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The Dismantling of *McDonnell Douglas v. Green*: The High Court Muddies the Evidentiary Waters in Circumstantial Discrimination Cases

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I. INTRODUCTION

> The broad, overriding interest, shared by employer, employee, and consumer, is efficient and trustworthy workmanship assured through fair and racially neutral employment and personnel decisions. In the implementation of such decisions, it is abundantly clear that Title VII tolerates no racial discrimination, subtle or otherwise.[1]

Twenty years have passed since the Supreme Court enunciated this worthy goal of employment discrimination law. The struggle for equality in our society is nowhere more evident than in the workplace. The workplace has become the battleground in the struggle for civil rights and equal opportunity.

The obvious barriers to discrimination—"No Blacks Need Apply"—are memories. Remaining behind, though, are complex barriers far more difficult to identify. In the American workplace of the 1990s, racism and even sexism in their more overt forms have largely faded, but subtle, even unconscious vestiges of prejudice persist.

While courts grapple with the subtleties of evidentiary proof of discrimination, the common and increasing refrain from employers is that they are often unable to accomplish legitimate workplace objectives,

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1. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 801 (1973).

specifically, the hiring and retention of a competent workforce, due to the fear of employment discrimination litigation. The passage of the Civil Rights Act of 1991,[2] with its provisions for additional remedies and jury trials,[3] has served only to exacerbate this collective angst.

Finding a balance between protecting victims of subtle prejudice on the one hand, and overreaching into legitimate decisionmaking of business on the other, is a Herculean task. Unfortunately, the ideal balance between the competing interests is often forgotten by the courts and Congress. Within the past five years, each branch has periodically pursued a set political agenda on one side of the equation without regard for the consequences to the other side, be they expressed in lost human capital or lost global competitiveness. The political volleyball engaged in by Congress and the United States Supreme Court illustrates the tension between the goal of equal opportunity and the risk of the federal court system becoming a "super-personnel board," second-guessing everyday legitimate personnel decisions as ruses for discrimination. Congress and the Court continue to be at odds with one another in fashioning many of the potentially outcome determinative procedural rules governing discrimination cases.[4] This friction reflects the divergence of the political

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2. *See* Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1073 (codified in scattered sections of 42 U.S.C.). The Act provides that in cases of intentional discrimination, remedies may include compensatory and punitive damages upon a certain capped amount which is determined by the size of the employer defendant. 42 U.S.C. § 1981(a)(1) (Supp. III 1991). The Act also states that in a case of intentional discrimination either party may request a jury trial. *Id.* § 1981(c).

3. Jury trials are now available in intentional discrimination cases under Title VII and the Americans with Disabilities Act upon demand by either party. *See* 42 U.S.C. § 1981(c). The new Act makes it clear that the right to a jury trial emanates from the availability of compensatory and punitive damages. *Id.*

4. The Civil Rights Act of 1991 was primarily a response to several decisions made by the Supreme Court during the 1988 Term, including Patterson v. McLean Credit Union, 491 U.S. 164 (1989) (ruling that 42 U.S.C. § 1981 does not prohibit workplace harassment based on race); Lorance v. AT&T Technologies, Inc., 490 U.S. 900 (1989) (holding that the statute of limitations begins running in a challenge to a facially neutral seniority system adopted for discriminatory purposes when the system is adopted); Martin v. Wilks, 490 U.S. 755 (1989) (holding that plaintiffs harmed by an affirmative action plan contained in a consent decree may bring independent lawsuits to challenge the action); Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989) (stating that plaintiffs in disparate impact cases must prove that the challenged practice does not serve the employer's legitimate interests); Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (ruling that employers can avoid liability in mixed-motive cases by proving that they would have taken the same action absent discriminatory motivation).

