrue. In other words, the court can decide there was discrimination as a matter of law and refuse to submit this question to the jury. As was subsequently shown, this was an incorrect interpretation. The clause does not have to be read as requiring a finding as a matter of law. It could just as easily be read to require only that the plaintiff is entitled to a factual finding that there was, or was not, discrimination, and many courts applied *Burdine* in exactly that way.[66] This issue is examined in more detail in Part III.A.

D. United States Postal Service v. Aikens

Two years after *Burdine*, the Court returned to the three-part scheme of proof. In *United States Postal Service v. Aikens,* a black postal worker filed suit claiming that he was denied promotions because of his race.[67] Aikens offered evidence that he was more qualified than white employees who got the promotions instead of him. In addition, he testified that his supervisor made

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64. *Burdine*, 450 U.S. at 256.

65. *Id.* (emphasis added).

66. *See infra*, notes 87-94. On the other hand, Justice Scalia in *St. Mary's Honor Center v. Hicks* found the "unworthy of credence" clause to be an anomaly, agreeing with the dissent that, taken out of context, "the words bear no other meaning but that the falsity of the employer's explanation is *alone enough* to compel judgment for the plaintiff." *Hicks*, 509 U.S. at 517.

67. United States Postal Serv. v. Aikens, 460 U.S. 711, 712 (1983).

disparaging remarks about blacks.[68] The Postal Service responded that Aikens did not have broad enough experience, and that he had refused transfers the Service offered him so he could obtain that experience.[69]

The Supreme Court reinforced its earlier holdings in *Burdine* and *McDonnell Douglas* that the plaintiff carried his initial burden by offering evidence to support each element of the prime facie case.[70] When this burden is met, a presumption arises in his favor that discrimination occurred. Thereafter, the burden shifts to the employer to offer a legitimate non-discriminatory reason for its actions. If the employer can do this, the presumption created by the prima facie case disappears and the court is faced with the obligation to determine if the plaintiff has carried his ultimate burden of proving discrimination.[71]

The Court felt that the lower courts erred in focusing too much on whether or not Aikens established the prima facie case. For example, the trial court was concerned over whether Aikens must show, as part of the prima facie case, that he was minimally qualified for the promotion or if he must show he was the most qualified.[72] The Supreme Court cautioned lower courts that they should not focus so much on the scheme of proof. That scheme, the Court held, was never intended to be a rigid or formalistic trap.[73] Instead, courts should focus on the ultimate question. If a defendant addresses the plaintiff's prima facie offering, it does not matter if plaintiff truly established a prima facie case because the presumption has disappeared and the court should move to the ultimate question.[74]

Reinforcing this notion, the Court noted in a footnote its view that Aikens' proof he was minimally qualified, with his other evidence, was enough to support a decision in his favor.[75] In other words, Aikens presented enough evidence to have his case decided on facts rather than as a matter of law. *Aikens* was a message to both plaintiffs and defendants that, as Justices Blackmun and Brennan stated in their concurrence, discrimination cases are no different from other civil cases.[76] In other words, neither party can rely on a formula to win judgment as a matter of law.

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68. *Aikens*, 460 U.S. at 713-14 n.2.

69. *Id.* at 715.

70. *Id.* at 714-15.

71. *Id.*

72. *Id.* at 713.

73. *Id.* at 715 ("The prima facie case method established in *McDonnell Douglas* was 'never intended to be rigid, mechanized, or ritualistic. Rather it is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination.'" (quoting *Furnco*, 438 U.S. at 577)).

74. *Aikens*, 460 U.S. at 715.

75. *Id.* at 713 n.2.

76. *Id.* at 718 (Blackmun and Brennan, JJ., concurring).

III. THE DIVERGENCE OF LOWER FEDERAL COURTS ON THE EFFECT OF PRETEXT EVIDENCE

Burdine, *Aiken*, *Furnco*, and a few other Supreme Court cases[77] effectively settled the issues surrounding the first and second steps of the three-part scheme of proof. That is, an inference of discrimination arose in favor of the plaintiff once the prima facie case had been shown. The inference disappeared once the employer offered a non-discriminatory reason. Also, the employer needed only *proffer* a non-discriminatory reason. The employer had no obligation to prove the efficacy or fairness of its reason. For those willing to look at the decisions with some scrutiny, the Court was trying to make clear that the three-part scheme was not a formalistic requirement. The steps were a way to marshal the case for the fact-finding phase, not a series of traps for either defendant or plaintiff. Despite the Court's efforts, however, the lower federal courts were deciding cases as a matter of law based on what happened when the parties reached the pretext stage of the *McDonnell Douglas* scheme.[78]

A. Pretext-Only

The question that presaged *Hicks* and *Reeves* was what to do if the plaintiff proved that the employer's offered non-discriminatory reason was untrue or a pretext for discrimination.[79] Should the plaintiff then win as a matter of law? Or should a jury be able to decide based solely on proof of pretext? Should the defendant win as a matter of law if the plaintiff shows pretext but cannot produce further evidence that the true reason was discriminatory? Some of the circuit courts took the approach that, if a plaintiff shows pretext, then either the plaintiff wins as a matter of law or the plaintiff is at least entitled to have the case decided by a jury. Both of these views have been called "pretext-only." In reality, the two views are quite different.

The first commentator to use the term "pretext-only" intended the term to mean the plaintiff could proceed to a jury after producing sufficient evidence to support a finding of pretext.[80] In other words, the defendant could

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77. *See, e.g.*, Johnson v. Transport. Agency Santa Clara Cty., Cal. 480 U.S. 616, 626 (1987); Cooper v. Fed. Reserve Bank of Richmond, 467 U.S. 867, 875 (1984).

78. Rappaport collects numerous examples. Rappaport, *supra* note 30 at 132-42 & nn.47-97.

79. Some courts and commentators have noted that the term "pretext" should imply more than mere untruth. *See, e.g.*, Lanctot, *supra* note 8, at 87 nn.99-01 (citing, among others, Pollard v. Rea Wire Magnet Co., 824 F.2d 557, 559 (7th Cir. 1987)).

80. For the origin of the terms pretext-only and pretext-plus see JuLyn M. McCarty & Michael J. Levy, *Focusing Title VII: The Supreme Court Continues The Battle Against Intentional Discrimination In St. Mary's Honor Center v. Hicks*, 14 HOFSTRA LAB. L.J. 177, 188 n. 94 (1996) (noting the term pretext-plus

not win on a motion for summary judgment even if the plaintiff had no proof beyond pretext. She did not use the term to mean the plaintiff wins as a matter of law without going to the jury. Many commentators writing on the subject after the *Hicks* decision have described pretext-only as meaning the plaintiff is entitled to judgment as a matter of law.[81] Other commentators have pointed out that the two pretext-only possibilities are worlds apart and should have distinctive terms. Case decisions that hold plaintiffs are entitled to win as a matter of law on proof of pretext have been called "pure pretext-only," a clarification that will be adopted here.[82] The view that the plaintiff can proceed to a jury, but cannot win as a matter of law, has been called "permissive pretext only,"[83] "permissive inference,"[84] and "pretext-maybe."[85] I will use the term pretext-permissive.

Many courts have been identified as pretext-only jurisdictions.[86] These circuits include the Second, Third, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, and the District of Columbia Courts of Appeal.[87] Because of the confusion over the term pretext-only, this has created the illusion that an overwhelming number of jurisdictions held that a plaintiff should win as a matter of law if the plaintiff proves pretext. This is patently incorrect and

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first appeared in Valdez v. Church's Fried Chicken, 683 F.Supp. 596, 631 (W.D. Tex. 1988) and that the term pretext-only first appeared in Lanctot, *supra* note 8, at 65-66).

81. *See, e.g.*, Michael J. Lambert, Comment, St. Mary's Honor Center v. Hicks: *The Pretext-Maybe Approach*, 29 NEW ENG. L. REV. 163, 171-72 (1994) ("[I]f a plaintiff disproves each of the defendant's explanations, the inference of discrimination arising from the plaintiff's prima facie case is considered unrebutted."); McCarty & Levy, *supra* note 80, at 188 ("[T]hus, if a plaintiff could prove pretext, he was entitled to judgment as a matter of law."); Jody H. Odell, Case Comment, *Between Pretext Only and Pretext Plus: Understanding* St. Mary's Honor Center v. Hicks *and Its Application to Summary Judgment*, 69 NOTRE DAME L. REV. 1251, 1258 (1994) ("judgment as a matter of law"); Stefanie Vines Efrati, Student Competition Paper, *Between Pretext Plus And Pretext Only: Shouldering The Effects Of Pretext On Employment Discrimination After* St. Mary's Honor Center v. Hicks *and* Fisher v. Vasser College, 75 CHI.-KENT L. REV. 153, 155 (1999) ("[M]ost lower courts took the pretext only view that a plaintiff who presented facts creating a plausible inference of discrimination, and who then went on to show that the employer's explanation for its action was a pretext, was generally entitled to win the case."); Gabrielle R. Lamarche, Note, *State Of Employment Discrimination Cases After* Hicks, 32 SUFFOLK U. L. REV. 107, 108 (1998) ("Pretext-only courts asserted that the pretextual reasoning conclusively proved discrimination."); Rappaport, *supra* note 30, at 133 ("as a matter of law"); 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, 278 (1994) ("entitled to judgment as a matter of law").

82. Robert Brookins, *Hicks, Lies and Ideology: The Wages of Sin is Now Exculpation*, 28 CREIGHTON L. REV. 939, 965 (1995).

83. Lamarche, *supra* note 81, at 108.

84. Odell, *supra* note 81, at 1269.

85. William R. Corbett, *The "Fall" of Summers, the Rise of "Pretext Plus", and the Escalating Subordination of Federal Employment Discrimination Law to Employment at Will: Lessons from McKennon and Hicks*, 30 GA. L. REV. 305, 345-46 (1996) (citing Lambert, *supra* note 81, at 171).

86. *See* Malamud, *supra* note 6, at 2234 n.23; McCarty & Levy, *supra* note 80, at 189 n.99; Odell, *supra* note 81, at 1258; Rappaport, *supra* note 30, at 133 n. 47; Whitis, *supra* note 81, at 279.

87. The pretext-only circuits are individually discussed *infra*, notes 88-103 and accompanying text.

requires some sorting-through. Several of the courts cited as adopting pretext-only did not hold that the plaintiff was entitled to judgment as a matter of law after a showing of pretext. Most of these courts were instead deciding that the plaintiff was entitled to have the case decided by the jury or the court acting as fact-finder.

The Fifth Circuit Court was said to have adopted pretext-only based on its decision in *Thornbrough v. Columbus and Greenville Railroad Co.*[88] In that case the court did quote the "unworthy of credence" clause from *Burdine*.[89] However, as stated above, this clause could be interpreted two ways. The Fifth Circuit Court did not state it would interpret *Burdine* to require judgment as a matter of law. To the contrary, the court stated that "Thornbrough . . . need only persuade the *factfinder* that the railroad's purported good reasons were untrue."[90] The court was deciding the question as a matter of fact, not law. Therefore, at least on this case, it appears the Fifth Circuit was not a pure pretext-only jurisdiction. Its position would best be described as pretext-permissive.