The Older Workers Benefit Protection Act of 1990, Pub. L. No. 101-433, 104 Stat. 978 (1990), legislatively reversed the Court's decision in Public Employees Retirement Sys. of Ohio v. Betts, 492 U.S. 158 (1989), which interpreted the Age Discrimination in Employment Act to preclude attacks on age discrimination in fringe benefits.

preferences of the Court and Congress, which emerged as the Court absorbed Reagan/Bush appointees and as the House and the Senate became controlled by Democratic majorities.[5]

On June 25, 1993, the volleying reached a particularly feverish pitch in *St. Mary's Honor Center v. Hicks*,[6] where a divided Supreme Court refashioned twenty years of precedent and changed the model of proof for the vast majority of individual intentional discrimination cases, theoretically making it more difficult for plaintiffs to prevail.[7] No longer will a

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Judge Easterbrook of the Seventh Circuit Court of Appeals provides a unique perspective on the semantics involved in the characterization of responsive civil rights legislation:

> Committee reports and articles in law reviews often speak of Congress "overruling" the Supreme Court, but like many a term chosen for rhetorical rather than analytical purposes the usage is ambiguous. Does it mean "The Supreme Court misunderstood the statute in force when it acted"? or does it mean "The legal rule the Supreme Court found in the existing statute is not the rule we prefer"? The former implies that the "overruling" statute regulates events that occurred before its enactment, for the new law ensures continuing operation of a rule that has been on the books all along. The latter implies prospective application, just like any other change in the law. Congress often concludes that existing rules are inadequate and provides new ones that it thinks superior. That the inadequacies in the existing statutes have been revealed by judicial decisions, rather than by the plaints of lobbyists, does not imply that a revision in the text of the United States Code is anything other than a spanking new rule of law.

Mojica v. Gannett Co., 7 F.3d 552, 562 (7th Cir. 1993) (Easterbrook, J., concurring) (holding that the Civil Rights Act of 1991 does not apply retroactively to employment decisions predating the Act).

5. The civil rights animosity between the Court and Congress first began some 20 years ago as the Court shifted to the right in 1972 with the first votes of Justices Rehnquist and Powell. By 1986, the Rehnquist Court stood far to the right of the Warren Court and the early Burger Court. Congress, on the other hand, began to move to the left in the early 1970s in part due to the increased activism of minority groups. *See generally* William N. Eskridge, Jr., *Reneging on History? Playing the Court/Congress/President Civil Rights Game*, 79 CAL. L. REV. 613 (1991). Eskridge argues that civil rights statutory policy in the 1990s will depend largely on the preferences of the Presidency. A more liberal President not only removes veto protection for the Court if Congress attempts to override a decision but may also persuade Congress to move even further to the left in general. *Id.* at 663. Other than a concerted effort to allow gays to serve openly in the military which resulted in a dubious compromise, President Clinton's administration as of the date of this writing has not proposed any broad-based changes in current employment discrimination legislation.

For a detailed discussion of the Rehnquist Court, see generally DAVID G. SAVAGE, TURNING RIGHT: THE MAKING OF THE REHNQUIST SUPREME COURT (1992).

6. 113 S. Ct. 2742 (1993).

7. *Id.* at 2754-56. The Supreme Court's decision came after nine years of litiga-

plaintiff automatically prevail upon proof that the employer's proffered reason for its action is false.[8] Instead, the plaintiff must prove the ultimate issue of discrimination.[9] The Court's decision was almost inescapably predicated on one or more of three grounds: (1) the belief that bias in the workplace is no longer prevalent; (2) the belief that frivolous discrimination claims under the pre-*St. Mary's* model were commonplace;[10] or (3) the belief that despite the merits or non-merits of claims, the federal court system is overloaded with discrimination claims and that procedural vehicles should be used to alleviate this problem.[11]

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tion, and as the case was remanded for further proceedings, the case is still unresolved as of the date of this Article.