The Sixth Circuit was also probably not a pure pretext-only jurisdiction. The case cited to support the pure pretext-only conclusion in the Sixth Circuit was *Tye v. Polaris Joint Vocational School District*.[91] Like the Fifth Circuit Court, this court also cited the *Burdine* clause.[92] However, the court did not state it was holding that proof of pretext required a discrimination finding as a matter of law. In fact, in a subsequent decision, the court made clear that a finding of law based on proof of pretext is inappropriate. In *Galbraith v. Northern Telecom, Inc.*,[93] a divided panel held that the plaintiff proved the defendant's proffered reason for a discharge was a pretext, but not a pretext intended to mask illegal discrimination. The court declined to grant judgment as a matter of law in favor of the plaintiff.[94] *Galbraith* illustrates the danger of assuming that a court approves of pure pretext-only merely because the court cites the *Burdine* clause. As do other courts, the Sixth Circuit Court of Appeals clearly felt that pure pretext-only is not the proper interpretation of the *Burdine* language.

The same mistake has been made regarding the Seventh and Tenth Circuit Courts of Appeals. Again, an assumption was made based on these courts'

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88. Whitis, *supra* note 81, at 278 n.83 (citing Thornbrough v. Columbus and Greenville R.R., 760 F.2d 633, 639 (5th Cir. 1985)).

89. *Thornbrough*, 760 F.2d at 639.

90. *Id.* at 647.

91. McCarty & Levy, *supra* note 80, at 189 n.99 (citing Tye v. Bd. of Educ. of Polaris Joint Voc. Sch. Dist., 811 F.2d 315, 319-20 (6th Cir. 1987)).

92. *Tye*, 811 F.2d at 319.

93. Galbraith v. N. Telecom, Inc., 944 F.2d 275, 282-83 (6th Cir. 1991).

94. *Id.*

citations to the *Burdine* clause.[95] These courts later made clear that a showing of pretext does not entitle a plaintiff to judgment as a matter of law.[96] The Ninth Circuit has also been classified as pure pretext-only, but appears to have used a pretext-permissive standard rather than pure pretext-only since at least 1988.[97]

The Eleventh Circuit Court of Appeals has also been cited as being a pure pretext-only jurisdiction, but again based only on the fact that the court cited the *Burdine* clause in one of its decisions.[98] However, contradictory subsequent decisions make it difficult to say which view prevailed in the Eleventh Circuit prior to *Hicks*.[99] Some of these decisions use pretext-permissive language and some use pure pretext-only language. In any event, because the court's position is unclear, it is incorrect to say this court adopted the pure pretext-only position.

The only courts that can be said to have adopted the pure pretext-only position were the Second,[100] Third,[101] Eighth,[102] and the District of Columbia[103] Courts of Appeal. The Fifth, Sixth, Seventh, Ninth, Tenth, and Eleventh were, at most, pretext-permissive jurisdictions. Because there are critical differences

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95. Rappaport, *supra* note 30, at 133 n. 47 (citing McCoy v. WGN Cont'l Broad. Co., 957 F.2d 368, 372 (7th Cir. 1992)); McCarty & Levy, *supra* note 80, at 189 n.99 (citing Pitre v. W. Elec. Co., 843 F.2d 1262, 1266 (10th Cir. 1988)).

96. Benzies v. Illinois Dept. of Mental Health and Developmental Disabilities, 810 F.2d 146, 148 (7th Cir. 1987) *cert. denied*, 483 U.S. 1006 (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."); EEOC v. Flasher Co., 986 F.2d 1312, 1321 (10th Cir. 1992) (holding that a showing of pretext does not require judgment in favor of the plaintiff).

97. Lanctot, *supra* note 8, at 74 n.51. McCarty & Levy, *supra* note 80, at n.99, classified the Ninth Circuit as pure pretext-only citing Perez v. Curcio, 841 F.2d 255, 257 (9th Cir. 1988). This classification is difficult to explain since the court in *Perez* did not grant judgment to the plaintiff, but merely reversed summary judgment and remanded the case for trial. *Id.* at 259.

98. Lambert, *supra* note 81, at 171 n.74 (citing Caban-Wheeler v. Elsea, 904 F.2d 1549, 1554 (11th Cir. 1990)).

99. Lanctot, *supra* note 8, at 85 n.96. (describing both pretext-plus and pretext-only decisions within the circuit court's decisions).

100. Rappaport, *supra* note 31, at 133 n.47 (citing Lopez v. Metro. Life Ins. Co., 930 F.2d 157, 161 (2d Cir. 1991) ("[T]o show that the proffered reasons are a pretext, a plaintiff need not directly prove discriminatory intent. It is enough for the plaintiff to show that the articulated reasons were not the true reasons for the defendant's actions." (citing *Burdine*, 450 U.S. at 256)).

101. Carden v. Westinghouse Elec. Corp., 850 F.2d 996, 1000 (3d Cir. 1988) ("[A] showing that a proffered justification is pretextual is itself equivalent to a finding that the employer intentionally discriminated.") (citing Duffy v. Wheeling Pittsburgh Steel Corp., 738 F.2d 1393, 1396 (3d Cir. 1984)).

102. Hicks v. St. Mary's Honor Center, 970 F.2d 487, 492 (8th Cir. 1992), *rev'd*, 509 U.S. 502 (1993) ("Once plaintiff proved all of defendants' proffered reasons for the adverse employment actions to be pretextual, plaintiff was entitled to judgment as a matter of law.").

103. King v. Palmer, 778 F.2d 878, 880-81 (D.C. Cir. 1985) (" Ms. King also points out that the trial court found defendants' proffered rationale for promoting Ms. Grant, that she was better qualified, to be 'clearly pretextual.' With the case in this posture, Ms. King argues the District Court was required under *Burdine* to enter judgment in her favor. We agree." (citation omitted)).

between the two views, lumping them together implies an almost monolithic view of the standard that simply did not exist. It falsely implies that the majority position was that plaintiffs win discrimination cases as a matter of law if they can prove pretext. Instead, many circuits were moving toward a pretext-permissive standard even before *Hicks*.

B. Pretext-Plus

Just as a minority of courts adopted the pure pretext-only view, another minority of courts adopted pretext-plus.[104] Pretext-plus is the view that a plaintiff must prove pretext and must also offer additional evidence that the defendant discriminated against him or her.[105] The Court of Appeals for the First Circuit clearly fell within the pretext-plus camp. For example, in *Medina-Munoz v. R.J. Reynolds Tobacco Co.*, the court held "when . . . the employer has articulated a presumptively legitimate reason for discharging an employee, the latter must elucidate specific facts that would enable a jury to find that, not only was the reason a sham, but a sham intended to cover up the employer's real motive: . . . discrimination."[106] Under this view, if the plaintiff did no more than offer evidence the defendant was lying, the court would dismiss the case as a matter of law in favor of the defendant.

The Fourth Circuit was also clearly a pretext-plus jurisdiction prior to *Hicks*.[107] The Seventh and Eleventh Circuits have been cited as being pretext-plus jurisdictions,[108] but as with some of the so-called pretext-only courts, this may have been incorrect. With respect to the Seventh Circuit Court, the

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104. As the discussion of *Burdine*'s "unworthy of credence" clause suggests, *supra* notes 65, 66, 88-95 and accompanying text, classifying the courts is not an exact science. The Sixth Circuit, for example, has stated: "The pretext plus approach was the position of the majority of the circuit courts prior to 1993." Kline v. Tenn. Valley Auth., 128 F.3d 337 (6th Cir. 1997) (citing decisions by the Eleventh, Tenth, Sixth, Fourth, Second and First Circuits).

105. *See, e.g.*, Lanctot, *supra* note 8, at 279 n.86 ("The 'pretext-plus' courts reject the notion that a plaintiff can prevail in an employment discrimination action merely by disproving the defendant's articulated reasons.").

106. Medina-Munoz v. R.J. Reynolds Tobacco Co. 896 F.2d 5, 9 (1st Cir. 1990). *See also*, Olivera v. Nestle P.R. Inc., 922 F.2d 43, 48 (1st Cir. 1990) ("In this circuit . . . a plaintiff has the burden not only of proving that the articulated reasons of the employer were pretextual *but also of adducing additional evidence* that the articulated reasons were a pretext for . . . discrimination." (emphasis added)).

107. *Kline*, 128 F.3d at 343 (citing Holder v. City of Raleigh, 867 F.2d 823 (4th Cir. 1989)). *See also* Kenneth R. Davis, *The Stumbling Three-Step, Burden-Shifting Approach in Employment Discrimination Cases*, 61 BROOK. L. REV. 703, 714 n.58 (1995) (citing *Holder*); Lanctot, *supra* note 8, at 83-84 n.94 (citing numerous cases and concluding that the law in the Fourth Circuit prior to *Hicks* was "somewhat unclear, although there appears to be a strong preference for the 'pretext plus' approach in recent opinions").

108. Lanctot, *supra* note 8, at 85-86 n.96 (noting that the Eleventh Circuit has issued decisions that seem to be at times pretext-plus and at times pretext-permissive); McCarty & Levy, *supra* note 80, at 190 n.103 (Eleventh Circuit); Rappaport, *supra* note 30, at 137 n.73 (Seventh Circuit).

presumption seems to have been made based on the court's assertion that a plaintiff must show pretext *and* that discrimination was the true reason.[109] However, the Seventh Circuit has not clearly held that if a plaintiff produces only evidence of pretext, without more, the defendant is entitled to summary judgment. The Eleventh Circuit has issued a decision that appears to support the pretext-plus position, but has also refused to approve summary judgment in favor of an employer when the plaintiff has only proven pretext.[110]

Contrary to some accounts, therefore, the largest number of the circuit courts fell within the pretext-permissive camp. Perhaps only four circuits were using pure pretext-only. Two, or perhaps three at one point, were using pretext-plus. The remainder were in the middle and subscribed to the view that a jury was ordinarily entitled to find discrimination based on a showing of pretext and that a court should not grant summary judgment in favor a defendant based solely on the fact that a plaintiff did not go beyond proof of pretext. There was sufficient confusion and split of authority, however, for the Supreme Court to step in. This they did in the case of *St. Mary's Honor Center v. Hicks*.[111]

IV. *ST. MARY'S HONOR CENTER V. HICKS*

Melvin Hicks was a black employee of St. Mary's Honor Center. The Honor Center was a correctional facility for criminals and Hicks was employed as a shift commander.[112] During the first six years of his employment, Hicks' performance was satisfactory. After that time, however, Hicks got a new supervisor. His supervisor began to discipline Hicks for various rule infractions such as failing to insure a door was properly guarded.[113] Hicks presented evidence that he was the only employee disciplined for many of these infractions and that other white shift commanders were not punished for similar offenses.[114] St. Mary's eventually terminated Hicks after he got into a heated argument with his supervisor.[115] Hicks responded by bringing a racial discrimination lawsuit against the Honor Center.

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109. Benzies v. Ill. Dept. of Mental Health and Dev. Disabilities, 810 F.2d 146, 148 (7th Cir. 1987), *cert. denied*, 483 U.S. 1006 (1987).

110. Lanctot, *supra* note 8, at 85-86 n.96 (citing Clark v. Huntsville City Bd. of Educ., 717 F.2d 525 (11th Cir. 1983) as the "leading Eleventh circuit case advancing the 'pretext-plus' rule," and Sparks v. Pilot Freight Carriers, 830 F.2d 1554 (11th Cir. 1987) as the "leading Eleventh Circuit case advancing the 'pretext-only' rule").

111. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993).

112. Hicks v. St. Mary's Honor Ctr., 756 F.Supp. 1245, 1246 (E.D. Mo. 1991).

113. *Id.* at 1246-47.

114. *Id.* at 1248.

115. *Id.*

A. The Trial Court's and the Court of Appeals' Decisions

The trial judge found that Hicks had established a prima facie case of discrimination. The court also found that the Honor Center, by citing Hicks' disciplinary record, offered a legitimate non-discriminatory reason for Hicks' termination.[116] Based on the evidence that other white shift commanders who committed similar misconduct were treated more favorably, the court found that Hicks successfully showed the Honor Center's reason to be pretextual.[117] However, the court held that Hicks had to do more than prove the reason was pretextual. He had to prove that the reason was pretext for discrimination.[118]

Hicks appealed the decision to the United States Court of Appeals for the Eighth Circuit.[119] That court adopted the pure pretext-only position. The court of appeals ruled that the trial court erred in assuming that there was an unspoken and non-discriminatory reason for terminating Hicks. Hicks, according to the appellate court, should have won as a matter of law once he proved that the Honor Center's non-discriminatory reason was false.[120] The court held that, once Hicks proved pretext, the Honor Center was in the same position as if it had said nothing at all. In other words, Hicks was entitled to reinstate the presumption of discrimination established by the prima facie case.[121]

B. The Supreme Court's Decision

The Supreme Court accepted the Honor Center's appeal to determine the question of whether or not proof of pretext entitled a plaintiff to judgment as a matter of law in an employment discrimination case.[122] Justice Scalia wrote the majority opinion. The touchstone of the majority opinion was the theme established in *McDonnell Douglas* and its progeny that the burden of proving discrimination remains at all times with the plaintiff. The court held, therefore, that disbelief of the employer's reason for his actions, by itself, cannot compel judgment for the plaintiff as a matter of law.[123] Justice Souter, writing for the dissent, strongly disagreed.

Justice Scalia began by reviewing the order and burden of proof established by the *McDonnell Douglas* line of cases. *McDonnell Douglas*

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116. *Hicks*, 756 F.Supp. at 1249-50.
117. *Id.* at 1251.
118. *Id.* at 1251-52.
119. Hicks v. St. Mary's Honor Ctr., 970 F.2d 487 (8th Cir. 1992).
120. *Id.* at 492.
121. *Id.* at 492-93.
122. *Hicks*, 509 U.S. at 502.
123. *Id.* at 511.

established the basic order of proof requiring the plaintiff to first support the elements of a prima facie case and then requiring the defendant to offer a legitimate non-discriminatory reason for its actions.[124] Once the prima facie case is established, a presumption arises that the employer unlawfully discriminated against the plaintiff.[125] Unless the employer responds to this presumption, a finding of discrimination is required.[126] But the majority stressed that the *McDonnell* line of cases make clear that the ultimate burden of proof must rest on the plaintiff at all times.[127]

The Court held that, by ruling that a showing of pretext requires judgment as a matter of law in favor of the plaintiff, the Eighth Circuit Court of Appeals moved the ultimate burden of proof from the plaintiff to the defendant.[128] To avoid liability, the defendant would be forced to prove non-discrimination. This, the Court felt, was an inappropriate resurrection of the presumption of discrimination created by prima facie case.[129] It violated the basic precept that a court cannot require the defendant to shoulder the burden of proof and would impose a finding of liability for discrimination without a factfinder determining that discrimination occurred.[130]

Instead of this result, the Court ruled, the *McDonnell Douglas* scheme of proof should simply drop from the case.[131] Only in this way can the plaintiff sustain the ultimate burden of persuading the factfinder that the plaintiff has been the victim of discrimination.[132] To rule otherwise, the court held, would "fl[y] in the face of our holding in *Burdine* that to rebut the presumption the defendant need not persuade the court that it was actually motivated by the proffered reasons."[133] Therefore, the plaintiff could not be entitled to judgment as a matter of law on a showing of pretext. Instead, the burden to prove pretext merges with the ultimate burden of persuading the factfinder that the plaintiff was the victim of intentional discrimination.[134] To reach this conclusion, Justice Scalia had to deal with the problematic language in *Burdine*. As stated above, *Burdine* states that a plaintiff claiming discrimination can prove the case "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by

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124. *Hicks*, 509 U.S. at 506-07.
125. *Id.* at 506.
126. *Id.*
127. *Id.* at 507.
128. *Id.* at 508-09.
129. *Id.* at 510.
130. *Id.* at 514.
131. *Id.* at 507.
132. *Id.* at 508.
133. *Id.* at 510 (quoting *Burdine*, 450 U.S. at 254).
134. *Id.* at 516-17.

showing that the employer's proffered explanation is unworthy of credence."[135] The dissent argued that this language must mean the plaintiff can succeed in its case by showing pretext.[136]

Justice Scalia agreed with the dissent that a literal reading of this language meant that the plaintiff must succeed if the employer's non-discriminatory reason is "unworthy of credence."[137] However, he noted, this language clearly ran counter to the repeated admonishments in the *McDonnell Douglas* line of cases that the ultimate burden of persuasion must remain with plaintiff.[138] This ultimate burden had to control the *Burdine* clause. Scalia chalked up the *Burdine* wording to a mistake in language.[139] Ultimately, the majority concluded that, notwithstanding the difficulty of proof in a discrimination case, such cases should be treated no differently than other ultimate questions of fact.[140] In other words, if there is a dispute of fact, the jury should decide.

The dissent argued that the result of the majority opinion is that an employer who lies is in a better position than one who remains silent. This is because one who remains silent after a prima facie case is established will suffer a judgment as a matter of law. One who lies, however, will avoid this result.[141] Scalia agreed, but dismissed the argument by noting that this scheme of proof was like many such devices in litigation that allow a liar a better position than a truthful litigant—at least initially.[142]

Justice Scalia was careful to make clear that proof the employer's non-discriminatory reason is untrue is an integral part of meeting the ultimate burden of persuasion. In fact, the court held that "[t]he factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination."[143] Thus, although the plaintiff could no longer win as a matter of law in the minority of jurisdictions that previously allowed this, it was also clear that the evidence of pretext meant the plaintiff would almost never *lose* as a matter of law. Evidence of pretext, the Court held, was enough to meet the ultimate burden of persuasion.[144] However, the Court's use of the permissive term "may" also

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135. *Hicks*, 509 U.S. at 517 (quoting *Burdine*, 450 U.S. at 256).
136. *Id.* at 531-32.
137. *Id.* at 517.
138. *Id.* at 515-17.
139. *Id.*
140. *See id.* at 523-24.
141. *Id.* at 539-40.
142. *Id.* at 520-21.
143. *Id.* at 511.
144. *Id.*

permitted a reasonable jury to find there was no discrimination even though there is proof of pretext.

V. THE REACTION TO *HICKS*

What the *Hicks* Court did was reject the positions of the pure pretext-only courts, like the Eighth Circuit, and the pretext-plus minority position of courts like the First Circuit. Instead, the Court adopted the standard that was accepted by the majority of courts. That standard is the pretext-permissive view. Plaintiffs were no longer entitled to judgment as a matter of law by only making a strong showing of pretext. However, defendants were no longer entitled to judgment as a matter of law simply because the plaintiff could do no more than show pretext. Unfortunately, many commentators,[145] and some courts,[146] labeled the *Hicks* decision an endorsement of the pretext-plus view. They did this by focusing only on the court's holding that the plaintiff must do more than prove pretext. Commentators decried that the Court had created a heightened burden of proof that would be impossible for many plaintiffs to meet.[147] Congress responded by introducing legislation designed to overturn *Hicks*.[148] Some experts went so far as to claim that plaintiffs could not succeed after *Hicks* without direct evidence of discrimination.[149]

The reaction of the circuit courts of appeal was varied. Few decisions after *Hicks* seem to overtly apply pretext-plus or pretext-only. They seem to acknowledge that *Hicks* is somewhere in between these positions. However,

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145. *See, e.g.*, Brookins, *supra* note 82 at 956-57 (stating the *Hicks* court had adopted the pretext-plus position); Maria Therese Mancini, Case Comment, *Employment Law-Proving Pretext May Be Insufficient In Title VII Employment Discrimination Case*—St Mary's Honor Center v. Hicks, 28 SUFFOLK U. L. REV. 235, 240 (1994) (same); Schleck, *supra* note 30, at 717 (same); Lambert, *supra* note 81, at 188 ("A broad reading of the majority's opinion puts the Hicks ruling in different light, casting it as a pretext-plus approach.").

146. *See, e.g.*, Smith v. Union Nat'l Bank, 202 F.3d 234, 249 (4th Cir. 2000) (quoting Vaughn v. The Metrahealth Cos., 145 F.3d 197, 202 (4th Cir. 1998).

147. *See, e.g.*, Brookins, *supra* note 82, at 994 ("The decision in *St. Mary's Honor Center v. Hicks* is presumptuous even for the United States Supreme Court. . . . The Court through *Hicks* undermines efforts to eliminate the more virulent subtle strain [of discrimination]."); Derrick L. Horner, *Toward Clarifying the Ambiguity of Merging Burden*—Saint Mary's Honor Center v. Hicks, 11 HARV. BLACKLETTER L.J. 205, 205 (1994) ("Although the court sought to clarify an ambiguity left after *McDonnell Douglas*, it rendered meaningless the employer's burden of producing legitimate reasons for its conduct, and transformed the plaintiff's duty to disprove such reasons into a burden that is impossible to meet."); Malamud, *supra* note 6, at 2234-35 (noting the reaction of many is that the Court had unfairly shifted the burden in discrimination cases onto the plaintiff); Rappaport, *supra* note 30, at 125 ("[T]he Supreme Court . . . makes it more difficult for employees who have suffered discrimination to win civil rights cases.").

148. Odell, *supra* note 81, at 1252 n.10. *See also* Davis, *supra* note 107, at 726-27 n.129.

149. Odell, *supra* note 81, at 1252 n.9; Thomas A. Cuniff, Note, *The Price Of Equal Opportunity: The Efficiency of Title VII After* Hicks, 45 CASE W. RES. L. REV. 507, 508 nn.7-10 (1995).

some circuits leaned heavily one way or another and effectively went against the lesson of *Hicks*.