8. *Id.*

9. *Id.*

10. An interesting study of Rule 11 sanctions shows that the rule is used heavily to sanction civil rights claimants:

> [A] nationwide survey of Rule 11 decisions between August 1983 and December 1987 shows that of the 680 motions for sanctions which resulted in published opinions, 28 percent were brought in Title VII and other civil rights cases. Plaintiffs were targeted in 86 percent of these motions, and sanctions were granted against them over 70 percent of the time. By comparison, on a sample-wide basis, Rule 11 violations were found less than 58 percent of the time. The next largest category of litigation, securities fraud and RICO cases, accounted for 15.2 percent of these Rule 11 motions. Plaintiffs were targeted 84 percent of the time, but sanctions resulted in only 45.5 percent of the cases.

ROBERT L. CARTER, *Thirty-Five Years Later: New Perspectives on Brown*, *in* RACE IN AMERICA 83, 91 (Herbert Hill & James E. Jones, Jr. eds., 1993) (citations omitted) (citing Georgene M. Vairo, *Rule 11: A Critical Analysis*, 118 F.R.D. 189, 200-01 (1988)). No empirical studies have analyzed whether the disproportionate sanctioning of civil rights claimants results from a disproportionate amount of frivolous claims or whether the sanctioning occurs because of the general inhospitability of the courts to civil rights claims.

The alleged frivolity of discrimination claims was brought pointedly to the attention of the Supreme Court in St. Mary's Honor Center v. Hicks, 113 S. Ct. 2742 (1993). An amicus brief filed with the Court states that the former model of proof allowed plaintiffs to "roll the dice" with the jury, thus encouraging "more unmeritorious lawsuits, unnecessarily diverting valuable personnel and capital resources from improving productivity to dealing with unwarranted litigation." Brief of the National Association of Manufacturers as Amicus Curiae in Support of Petitioners, at LEXIS 74-75, St. Mary's Honor Ctr. v. Hicks, 113 S. Ct. 2742 (1993) (No. 92-602).

Likewise, the Chamber of Commerce of the United States of America filed an amicus brief which stated that "[t]he federal antidiscrimination laws were not designed to provide a forum for disgruntled employees to voice their objections over legitimate employment practices." Brief of the Chamber of Commerce of United States as Amicus Curiae in Support of the Petitioners, at LEXIS 44 n.5, St. Mary's Honor Ctr. v. Hicks, 113 S. Ct. 2742 (1993) (No. 92-602). The Chamber's brief concluded that the "pretext-only" view (ultimately rejected by the majority in *St. Mary's*) would "lead to far more trials, far higher settlement costs, and far higher defense costs." *Id.* at 47.

11. Several amicus briefs filed with the Court supported the pretext-plus view in

St. Mary's cuts deeply across the panoply of discrimination laws in that while *St. Mary's* is a Title VII[12] case, its model of proof will likely apply to individual circumstantial discrimination cases brought under Section 1983,[13] Section 1981,[14] the Age Discrimination in Employment Act,[15] and the Americans with Disabilities Act.[16] Further, because juries

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large part to facilitate the use of summary judgment by the employer to rid the federal courts of an increasing backlog of discrimination cases. For example, in support of the pretext-plus view, the Chamber of Commerce of the United States argued:

> By eliminating the use of summary judgment as a just and speedy method of adjudicating claims, the [pretext-only view of the lower court] will undoubtedly contribute to the flood of discrimination claims in the federal court system. As of September 30, 1992, there were 10,771 private employment-related civil rights actions pending in the federal courts. In 1991, there were only 8,370 such cases pending in the federal court system. This represents an increase of 28.7% over a one-year period. Without the benefit of summary judgment motions to help reduce this backlog, the federal court system's caseload will continue to grow at incremental rates.

Brief of the Chamber of Commerce of the United States as Amicus Curiae in Support of the Petitioners, at LEXIS 47, St. Mary's Honor Ctr. v. Hicks, 113 S. Ct. 2742 (1993) (No. 92-602) (citations omitted) (citing Report of the Office of the Administrative Office of the United States Courts, Table C-2A (Sept. 30, 1988 through Sept. 30 1992)).