A. Pretext-Permissive

Following the Supreme Court's instructions in *Hicks*, the Eighth Circuit abandoned pure pretext-only and developed a "middle ground" standard between pure pretext-only and pretext-plus.[150] The Eighth Circuit sought to "unify and clarify" this standard in *Ryther v. KARE 11*.[151] C. Thomas Ryther was a TV sportscaster who claimed he was forced off the air as the result of age discrimination. The station management argued that the decision not to renew Ryther's contract was based on market research. Ryther responded by presenting evidence that the decision not to renew his contract was made before the research was commissioned, that the research was designed so as to be biased against him, and that KARE 11 created a work environment that was generally unfavorable to older employees.[152] The *en banc* court interpreted *Hicks* as requiring a pretext-permissive standard: "The elements of the prima facie case and disbelief of the defendant's proffered reasons are the threshold findings, beyond which the jury is permitted, but not required, to draw an inference leading it to conclude that there was intentional discrimination."[153] At the same time, the court was careful to "expressly acknowledge . . . that evidence of pretext *does not always* support an inference of intentional discrimination."[154]

The language of the Eighth Circuit's holding in *Ryther* was borrowed from the Third Circuit's opinion in *Sheridan v. E. I. DuPont*. As the *Ryther* court pointed out, the Third Circuit did not address the question of whether there could be a case warranting summary judgment even if there was evidence of pretext. The trial court had recognized that Sheridan's evidence undermined the legitimacy of the employer's reasons for disciplinary action, but overturned the verdict after failing to find evidence in the record "that gender played a determinative role in defendant's conduct."[155] The appeals court in *Sheridan* held that once a plaintiff has submitted sufficient evidence showing the employer's reason was implausible, the court "may not pretermit

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150. Rothmeier v. Inv. Advisers, Inc., 85 F.3d 1328, 1334 (8th Cir. 1996).

151. Ryther v. KARE 11, 108 F.3d 832, 836 (8th Cir. 1997) (en banc). As in other circuits, the Eighth Circuit standard had been neither unified nor clear in the years immediately after Hicks. *Rothmeier*, 85 F.3d at 1336.

152. *Ryther*, 108 F.3d at 838-44.

153. *Id.* at 837 (quoting Sheridan v. E. I. DuPont de Nemours & Co., 100 F.3d 1061, 1066-67 (3d Cir. 1996) (en banc)).

154. *Ryther*, 108 F.3d at 837 n.2 (emphasis in original).

155. *Sheridan*, 100 F.3d at 1064.

the jury's ability to draw inferences from this testimony, including the inference of intentional discrimination drawn from an unbelievable reason proffered by the employer."[156] Declaring that a false explanation is inherently probative of consciousness of guilt, the court went on to suggest that "if the employer fails to come forth with the true and credible explanation and instead keeps a hidden agenda, it does so at its own peril."[157] The *Sheridan* majority declined the dissent's invitation to speculate about the kind of factual situation that would justify summary judgment despite evidence of pretext.[158]

In contrast, the Eighth Circuit in *Ryther* cited two of its own cases as appropriate exceptions within the pretext-permissive standard.[159] In *Rothmeier v. Investment Advisers* the plaintiff offered substantial evidence that the employer's reasons for firing him were not true. Unfortunately for the plaintiff his evidence of pretext did not show age discrimination, but rather that he had been fired for alleging that the company had violated federal securities regulations.[160] Similarly, in *Barber v. American Airlines* the plaintiffs' evidence contained "the seeds of its own refutation."[161] Barber and his coworkers claimed they had been treated unfavorably under the airline's seniority system, but the employees who had allegedly been favored were all in the same protected class as the plaintiffs.[162]

The Circuit Court for the District of Columbia in *Aka v. Washington Hospital Center* also acknowledged that some cases are exceptions[163] and set a standard similar to *Ryther*. Aka claimed his employer refused to transfer him because of his disability. The main issue revolved around whether or not he was the best qualified, and each party presented evidence pointing to different conclusions.[164] The court held that it would be improper to grant summary judgment in favor of the Hospital because Aka had presented sufficient pretext evidence that he was more qualified than successful candidates and, therefore, it was improper to enter summary judgment in favor of the Hospital.[165] The court further concluded, however, that *Hicks* sometimes allows the court to rule as a matter of law against the plaintiff even if there is evidence of pretext.[166] The *Aka* court noted that a particularly weak showing of pretext or

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156. *Sheridan*, 100 F.3d at 1072.

157. *Id.* at 1069.

158. *Id.* at 1070.

159. *Ryther*, 108 F.3d at 837 n.4 (citing *Rothmeier*, 85 F.3d 1328; Barber v. Am. Airlines, Inc., 791 F.2d 658 (8th Cir. 1986)).

160. *Rothmeier*, 85 F.3d at 1337.

161. *Barber*, 791 F.2d at 660.

162. *Id.*

163. Aka v. Washington Hosp. Ctr., 156 F.3d 1284 (D.C. Cir. 1998) (en banc).

164. *See id.* at 1287.

165. *Id.* at 1295.

166. *Id.* at 1290

a showing of pretext that pointed toward a non-discriminatory reason would not suffice to avoid summary judgment.[167]

The Ninth Circuit in *Washington v. Garrett* initially interpreted *Hicks* as requiring a pure pretext-permissive standard similar to the Third Circuit's standard in *Sheridan*:

> Because, as *St. Mary's* recognizes, the fact-finder in a Title VII case is entitled to infer discrimination from a plaintiff's proof of a *prima facie* case and a showing of pretext without anything more, there will always be a question for the fact-finder once a plaintiff establishes a *prima facie* case and raises a genuine issue as to whether the employer's explanation for its action is true.[168]

Prior to *Reeves*, however, other Ninth Circuit decisions appeared to recognize exceptions. For example, in *Nidds v. Schindler Elevator* a divided panel upheld summary judgment for the defendant, holding that the plaintiff's evidence of age-related comments were only "weak evidence and not enough to create an inference of age discrimination."[169]

The dissent in *Nidds* argued that the holding represented a departure from the Ninth Circuit's previous summary judgment standard in employment discrimination cases, and that the standard "should not unnaccountedly be lowered."[170] Two years later, in *Godwin v. Hunt Wesson*, another panel attempted to reconcile inconsistencies in the pretext standard.[171] The *Godwin* court suggested that when a plaintiff "offers direct evidence of discriminatory motive, a triable issue as to the actual motivation of the employer is created even if the evidence is not substantial."[172] However, where a plaintiff relies on evidence that an employer's explanation is "inconsistent or otherwise not believable" in order to raise an inference of discrimination, the evidence must be specific and substantial.[173]

Other circuits that interpreted *Hicks* consistently with either the *Sheridan* or the *Aka* pretext-permissive standard included the Seventh,[174] Tenth,[175] and

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167. *Aka*, 156 F.3d at 1291.
168. Washington v. Garrett, 10 F.3d 1421, 1433 (9th Cir. 1993).
169. Nidds v. Schindler Elevator Corp., 113 F.3d 912, 919 (1996).
170. *Id.* at 921 (Noonan, J., dissenting)
171. Godwin v. Hunt Wesson, Inc., 150 F.3d 1217 (1998).
172. *Id.* at 1221.
173. *Id.* at 1222.
174. Jackson v. E.J. Branch Corp, 176 F.3d 971 (7th Cir. 1999).
175. Randle v. City of Aurora, 69 F.3d 441 (10th Cir. 1995).

Eleventh[176] Circuits.[177] Regardless of whatever legitimate confusion there may have been about the Seventh and Eleventh Circuit Courts before *Hicks*, it is clear that these courts were no longer pretext-plus courts by the time *Reeves* was decided. The Seventh Circuit Court made this clear in *Jackson v. E.J. Branch Corp.*[178] In *Jackson*, the Seventh Circuit held that "if the employer offers a pretext—a phony reason—for why it fired an employee, then the trier of fact is permitted, although not compelled, to infer that the real reason was age [or another illegitimate discriminatory reason]."[179] In another case, the court noted that after offering proof of pretext the plaintiff "need not also come forward with further evidence of intentional discrimination to survive summary judgment."[180] These decisions place the Seventh Circuit Court squarely with those jurisdictions that have adopted the pretext-permissive standard.

The Eleventh Circuit Court likewise made clear it approves of pretext-permissive. In a case published shortly before *Reeves*, the court noted that proof of pretext, together with the elements of the prima facie case were sufficient to show discrimination.[181] In other words, the plaintiff will survive a motion for summary judgment based on evidence of pretext alone.[182] In fact, the court specifically noted that, with one case exception, pretext-permissive had always been the standard in the Eleventh Circuit.[183]

B. Pretext-Plus or Leaning That Way

While most circuits established standards comparable to *Aka*, several historically pretext-plus circuits interpreted *Hicks* to support a standard that is arguably not much different from pretext-plus. The First Circuit Court of

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176. Combs v. Plantation Patterns, 106 F.3d 1519 (11th Cir. 1997), *cert. denied* 522 U.S. 1045 (1998).

177. In order to clarify without generating any more labels, the exceptions recognized by the Eighth and DC Circuits will be referred to here as the *Aka* standard. This standard consists of a general rule recognizing that pretext evidence has significant probative value and is usually sufficient to support a finding of discrimination. At the same time, the *Aka* standard is subject to a limited number of reasonably well defined exceptions for scenarios where the pretext evidence itself points to some conclusion other than illegal discrimination. The *Aka* standard is distinguishable from a pure conception of pretext-permissive, under which evidence of pretext is always enough to reach the jury.

178. Jackson v. E.J. Branch Corp., 176 F.3d 971, 984 (7th Cir. 1999).

179. *Id.* (quoting Anderson v. Baxter Healthcare Corp., 13 F.3d 1120, 1123 (7th Cir. 1994)).

180. Hoffman v. MCA, Inc., 144 F.3d 1117, 1123 (7th Cir. 1998) (quoting Fuka v. Thomson Consumer Elec., 82 F.3d 1397, 1404 (7th Cir. 1996)).

181. Schoenfeld v. Babbitt, 168 F.3d 1257, 1269 (11th Cir. 1999) (citing *Hicks*, 509 U.S. at 511).

182. *Combs*, 106 F.3d at 1529 ("[A] Plaintiff is entitled to survive summary judgment, and judgment as a matter of law, if there is sufficient evidence to demonstrate the existence of a genuine issue of fact as to the truth of each of the employer's proffered reasons for its challenged action.").

183. *Id.*

Appeals, for example, has been classified as a pretext-plus jurisdiction on the basis of *Woods v. Friction Materials.*[184] In *Woods* the appeals court noted that a showing of pretext does not compel a finding of discrimination, but did not actually decide the case on that basis.[185] Woods challenged Friction Materials' failure to hire him in favor of a younger, white applicant. Although the court agreed that Woods presented evidence he was qualified, it held he failed to present evidence he was better qualified than the successful applicants. In fact, he admitted he knew nothing about their qualifications.[186] Thus, Woods had failed to present evidence that the employer's reason not to hire him was pretextual, making the value of the case as a statement of pretext-plus somewhat doubtful.

A more thorough discussion of the First Circuit's interpretation of Hicks is found in *Thomas v. Eastman Kodak.*[187] The court in *Thomas* reversed a grant of summary judgment for defendant, holding that the plaintiff's evidence of pretext was sufficient to support a finding of discrimination.[188] Although the *Thomas* panel adopted the pretext-plus label, it cautioned that "the labels 'pretext' and 'plus' must be used with great care."[189] Discussing proof of pretext at some length, the court went on to say that:

> Because discrimination, and discrimination cases, come in many different forms, a case-by-case analysis is always necessary. There can be no rigid requirement that plaintiffs introduce a separate "plus" factor, such as a negative employer comment about the plaintiff's protected class, in order to prove discrimination. Otherwise the *McDonnell Douglas/Burdine* framework would no longer serve the purpose for which it was designed: allowing plaintiffs to prove discrimination by circumstantial evidence.[190]

Despite these words of caution, the *Thomas* court made clear that mere contradiction of the employer's explanation was never enough to survive summary judgment in the First Circuit. The plaintiff's evidence must also be sufficient to support an inference that the employer's true reason was discriminatory.[191] The Supreme Court denied certiorari for *Thomas* in the same term it heard *Reeves.*[192]

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184. *Reeves*, 530 U.S. at 141 (citing Woods v. Friction Materials, Inc., 30 F.3d 255 (1st Cir. 1994)).
185. *Sheridan*, 100 F.3d at 1068 n.7 (citing *Woods*, 30 F.3d at 262).
186. *Woods*, 30 F.3d at 262.
187. Thomas v. Eastman Kodak Co., 183 F.3d 38 (1st Cir. 1999) *cert. denied*, 528 U.S. 1161 (2000).
188. *Id.* at 65.
189. *Id.* at 57.
190. *Id.* at 58.
191. *Id.* at 56, 62.
192. Eastman Kodak Co. v. Thomas, 528 U.S. 1161 (2000).

The Second Circuit arrived at a similar standard by a somewhat different route. In the years immediately after *Hicks*, several panels of the Second Circuit issued opinions resembling the *Rythe*r standard, perhaps showing the lingering influence of the circuit's earlier pure pretext-only standard.[193] That standard eventually shifted to become more like the First Circuit standard when the court decided *Fisher v. Vassar College*.[194] In *Fisher* the appellate court acknowledged Justice Scalia's statement in *Hicks* that no additional proof beyond evidence of pretext was required.[195] Nevertheless, the court reversed a trial court finding of discrimination that had been based on Fisher's proof of pretext.[196]

Fisher was a college professor who was denied tenure ostensibly for the reason that she had insufficient commitment to research, poor teaching ability, and poor working relationships.[197] The district court found that Fisher presented adequate evidence that she had in fact performed well, had received favorable teaching evaluations, and had good working relationships.[198] On appeal, the reviewing Second Circuit panel rejected the district court's findings in this regard. The panel agreed there was evidence of pretext but it was pretext that "points nowhere."[199] The panel's decision was affirmed by a sharply divided court on *en banc* review.[200] The *en banc* court correctly noted that a showing of pretext does not compel a finding of discrimination, but the court nevertheless approved the panel's decision to overturn the trial court's finding of discrimination despite evidence of pretext. Unlike the Third Circuit in *Sheridan*, the Second Circuit in *Fisher* did not attach much inherent weight to pretext evidence, explaining that "discrimination does not lurk behind every inaccurate statement."[201] By requiring the evidence to "point" to discrimination, the court appeared to adopt a pretext-plus position very similar to the First Circuit's. The court was at least requiring a very convincing showing of pretext.[202]

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193. *See, e.g.*, EEOC v. Ethan Allen, Inc., 44 F.3d 116, 120 (2d Cir. 1994) ("A finding of pretextuality . . . permits the ultimate inference of discrimination.").

194. Fisher v. Vassar College, 114 F.3d 1332 (2d Cir. 1997).

195. *Id.* at 1343.

196. *Id.* at 1347.

197. Fisher v. Vassar College, 852 F. Supp 1193, 1209 (S.D.N.Y. 1994), *rev'd*, 114 F.3d 1332 (2d Cir. 1997), *cert. denied* 522 U.S. 1075 (1998). *See* Efrati, *supra* note 81, at 168.

198. *Fisher*, 852 F. Supp. at 1205-09.

199. Fisher v. Vassar College, 70 F.3d 1420, 1437 (2d Cir. 1995).

200. Fisher v. Vassar College, 114 F.3d 1332, 1333 (2d Cir. 1997).

201. *Id.* at 1337. The court went on to suggest that "[I]ndividual decision-makers may intentionally dissemble in order to hide a reason that is non-discriminatory but unbecoming or small-minded, such as back-scratching, log-rolling, horse-trading, institutional politics, envy, nepotism, spite, or personal hostility." *Id.* The court did not identify any evidence in the record "pointing" to any of these myriad possibilities.

202. *Id.* at 1368-74 (Newman, C.J., Kearse, Winter, and Cabranes, J.J., dissenting).

The Fifth Circuit has also been classified as a pretext-plus jurisdiction, but like the First Circuit, the Fifth Circuit's standard after *Hicks* was not as rigid as some commentators have maintained.[203] For example, in *Rhodes v. Guiberson Oil Tools* a Fifth Circuit panel reversed a magistrate's denial of JMOL to the defendant following a jury verdict for the plaintiff.[204] The majority opinion held that the plaintiff's pretext evidence was insufficient to support the jury verdict.[205] In doing so, the panel explicitly rejected the notion that *Hicks* articulated "some new hybrid test" similar to the pretext-permissive standard represented by *Aka* and *Sheridan*.[206] On rehearing *en banc*, however, the Fifth Circuit reversed the panel decision and reinstated the jury verdict.[207] The *en banc* court held that "In tandem with a prima facie case, the evidence allowing rejection of the employer's proffered reasons will often, perhaps usually, permit a finding of discrimination."[208] On its face, this standard is difficult to distinguish from the *Aka* standard.

The only other circuit that can readily be classified as pretext-plus is the Fourth. After *Hicks*, the Fourth Circuit retained and perhaps even heightened the requirements of its pretext-plus standard. The Fourth Circuit directly stated that a plaintiff must do more than show pretext,[209] and in *Vaughan v. Metrahealth* the court straightforwardly held that pretext-plus "is a better approach than 'pretext only.'"[210] In one case, the Fourth Circuit went so far as to suggest that a *McDonnell Douglas* plaintiff must produce evidence of the employer's "stated purpose to discriminate."[211]

In sum, although every circuit recognized prior to *Reeves* that a prima facie case and evidence of pretext could sometimes be sufficient to support a jury verdict,[212] some courts did not seem to attach much probative value to pretext evidence. These courts reasoned, often explicitly, that the number of possible alternative explanations for employer dissembling was likely to be so large that the plaintiff must narrow the inquiry and show that the evidence was

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203. *See, e.g.*, Davis, *supra* note 107, at 738 ("Most of the courts that follow the pretext-plus interpretation never allow the case to reach the jury . . . .").

204. Rhodes v. Guiberson Oil Tools, 39 F.3d 537, 545 (5th Cir. 1994).

205. *Id.* at 544.

206. *Id.* at 542 n.5, 544.

207. Rhodes v. Guiberson Oil Tools, 75 F.3d 989, 996 (5th Cir. 1996) (en banc).

208. *Id.* at 994.

209. *Smith*, 202 F.3d at 249.

210. *Vaughan*, 145 F.3d at 202.

211. Henson v. Liggett Group, Inc., 61 F.3d 270, 275 (4th Cir. 1995).

212. The only circuit not mentioned above, the Sixth, has adopted a unique method of analyzing pretext, making comparison with other circuits difficult. *See* Kline v. Tenn. Valley Auth., 128 F.3d 337, 346 (6th Cir. 1997); Manzer v. Diamond Shamrock Chemicals, 29 F.3d 1078, 1084 (6th Cir. 1994). In *Kline* the Sixth Circuit classified itself as pretext-plus prior to *Hicks* and pretext-permissive afterward. *Kline*, 128 F.3d at 343-46. At least one commentator has suggested that the Sixth Circuit's post-*Hicks* analysis is really pretext-plus "masquerading" as pretext-permissive. Davis, *supra* note 107, at 731-33.

specifically probative of discriminatory intent. Other courts attached much greater weight to pretext evidence, usually allowing cases involving pretext to go to a jury. As *Reeves* shows, the District of Columbia Circuit Court set the proper balance in *Aka*. Usually, proof of pretext should mean the case goes to a jury. However, there will occasionally be an odd case that, despite proof of pretext, should be dismissed.

VI. *REEVES V. SANDERSON PLUMBING PRODUCTS*

Based on this somewhat divergent view of the circuit courts on whether summary judgment was still possible if there was evidence of pretext, the Supreme Court decided to revisit the issue in the case of *Reeves v. Sanderson Plumbing Products*.[213] Roger Reeves was fifty-seven years old and worked for Sanderson Plumbing as a supervisor in the "hinge room" of the company's production facility.[214] He had been working for the company for forty years. He worked in the Hinge Room with another supervisor named Joe Oswalt (who was in his mid thirties). Oswalt and Reeves reported to Russell Caldwell (age forty-five). Part of Reeves' job was to monitor the time worked of his subordinates and report those hours to his superiors.

Caldwell reported to senior management that productivity was down in Reeves' and Oswalt's area because the workers were coming in late and leaving early.[215] The time records did not show this, so the director of manufacturing, Powe Chesnut, ordered an investigation. According to Sanderson Plumbing, the investigation revealed bad record keeping practices and a "lax" environment in the Hinge Room.[216] A second investigation showed that employees in the Hinge Room had not been disciplined for attendance violations.[217] As a result of these investigations, Reeves and Caldwell were terminated.[218] Reeves responded by filing suit claiming he had been discriminated against because of his age.

A. The Trial Court's and the Court of Appeals' Decisions

Reeves met the requirements of a prima facie case by showing: (1) he was in the protected class, (2) he was qualified for his position; (3) he was

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213. Reeves v. Sanderson Plumbing Products, 530 U.S. 133, 140-41 (2000). The facts of the case are drawn from the Supreme Court's statement of the record rather than the abbreviated version given by the Fifth Circuit. Reeves v. Sanderson Plumbing Products, Inc., 197 F.3d 688 (5th Cir. 1999).

214. *Reeves*, 530 U.S. at 137.

215. *Id.* at 137-38.

216. *Id.* at 143.

217. *Id.*

218. *Id.* at 138.

discharged; and (4) he was replaced by a person much younger and outside the protected class.[219] Sanderson Plumbing offered the time record discrepancies as its legitimate non-discriminatory reason for firing Reeves.[220]

To show pretext, Reeves responded that he had recorded the time correctly for those persons under his supervision. Specifically, he offered evidence that the employees who allegedly came in late had not done so. Both Reeves and Oswalt testified that the company time clock often failed to record the start time when an employee clocked in.[221] The supervisors would respond by checking to insure the employee was present and then recording his or her time manually. Therefore, the employees had not been late. Reeves also introduced evidence that he was not responsible for disciplining employees.[222] Reeves further testified that, when he was first terminated, he was told it was because of his failure to record only one employee as absent. Therefore, Sanderson Plumbing had changed the alleged basis for its decision.[223] The court of appeals responded that the employer's attempt to strengthen its case with additional instances of incorrect timekeeping "smacks more of competent trial preparation than telling a lie."[224] The court neglected to mention that Reeves had not been at work on the days the original timekeeping errors occurred.[225] Finally, Reeves testified that, in the past, the company had simply adjusted the pay of employees who had inaccurate time.[226] No one was fired.