Another amicus brief suggested yet a fourth policy factor which may have, in part, swayed the majority to reformulate the *McDonnell* model: the inability of employers to make critical and subjective evaluations of employees due to the fear of being embroiled in discrimination litigation. *See* Brief of the National Association of Manufacturers as Amicus Curiae in Support of Petitioners, at LEXIS 75-76, St. Mary's Honor Ctr. v. Hicks, 113 S. Ct. 2742 (1993) (No. 92-602) (citing Charles A. Brake, Jr., *Limiting the Right to Terminate at Will—Have the Courts Forgotten the Employer?* 35 VAND. L. REV. 201, 229-30 (1982)).

12. Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17 (1988).

13. 42 U.S.C. § 1983 (1988). Section 1983 does not create any substantive rights of its own but provides a private cause of action against someone acting "under color of any statute, ordinance, regulation, custom or usage of any State," who deprives the claimant of a constitutional right. *Id.; see also* Pilditch v. Board of Educ., 3 F.3d 1113 (7th Cir. 1993). Plaintiffs often raise § 1983 claims in conjunction with Title VII claims because § 1983 does not require claimants to exhaust state or local administrative remedies, may offer a longer statute of limitations, allows for jury trials, and provides for punitive damages. *Id. But see* Day v. Wayne County Bd. of Auditors, 749 F.2d 1199, 1204 (6th Cir. 1984) (holding that a plaintiff cannot use § 1983 to gain perceived advantages not available to a Title VII claimant). A plaintiff may also conjunctively plead § 1983 if some law other than Title VII is the source of the right alleged to have been denied. *See* Johnston v. Harris County Flood Control Dist., 869 F.2d 1565, 1575-76 (5th Cir.), *cert. denied*, 483 U.S. 1019 (1989).

14. 42 U.S.C. § 1981 (1988).

15. *See* Patterson v. McLean Credit Union, 491 U.S. 164, 186 (1989) (applying

are now available in intentional discrimination cases under all of these statutes, lower courts must carefully craft jury questions and instructions to comport with the majority holding.

The volleying between the Court and Congress continued when, only one month after the decision was issued, the House introduced a bill entitled the "Employment Discrimination Evidentiary Amendment Act of 1993," H.R. 2787, which sought to override the majority's holding. No parallel Senate bill has been introduced as of yet, and the House bill, seven months after its introduction, is still in its initial form. The proposed legislation not only fails to resolve the evidentiary issues resulting from *St. Mary's*, but creates questions of its own.

Many important statutory interpretation issues remain to be decided under the inartful and vaguely-worded Civil Rights Act of 1991, an act which is the embodiment of political compromise and scant, contradictory legislative history.[17] Many of these issues are already winding their way through the federal courts, and most will be decided in the next ten years.[18] One such issue is whether the Court's rancorous 5-4 decision in

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framework to claims under 42 U.S.C. § 1981); Richmond v. Board of Regents of Univ. of Minnesota, 957 F.2d 595, 598 (8th Cir. 1992) (ruling that the burden of establishing a prima face case of discrimination is the same under Title VII, § 1981, § 1983, or the Age Discrimination in Employment Act). The plaintiff in *St. Mary's* brought suit under both Title VII and § 1983, and the Eighth Circuit cited *Richmond* in holding that the same proof structure applied to both causes of action. Hicks v. St. Mary's Honor Ctr., 970 F.2d 487, 490-91 (8th Cir. 1992).

However, the Supreme Court in *St. Mary's* did not definitively resolve whether § 1983 utilizes the same model of proof as does Title VII in an intentional discrimination case. The Court stated:

> The Court of Appeals held that the purposeful-discrimination element of respondent's § 1983 claim against petitioner Long is the same as the purposeful-discrimination element of his Title VII claim against petitioner St. Mary's. Neither side challenges that proposition, and we shall assume that the *McDonnell Douglas* framework is fully applicable to racial-discrimination-in-employment claims under 42 U.S.C. § 1983.

St. Mary's Honor Ctr. v. Hicks, 113 S. Ct. 2742, 2746 n.1 (1993) (citations omitted).