In addition to this evidence of pretext, Reeves offered additional evidence that Sanderson discriminated against him. Reeves and Oswalt testified that Chesnut treated Reeves differently than younger supervisors.[227] Chesnut frequently berated Reeves while tolerating similar conduct from younger supervisors.[228] Despite having similar performance to Oswalt, only Reeves' efficiency was challenged, and he was disciplined because of this alleged poor efficiency.[229] Chesnut also made age-based remarks. He told Reeves "he was so old he must have come over on the Mayflower" and "he was too damn old to do his job."[230] A younger supervisor also testified that Chesnut scrutinized Reeves more than younger managers and disciplined Reeves for low

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219. *Reeves*, 197 F.3d at 692.
220. *Id.*
221. *Reeves*, 530 U.S. at 144.
222. *Id.* at 145.
223. *See id.*
224. *Reeves*, 197 F.3d at 693.
225. *Reeves*, 530 U.S. at 145.
226. *Id.*
227. *Id.* at 151.
228. *Id.*
229. *Id.*
230. *Id.*

production whereas he did not discipline younger supervisors with comparable performance.

The trial court submitted the case to the jury who returned a verdict in favor of Reeves. Sanderson appealed the verdict to the Fifth Circuit Court of Appeals, which reversed the verdict. The appeals court held that, although Reeves may have introduced enough evidence to prove that Sanderson Products' reason was untrue, he had not introduced sufficient information to prove the true reason was age discrimination.[231] In overturning the verdict, however, the panel did not clearly set forth a pretext-plus standard of review. Instead the panel held that "whether Sanderson was forthright in its explanation for firing Reeves is not dispositive .... We must as an essential final step, determine whether Reeves presented sufficient evidence that his age motivated Sanderson's employment decision."[232] This statement of the plaintiff's burden is a reasonable paraphrase of the *Hicks* standard and would not have been in error if the court had looked at all the evidence and drawn all permissible inferences in favor of the plaintiff.

Instead, the appeals court ignored Reeves' evidence of pretext and rejected all of Reeves' additional evidence of discrimination. The court rejected Chesnut's differential treatment of Reeves on the grounds that Sandra Sanderson, not Chesnut, was the person who made the decision to terminate Reeves.[233] The court held this despite the fact that Chesnut was married to Sanderson and that there was evidence he had great influence within the company.[234] The court further rejected Chesnut's age-related remarks as evidence of discrimination because they were not made in the context of the termination decision.[235] In addition, the court found it persuasive that Sanderson Plumbing employed other managers over the age of forty and that younger supervisors were also disciplined because of poor record-keeping.[236]

B. The Supreme Court's Decision

The Supreme Court accepted the case to resolve a perceived conflict among the courts of appeals as to plaintiff's burden at the pretext stage.[237] Justice O'Connor delivered the unanimous opinion for the Court. The Court began by reiterating its position that a plaintiff must prove that the employer

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231. *Reeves*, 530 U.S. at 139.
232. *Reeves*, 197 F.3d at 693.
233. *Id.* at 693-94.
234. *Reeves*, 530 U.S. at 152.
235. *Reeves*, 197 F.3d at 693.
236. *Id.* at 694.
237. *Reeves*, 530 U.S. at 140.

was motivated by discriminatory animus (in this case age).[238] "The plaintiff's age must have actually played a role in [the employer's decision-making] process and had a determinative influence on the outcome."[239] This, of course, was merely a restatement of the principle the Court found preeminent in *Hicks*.

The Court then examined what the appeals court did at the pretext stage.[240] The Fifth Circuit panel, instead of looking at all the evidence presented by Reeves, focused only on evidence beyond proof of pretext and evidence used to support the prima facie case. Specifically, it focused only on evidence of age-based remarks and that Reeves was treated differently from younger supervisors, *completely neglecting the evidence of pretext*.[241] In Justice O'Connor's words, the Court found that the Fifth Circuit panel

> confined its review of evidence favoring petitioner to that evidence showing that Chesnut had directed derogatory, age-based comments at petitioner, and that Chesnut had singled out petitioner for harsher treatment than younger employees. It is therefore apparent that the court believed that only this additional evidence of discrimination was relevant to whether the jury's verdict should stand.[242]

Not surprisingly, the Court held that this position was inconsistent with *Hicks*.[243] Justice O'Connor noted that, although *Hicks* holds that it is not enough to merely disbelieve the defendant's non-discriminatory reason, the fact-finder is permitted to take that disbelief and go to the next step and conclude discrimination, and it may do this without any additional evidence.[244] Proof of pretext, the Court noted, can be a powerful circumstantial case of discrimination.[245]

The Court was careful to note that proof of pretext will not always support a jury's finding of discrimination.[246] For example, if the evidence clearly showed that, while the defendant's reason was false, there was a third reason for the decision, a jury verdict in favor of the plaintiff would not be sustainable.[247] The Court declined to give any further guidelines under which courts could grant summary judgment. However, the Court clearly left the

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238. *Reeves*, 530 U.S. at 141 (citing 29 U.S.C. § 623(a)(1) (1994)).
239. *Id.* (quoting Hazen Paper Co. v. Biggins, 507 U.S. 604, 610 (1993)).
240. *Id.* at 146.
241. *Id.*
242. *Id.*
243. *Id.*
244. *Id.* at 147.
245. *Id.*
246. *Id.* at 148.
247. *Id.*

door open to permit courts to throw out cases in which the prima facie case and proof of pretext was particularly weak.[248]

The Court finally examined whether, despite the court of appeals' error regarding Reeves' burden, Sanderson Products was still entitled to judgment as a matter of law.[249] The Court easily concluded Sanderson was not. The Court held that the lower court had wrongly rejected Reeves' evidence of discrimination beyond pretext.[250] In dismissing the age-based remarks and the evidence Reeves was treated differently from younger supervisors, the appeals court over-stepped its bounds. In essence, the Court noted, the appellate court improperly failed to consider this evidence with inferences favorable to the plaintiff. By rejecting Reeves' evidence as unpersuasive as a matter of law the court stepped into the fact-finding arena and drew inferences unfavorable to the plaintiff.[251] This, the Supreme Court held, it could not do. Instead, the age-based remarks and differential treatment supported Reeves' case and were properly submitted to the fact finder.

The Court also held that the court of appeals erred in its view of the evidence that Chesnut was not the decision-maker, that younger workers were disciplined, and that other older supervisors worked at the Sanderson plant.[252] While the Court felt this evidence was relevant, it was wrong to place dispositive weight on it. In placing such weight on it, the Fifth Circuit used the evidence without considering inferences in favor of Reeves. For example, the argument that Chesnut was not the decision-maker was suspect given his relationship to Sanderson and influence within the company. The evidence of younger workers being disciplined and older supervisors working at Sanderson was also relevant—but did not outweigh Reeves' case as a matter of law. In ignoring Reeves' evidence, the court of appeals erroneously failed to consider all evidence in the light most favorable to Reeves.[253] The Court therefore reversed the decision of the Fifth Circuit and reinstated the jury verdict.

In the *Reeves* case, the Court sent two clear messages to the lower federal courts. First, where there is proof of pretext, a court generally may not grant judgment as a matter of law. Instead, the case should be submitted to the fact finder. Second, a court may not dismiss circumstantial evidence of discrimination on the grounds that the evidence, in its opinion, is insufficiently related to the discharge decision nor may it give presumptive credit to an employer's evidence it did not discriminate.

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248. *Id.* at 148-49.
249. *Reeves*, 530 U.S. at 149.
250. *Id.* at 151-54.
251. *Id.*
252. *Id.*
253. *Id.* at 154.

VII. THE IMPACT OF *REEVES* AND *HICKS* ON SUMMARY JUDGMENT

There were two main pillars of summary judgment in employment discrimination cases that *Reeves* and *Hicks* toppled (or at least undermined). The first of these is the most obvious. Pretext-plus is dead. Although *Hicks* should have made this clear, some courts didn't quite hear the message. The lesson is now quite unavoidable. Courts can no longer keep a case from the jury based simply on the belief that the plaintiff must do more than prove the defendant's non-discriminatory reason is untrue.

The Supreme Court did, of course, note that there will be cases in which the court may still grant summary judgment even if there is a showing of pretext. However, the examples cited by the Supreme Court indicate this will be an unusual case.[254] The example used was where the evidence clearly showed some other non-discriminatory reason for the employment action.[255] This is precisely the *Aka* standard set forth by the pretext-permissive circuit courts, citing *Rothmeier* as an example.[256] Finally, the Court also preserved the option of granting summary judgment if the plaintiff's showing was so weak that no rational jury could credit it.[257]

The second pillar is more subtle than pretext-plus. As stated above, the decision of the Supreme Court in *Reeves* is divided into two sections. The first of these addresses the pretext-plus standard. In it, the Court held that the Fifth Circuit Court of Appeals erred in holding that Reeves was required to do more than establish a prima-facie case and evidence of pretext. In other words, the jury may find discrimination based on pretext. No additional evidence of discrimination is required. The Court agreed that Reeves had established a prima facie case and had offered sufficient evidence of pretext.[258] In reaching this conclusion, the Court seemingly had done everything it needed to reverse the Fifth Circuit and sustain the jury's verdict in favor of Reeves. However, the Court did not stop there. Instead it went on to examine how the lower court treated Reeve's additional evidence of discrimination—"additional" meaning evidence beyond the prima facie case and evidence of pretext. Why was it necessary to do this? The Court said it was doing it to determine whether "despite the Court of Appeals' misconception of petitioner's evidentiary burden, respondent was nonetheless entitled to judgment as a

254. *Reeves*, 530 U.S. at 148.
255. *Id.*
256. *See supra*, notes 159-166 and accompanying text.
257. *Reeves*, 530 U.S. at 148.
258. *Id.* at 149.

matter of law."[259] The Court was really examining the "plus" evidence that Reeves offered. Did this mean there is still life left in pretext-plus?

The main answer is that the Court did leave the door open for summary judgment in some cases even if there is evidence of pretext. As stated above, in some cases where pretext points to a non-discriminatory reason or the plaintiff's case is weak, summary judgment can be granted. Therefore, it was necessary to see if Reeves' case was one of these weak ones. This conclusion regarding the Court's motivation is supported by Justice Ginsburg's concurrence. Justice Ginsburg wrote the concurrence for two reasons. One was to emphasize that a court can grant summary judgment, despite evidence of pretext, only in unusual cases.[260] The second was to point out that the Court might have to reexamine such an "unusual" case in the future to provide further guidance.[261]

Another, potentially farther reaching part of the answer may be that the Court felt it needed to tell the lower courts that they were inappropriately rejecting evidence of discrimination at the pretext stage. In any event, because the door to summary judgment was left somewhat ajar, the Court had to examine whether the summary judgment could have been granted in this case notwithstanding that Reeves produced evidence of pretext.