16. 42 U.S.C. § 12101-12112 (Supp. III 1991).

17. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified in scattered sections of 42 U.S.C.). Despite two years of debate on the Act, many important terms were left undefined, and the Act also expresses inconsistent statutory purposes. Further, the legislative history of the Act contains no committee hearings or reports and only brief floor debate on the Act's final provisions, much of which clearly was manufactured to provide legislative history in accordance with the speaker's political preference.

18. The first issue already facing the Court is whether the Act is retroactive. The Court granted certiorari in the consolidated cases of Harvis v. Roadway Express, Inc., 973 F.2d 490 (6th Cir. 1992) (holding that the 1991 Act could not be applied retroactively to cases which were pending when the legislation was enacted), *cert. granted*, 113 S. Ct. 1250 (1993), and Landgraf v. USI Film Prod., 968 F.2d 427 (5th Cir. 1992)

St. Mary's reflects a pro-employer bias, thus foreshadowing employer victories on numerous issues currently being litigated under the various anti-discrimination statutes. Clearly, many of the Court's decisions in its notorious 1988 term impeded the abilities of plaintiffs to recover in discrimination cases.[19] Critics of the Court are quick to look to these cases and characterize the Court as having an anti-civil rights agenda without taking into account several pro-civil rights decisions made by the Court in recent years, including the Court's most recent pronouncement on the law of sexual harassment.[20] Indeed, in affirmative action cases, the Court has clearly distorted the rules of statutory interpretation and the plain meaning of Title VII to generally uphold affirmative action plans.[21]

(holding that the damages and jury trial provisions of the 1991 Act did not apply retroactively), *cert. granted*, 113 S. Ct. 1250 (1993) (consolidated for argument and argued Oct. 13, 1993).

19. *See supra* note 5; *see also* 136 CONG. REC. S1022 (daily ed. Feb. 7, 1990) (statement of Sen. Metzenbaum) ("In a stunning series of 5-4 decisions announced last spring, the new majority on the court reversed longstanding precedents and denied protection to the victims of employment discrimination.")

20. Harris v. Forklift Sys., Inc., 114 S. Ct. 367 (1993). In *Harris*, the Court held that conduct need not seriously affect an employee's psychological well-being or lead her to suffer injury to be actionable as abusive work environment harassment. *Id.* at 371.

In addition, the Court recently ruled that the definition of "willful," a finding which allows a doubling of damages under the Age Discrimination in Employment Act, means "the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute." Hazen Paper Co. v. Biggins, 113 S. Ct. 1701, 1710 (1993). The Court refused to adopt more restrictive definitions which had emerged in the lower courts. Conversely, in that same case, the Court refused to infer age discrimination animus when discharge occurs to avoid the vesting of retirement benefits which are based on years of service as opposed to the age of employee. *Id.* at 1709; *see also* International Union, UAW v. Johnson Controls, Inc., 499 U.S. 187 (1991) (holding that defendant's fetal protection policy was facially discriminatory and no bona fide occupational qualification defense existed to defend its use); Yellow Freight Sys., Inc. v. Donnelly, 494 U.S. 820 (1990) (ruling that state courts have concurrent jurisdiction over Title VII cases if a state claim is attached); Watson v. Fort Worth Bank & Trust, 487 U.S. 977 (1988) (stating that disparate impact analysis applies to subjective employment practices); Johnson v. Transportation Agency, 480 U.S. 616 (1987) (holding that an affirmative action plan was valid even in the absence of prior discrimination by the employer).

21. Johnson v. Transportation Agency, 480 U.S. 616 (1987). In *Johnson*, Justice Stevens stated that "[t]he logic of antidiscrimination legislation requires that judicial constructions of Title VII leave 'breathing room' for employer initiatives to benefit members of minority groups." *Id.* at 645 (Stevens, J., concurring). Justice Scalia dissented and added that "Title VII has not been repealed but actually inverted." *Id.* at 677 (Scalia, J., dissenting).