The Court made short work of the notion that Reeve's case was too weak to survive summary judgment. The Court effectively chastised the court of appeals for rejecting Reeves' evidence of discrimination and placing great weight on Sanderson Products' evidence that it did not discriminate.[262] The Court reminded lower courts that, in making a decision on whether to throw out a case as a matter of law, the court must consider all evidence in favor of the plaintiff and must take every inference from the evidence in favor of the plaintiff.[263] The Fifth Circuit simply did not do this. It ignored the age-based remarks, the evidence that Chesnut was involved in the decision to terminate, and that Reeves was treated differently from younger supervisors. To do this was to fail to consider the evidence in the light most favorable to Reeves. For the same reason, the Court held the Fifth Circuit was wrong to credit Sanderson's evidence that younger workers were disciplined and that it had older supervisors in its workforce. Such evidence, while relevant, should not be used to defeat a plaintiff's otherwise sufficient case on summary judgment.

This second part of the *Reeves* decision is at least as important as the part that rejects pretext-plus. This is because it is quite common for courts, on

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259. *Reeves*, 530 U.S. at 149.
260. *Id.* at 154-55 (Ginsberg, J., concurring).
261. *Id.*
262. *Id.* at 151-54.
263. *Id.*

motions for summary judgment, to reject evidence of discrimination like that rejected by the Court of Appeals for the Fifth Circuit.[264] For example, courts will often dismiss discriminatory remarks as too remote to be persuasive,[265] or find that any possible discriminatory animus of one manager was irrelevant if he was not the decision-maker.[266] Similarly, courts will often give great weight, even on summary judgment, to defendants' other evidence it did not discriminate such as that the decision-maker is in the same class as the plaintiff.[267] Some courts have also refused to draw inferences in favor of the plaintiff if the person who made the adverse decision is the "same actor" who hired the plaintiff.[268] As the cited examples make clear, these practices were

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264. *See* Michael J. Zimmer, *Slicing & Dicing of Individual Disparate Treatment Law*, 61 LA. L. REV. 577, 589-92 (2001).

265. *See, e.g.*, Brewer v. Quaker State Oil Refining, 69 Fair. Emp. Prac. Cases 753, 758 (BNA) (3d Cir. 1995); *Reeves*, 197 F.3d at 692; Price v. Marathon Cheese Corp., 119 F.3d 330, 333 (5th Cir. 1997); EEOC v. Manville Sales Corp., 27 F.3d 1089, 1093 n.2 (5th Cir. 1994); Bienkowski v. Am. Airlines, Inc., 851 F.2d 1503, 1507 (5th Cir. 1988); Waggoner v. City of Garland, 987 F.2d 1160, 1166 (5th Cir. 1993); Cullen v. Olin Corp., 195 F.3d 317, 323 (7th Cir. 1999); Cianci v. Pettibone Corp., 152 F.3d 723, 727 (7th Cir. 1998); Bahl v. Royal Indemnity Co., 115 F.3d 1283, 1293 (7th Cir. 1997); Merrick v. Farmers Ins. Group, 892 F.2d 1434 (9th Cir. 1990); Nesbit v. Pepsico, Inc., 994 F.2d 703, 705 (9th Cir. 1993) (holding statement of corporate officer having no direct relationship to plaintiff that "we don't necessarily like grey hair" in age discrimination suit not sufficient to withstand summary judgment).

266. Ostrowski v. Atl. Mut. Ins. Cos., 968 F.2d 171, 182 (2d Cir. 1992) (holding that burden shifting requires "evidence of conduct or statements by persons involved in the decision-making process that may be viewed as directly reflecting the alleged discriminatory attitude, and that . . . is sufficient *to permit the factfinder to infer* that the attitude was more likely than not a motivating factor in the employer's decision") (emphasis added); Gomez v. Allegheny Health Services, Inc., 71 F.3d 1079, 1085 (3d Cir. 1995); Ezold v. Wolf, Block, Schorr and Solis-Cohen, 983 F.2d 509, 546-47 (3d Cir. 1992), *cert. denied*, 510 U.S. 826 (1993) (holding six comments made over the five years before decision at issue by individual not working for employer at time of decision too remote to show independently that unlawful discrimination more likely than proffered reason); Turner v. N. Am. Rubber, Inc., 979 F.2d 55, 59 (5th Cir. 1992); Radabaugh v. Zip Feed Mills, Inc., 997 F.2d 444, 449 (8th Cir. 1993); Gunter v. Coca-Cola Co., 843 F.2d 482, 484 (11th Cir. 1988).

267. Jiminez v. Mary Washington Coll., 57 F.3d 369, 384 (4th Cir. 1995) (noting that professors in same class as plaintiff were given tenure and non-minority professors refused tenure); *Reeves*, 197 F.3d at 694 (noting that decision-makers were in the same class as plaintiff); Rhodes v. Guiberson Oil Tools, 75 F.3d 989, 1002 (5th Cir. 1996) (finding persuasive evidence there was no discrimination where decision-maker was in the same class as the plaintiff); Lowe v. J.B. Hunt Transp., Inc., 963 F.2d 173, 174-75 (8th Cir. 1992) (noting decision-maker in same class as plaintiff); Hicks v. St. Mary's Honor Center, 756 F.Supp. 1244, 1252 (E.D. Mo. 1991) (citing fact that decision-makers were members of the same protected class in support of the court's conclusion that plaintiff failed to satisfy the ultimate burden of proving intentional discrimination under Title VII), *rev'd*, 970 F.2d 487 (8th Cir. 1992), *rev'd*, 509 U.S. 502 (1993); Langston v. Carraway Methodist, 840 F.Supp. 854, 866 (N.D. Ala. 1993) (noting six of eight members of reorganization committee in same class as plaintiff).

268. *See, e.g.*, LeBlanc v. Great Am. Ins. Co., 6 F.3d 836, 847 (1st Cir. 1993) (noting that decision-maker approved transfer and sixteen percent pay raise two years before dismissal); Grady v. Affiliated Cent. Inc., 130 F.3d 553, 560 (2d Cir. 1997) (finding an inference of no discrimination where the person terminating was also the person who hired); Proud v. Stone, 945 F.2d 796, 797 (4th Cir. 1991) (noting that decision-maker hired plaintiff six months earlier); Buhrmaster v. Overnight Transport., Inc., 61 F.3d 461, 463 (6th Cir. 1995) (noting that same person was responsible for hiring, promoting, and firing plaintiff).

not limited to the historically pretext-plus circuits even before *Reeves*. Through its decision, the Supreme Court was clearly instructing the lower courts that they have gone too far in dismissing the discriminatory inferences of evidence and in crediting the inferences of evidence that favor defendants. That message will be largely ineffective if it is perceived as being aimed only at courts that were historically labeled as pretext-plus.

In fact, after *Hicks* it became impossible to identify pretext-plus courts solely on the basis of language indicating that proof of pretext is not necessarily enough to prove discrimination. Just as the "unworthy of credence" language from *Burdine* was not an accurate indicator of pure pretext-only, recognition that a plaintiff must ultimately prove discrimination is no longer an accurate indicator of pretext-plus. Many of the decisions discussed in Part V cited *Hicks* to the effect that a finding of untruth is not equivalent to a finding of discrimination.[269] The question that remains is whether courts that have historically placed a heavy burden on plaintiffs are the same courts that tend to apply specialized evidentiary doctrines to discount the value of a discrimination plaintiff's other evidence. If not, continuing to label courts may be counterproductive if it obscures what the courts are actually doing.

Since the *Reeves* decision was issued, the reaction of the lower courts has been interesting. The historically pretext-plus jurisdictions are likely to be the most closely watched, and are likely to generate the most controversy. Perhaps because the pretext-plus standard was dead or dying before *Reeves*, these circuits are having some difficulty sorting through earlier cases to determine what aspects are still good law.

Fifth Circuit decisions immediately after *Reeves* reflect a wide range of reactions. One panel withdrew an unpublished affirmance of summary judgment and sent the case back for trial, explicitly recognizing that the earlier decision had rested on "a now-disallowed legal standard."[270] In *Vadie v. Mississippi State University* another panel suggested that the appeals court opinion in *Reeves* was an anomaly that did not reflect the Fifth Circuit standard set forth by the *en banc* court in *Rhodes*. The *Vadie* panel went on to hold that *Rhodes* was entirely consistent with *Reeves*.[271] Still another panel reversed a district court's grant of judgment notwithstanding a jury verdict,

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269. *See, e.g.*, Ryther v. KARE 11, 108 F.3d 832, 838 n.5 (8th Cir. 1997) (quoting *Hicks*, 509 U.S. at 519 ("It is not enough . . . to disbelieve the employer; the factfinder must believe the plaintiff's explanation of intentional discrimination.")); Aka v. Washington Hosp. Center, 156 F.3d 1284, 1289 (D.C. Cir. 1998) (quoting *Hicks*, 509 U.S. at 507-08, to suggest that plaintiff will seek to prove "'that the proffered reason was not the true reason for the employment decision,' and that race [or some other discriminatory basis] was"); Fisher v. Vassar College, 114 F.3d 1332, 1336 (2d Cir. 1997) (same).

270. Evans v. City of Bishop, 238 F.3d 586, 592 (5th Cir. 2000).

271. Vadie v. Miss. State Univ., 218 F.3d 365, 373 n.23 (5th Cir. 2000).

rejecting the *Vadie* court's defense of *Rhodes* and noting particularly that "[i]n light of the Supreme Court's admonition in *Reeves*, our pre-*Reeves* jurisprudence regarding so-called 'stray remarks' must be viewed cautiously."[272]

None of the Fifth Circuit decisions since *Reeves* appear to have entirely avoided its holding, although the court has said that "a mere scintilla of evidence of pretext does not create an issue of material fact in all cases."[273] More recent decisions have acknowledged that proof of pretext, together with the prima facie case, is enough to get a case to a jury.[274] However, the court also states that "[w]hile we are mindful of the Supreme Court's recent admonition that Title VII plaintiffs need not always present evidence above and beyond their prima facie case and pretext, . . . discrimination suits still require evidence of discrimination."[275] Thus, the court has expressed some reluctance to accept that the combination of pretext and a prima facie case is evidence of discrimination.

The Fourth Circuit has also clearly acknowledged the *Reeves* decision and has applied it in cases that probably would have been dismissed before *Reeves*.[276] However, in *Rowe v. Marley Co.*,[277] an employee claimed discriminatory discharge after he was selected for termination from among other employees. The employer explained that it selected Rowe for discharge because his sales territory was the easiest to eliminate for geographical reasons. However, at least one manager involved in the decision said it was based on performance. Despite holding that this was evidence the employer's reason was pretextual, the Fourth Circuit upheld summary judgment. Like the Fifth Circuit, the Fourth Circuit has left itself room to grant summary judgment even where there is evidence of pretext if that evidence is, in the court's view, weak.[278] Similarly, in *Smith v. Union National Bank*, the court held that "the plaintiff must do more than merely raise a jury question about the veracity of the employer's proffered justification."[279]

In *Feliciano v. El Conquistador*, the First Circuit responded to *Reeves* by adhering to its existing precedents, claiming that its version of pretext-plus had

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272. Russell v. McKinney Hospital Venture, 235 F.3d 219, 229 (5th Cir. 2000).

273. Crawford v. Formosa Plastics Corp., La., 234 F.3d 899, 902 (5th Cir. 2000).

274. *See* Blow v. City of San Antonio, Tex., 236 F.3d 293, 297-98 (5th Cir. 2001), *reh'g en banc denied*, 250 F.3d 745 (5th Cir. 2001).

275. Rubinstein v. Adm'rs of Tulane Educ. Fund, 218 F.3d 392, 400 (5th Cir. 2000), *reh'g en banc denied*, 232 F.3d 212 (2000), *cert. denied*, 121 S.Ct. 1393 (2001).

276. *See, e.g.*, EEOC v. Sears Roebuck and Co., 243 F.3d 846 (4th Cir. 2001).

277. Rowe v. Marley Co., 233 F.3d 825 (4th Cir. 2000).

278. *Id.* at 830.

279. Smith v. First Union Nat'l Bank, 202 F.3d 234, 249 (4th Cir. 2000) (quoting Vaughn v. The Metrahealth Cos., 145 F.3d 197, 202 (4th Cir. 1998)).

been misunderstood.[280] It is true that, even prior to *Reeves*, the First Circuit had explained that "[a]lthough it uses the label 'plus,' the First Circuit's 'pretext-plus' standard does not necessarily require the introduction of additional evidence beyond that required to show pretext."[281] In *Feliciano*, however, the panel went on to hold that the First Circuit's "precedents are consistent with *Reeves*" and that Feliciano's evidence of pretext was too "thin" to survive summary judgment.[282]

Like the First Circuit, the Second Circuit has defended its history, holding in *James v. New York Racing Association* that "the Supreme Court's reasoning in *Reeves* is wholly compatible and harmonious with our reasoning in *Fisher*."[283] The court in *James* specifically relied on the most controversial line of reasoning from *Fisher*, effectively arguing that the plaintiff's evidence of pretext pointed nowhere: "there are so many reasons why employers give false reasons for an adverse employment action that evidence contradicting the employer's given reason—without more—does not necessarily give logical support to an inference of discrimination."[284] Another recent Second Circuit opinion noted that "[o]ur Circuit has not read *Reeves* quite so favorably to Title VII plaintiffs" as the Fourth and Fifth Circuits. Specifically, the Second Circuit has not set out a narrow exception based "on unusual circumstances or evidence precluding a finding of discrimination," but instead has simply ruled in several cases that "a *prima facie* case and evidence permitting a finding of pretext did not suffice to permit a finding of discrimination."[285]

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280. Feliciano De La Cruz v. El Conquistador Resort & Country Club, 218 F.3d 1, 9-10 (1st Cir. 2000) (as amended by order denying panel rehearing).

281. *Id.* at 10 (quoting Thomas v. Eastman Kodak Co., 183 F.3d 38, 57 (1st Cir. 1999) (internal quotations omitted)).

282. *Feliciano*, 218 F.3d at 10.

283. James v. N.Y. Racing Ass'n, 233 F.3d 149, 155-56 & n.3. At least one recent article has suggested that *Reeves* expressly approved the result in *Fisher v. Vassar College*. Tracy E. Higgins and Laura A. Rosenbury, *Agency, Equality and Antidiscrimination Law*, 85 CORNELL L. REV. 1194, 1212 (2000) ("Indeed, the Court cited *Vassar* as an example of a situation where summary judgment was appropriate."). The Court's discussion of *Fisher*, however, was actually very limited. In describing the split among the circuits in Part I of the *Reeves* opinion, Justice O'Connor divided the examples into three groups, but without labeling any of the groups. *Reeves*, 530 U.S. at 140-41. The first group consisted of cases from the Third, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits, presumably intended as examples of the pretext-permissive standard. Next came the DC Circuit's *Aka* decision, standing alone. Finally, O'Connor listed the *Fisher* decision along with decisions from the First, Fourth and Fifth Circuits, presumably as examples of the pretext-plus standard. The much-noted ambiguity of *Reeves* arises primarily from the fact that none of these listed opinions were categorically approved or rejected. With respect to *Fisher*, Justice O'Connor approvingly cited only a specific statement: "[I]f the circumstances show that the defendant gave the false explanation to conceal something other than discrimination, the inference of discrimination will be weak or nonexistent." *Reeves*, 530 U.S. at 148 (quoting Fisher, 114 F.3d at 1338). This citation is consistent with the standard set forth in *Aka* and *Rythe*r, and falls far short of endorsing the "points nowhere" reasoning from the original panel decision in *Fisher*.

284. *Id.* at 154.

285. Zimmerman v. Assoc. First Capital Corp., 251 F.3d 376, 382 (2d Cir. 2001).

Developments in the historically pretext-permissive circuits have been less dramatic. At least one circuit that did not recognize exceptions to the pretext-permissive rule has now done so.[286] In an unpublished decision the Ninth Circuit recently applied the *Godwin* requirement that pretext evidence must be "specific" and "substantial" in order to create a triable issue of fact.[287] The impact of this standard is hard to guage, however, because while the *Godwin* standard appears to discount the value of indirect pretext evidence, it gives increased weight to evidence of hostile comments in the workplace by classifying such remarks as "direct evidence" of discriminatory animus or motivation.[288] Far from being considered direct evidence of discrimination, offensive comments are often dismissed in other circuits as mere "stray remarks."[289]

A search of recent decisions reveals relatively few cases where historically pretext-permissive circuit courts have dismissed or discounted certain categories of plaintiffs' evidence, but in a recent unpublished decision one Sixth Circuit panel apparently went so far as to elevate the "same actor" inference to the status of a formal rule.[290] Meanwhile, the Seventh Circuit has continued to develop its "honest belief" rule, under which an employer who honestly believes a "foolish or trivial or even baseless" reason for taking action against an employee cannot be held liable.[291] In similar circumstances other circuits have held that an employer's decision-making process may be so

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286. Chapman v. AI Transport, 229 F.3d 1012, 1025 (11th Cir. 2000).

287. Leeny v. Clark County, Nos. 00-15291 & 00-16548, 2001 U.S. App. LEXIS 23160, at *3 (9th Cir. Oct. 24, 2001) (unpublished per curiam).

288. *Compare* Chuang v. Univ. Cal. Davis Bd. of Trustees, 225 F.3d 1115, 1128-29 (9th Cir. 2000) (citing Godwin v. Hunt Wesson, Inc., 150 F.3d 1217, 1220-21 (9th Cir. 1998)) (holding offensive comments by department chair and Executive Committee member were direct evidence of discriminatory intent) *with* Yates v. Rexton, Inc., 267 F.3d 793, 799 (8th Cir. 2001) ("Although Yates argues that the statements of various Siemens managers about him specifically and about age in general constitute direct evidence, they do not."). The Ninth Circuit does not appear to have considered whether classifying workplace comments as direct evidence implicates the *Price Waterhouse* framework. *See supra* notes 31-32.

289. *See supra*, notes 265-66 and accompanying text. *See also* Wallace v. The Methodist Hosp. System, 271 F.3d 212, 222-25 (5th Cir. 2001) (per curiam). The *Wallace* panel held that a supervisor's statement "that Wallace 'needed to choose between work and family'" was "not probative evidence of discriminatory intent" in a pregnancy discrimination case. While the supervisor's comment "may reflect a stereotype about a woman's commitment to the workplace . . . it does not relate specifically to an employment decision" even though the supervisor had authority over the employment decision and made the comment during a formal evaluation. *Id.* at 224.

290. Phelps v. Jones Plastic & Eng'g Corp., No. 00-5450, 2001 U.S. App. LEXIS 20814, at *13-14 (6th Cir. Sept. 19, 2001)(unpublished per curiam).

291. Gordon v. United Airlines, Inc., 246 F.3d 878, 889 (7th Cir. 2001) (quoting Brill v. Lante Corp., 119 F.3d 1266, 1270 (7th Cir. 1997). The Seventh Circuit's version of the honest belief rule is compared with the Sixth Circuit's version in Dana W. Atchley, Note, *The Americans with Disabilities Act: You Can't Honestly Believe That!*, 25 J. LEGIS. 229 (1999).

defective that "any reliance placed by the employer in such a process cannot be said to be honestly held."[292]

Not much imagination is required to see how the Seventh Circuit's rule could operate as another method of discounting a plaintiff's pretext evidence. In *Alexander v. Wisconsin Department of Health* the lower court found, and the appeals court confirmed, that the plaintiff "proffered ample evidence that several of his coworkers were bigots and that their bigotry made his work environment extremely difficult."[293] The appeals court further noted the employer's "lack of commitment" to investigating or remedying the situation.[294] Witnesses for the plaintiff and defendant gave very different factual accounts of the events leading to the plaintiff's discipline and discharge, but the Seventh Circuit panel nevertheless upheld a grant of summary judgment.[295] The appeals court held the factual disputes irrelevant because the department administrator had a "legitimate belief that such discipline was justified."[296] In other words, the plaintiff could not survive summary judgment unless he specifically showed that the department administrator "had a discriminatory animus towards him that tainted her assessment" of the conflicting stories presented by participants in the internal disciplinary process.[297]

CONCLUSION

The Supreme Court has clearly pushed discrimination cases away from judges and toward juries. Now it should be clear in most cases that the plaintiff's prima facie case, together with a showing that the defendant's non-discriminatory reason is pretext, is enough to get a case to a jury. This is the last place employers want to have such cases decided because of their belief that juries tend to rule against them. The logical result is that plaintiffs will find discrimination cases easier to settle and thus more lucrative to bring. A number of commentators have suggested that this fear of plaintiff windfalls is a major reason why courts continue to find ways to grant summary judgment and judgment as a matter of law where plaintiffs have presented evidence of

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292. Smith v. Chrysler Corp., 155 F.3d 799, 807-08 (6th Cir. 1998). The *Smith* court cited *Fischbach v. District of Columbia Dept. of Corrections*, 86 F.3d 1180, (D.C. Cir. 1996), to the effect that "if the employer made an error too obvious to be unintentional, perhaps it had an unlawful motive for doing so." *Fischbach*, 86 F.3d at 1183.

293. Alexander v. Wis. Dept. of Health & Family Serv., 263 F.3d 673, 683 (7th Cir. 2001).

294. *Id.* at 673.

295. *Id.* at 677-80.

296. *Id.* at 683.

297. *Id.* at 684.

pretext, even after *Reeves*.[298] The need to manage growing judicial caseloads may be an equally important factor.[299]

In any case, the *Reeves* Court made clear that the lower federal courts need to be more careful in evaluating evidence on summary judgment. It is not the role of the court to evaluate the merits of discrimination evidence and weigh credibility. Nor may those courts draw inferences unfavorable to the plaintiff while dismissing favorable inferences, even if the inference is disguised as an evidentiary "rule" purportedly governing treatment of "stray remarks" or actions by the "same actor." It will be interesting to see if the lower courts will follow this lead or if, as Justice Ginsberg thinks, there will be a need for more corrective decisions.

298. Ware, *supra* note 13, at 58-63; Zimmer, *supra* note 264, at 601. *See generally* Michael Selmi, *Why are Employment Discrimination Cases so Hard to Win?*, 61 LA. L. REV. 555 (2001).

299. *See* BRUNET, REDISH & REITER, *supra* note 9, at §§ 1.01, 3.01.