Thus, despite the Court's apparent conservative majority in the civil rights area, not all of the Court's recent decisions reflect an anti-civil rights bias.

Further, the Court's complexion has begun to change with the recent confirmation of Justice Ginsburg as Justice White's replacement. As the first appointee by a Democratic president since 1967, her presence may well affect the outcome of future discrimination cases, although the sometimes conservative Justice White joined the pro-plaintiff dissent in *St. Mary's*.[22] If the Court, in interpreting the many issues under the Civil Rights Act of 1991, continuously rules so as to restrict a plaintiff's[23] ability to recover, Congress will surely intervene either in the form of yet another Civil Rights Act or in piecemeal form as each conservative decision issues.

But while future cases remain to be decided by the Court and responsive legislation remains a mere possibility, the impact of *St. Mary's* is immediate.[24] The initial reaction of commentators was that the decision would severely impact a plaintiff's ability to prevail in a circumstantial case primarily because it could result in a multitude of summary judgments for employer defendants.[25] Thus, plaintiffs would be deprived of one of the key provisions in the Civil Rights Act of 1991: the right to a ju-

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22. Justice Ginsburg's role on the Court is yet to be defined. In the 1970s, she was at the forefront of the women's rights movement as an American Civil Liberties Union litigator. As a federal appellate judge in the 1980s, however, her rulings often adhered to precedent, sometimes disappointing her liberal allies.

The Court's current make-up is intriguing. Although he remained an enigma, former Justice White often sided with the conservative wing of Chief Justice Rehnquist, Justice Scalia, and Justice Thomas. Justice Kennedy, while straying from the conservative wing in 1992, appears to have drifted back towards it. Justice O'Connor has remained a maverick, and Justice Souter has emerged a moderate. Justices Blackmun and Stevens comprise the liberal wing.

23. Where the plaintiff alleges reverse discrimination, the anti-civil rights view actually favors the typically white plaintiff and opposes the employer.

24. The Supreme Court's holding in *St. Mary's* must be applied retroactively to the thousands of pending cases pursuant to Harper v. Virginia Dep't of Taxation, 113 S. Ct. 2510 (1993).

25. *See, e.g.*, Linda Greenhouse, *Justices Increase Workers' Burden in Job-Bias Cases*, N.Y. TIMES, June 26, 1993, at A1 ("Ruling in an important civil rights case, a divided Supreme Court today made it harder for employees to prove they suffered discrimination on the job."); David G. Savage, *Justices Rule Fired Workers Must Prove Bias*, L.A. TIMES, June 26, 1993, at A1 ("The Supreme Court revised the rules for deciding job discrimination claims and made it harder for employees to prove that they are victims of illegal bias . . . . Some job bias experts called Friday's decision a clarification of the rules, while other civil rights advocates branded it a major change in the law. Both sides agreed, however, that it will have significant impact in thousands of job discrimination claims.").

ry.[26] However, as this Article will argue, the majority opinion actually provides ammunition for many plaintiffs to withstand a summary judgment motion. As a result, on close examination, the decision's effect *should* be less extreme than a first reading might indicate.

When read as a whole, *St. Mary's* is clearly designed to promote employer efficiency and to free decisionmakers from the specter and expense of discrimination litigation. The danger of the trial courts' implementation of this objective, however, is that not only frivolous claims will be "culled" from the judicial system but that countless meritorious claims will be lost as well. If lower courts fail to rely on the "ammunition" the majority decision gives the plaintiffs, and instead routinely base employer summary judgments on *St. Mary's*, the decision may be seen by employers as "carte blanche" to perpetuate subtle, hidden discrimination, rather than as an impetus to exercise otherwise constrained business judgment. Another possible outcome, antithetical to Title VII goals, is that plaintiffs' attorneys, faced with the prospect of financing litigation with a more dubious outcome, may begin to refuse otherwise meritorious discrimination cases with no "smoking gun" evidence at hand. The majority's response, one would imagine, would be that the decision encourages attorneys to simply be more selective about weeding out frivolous claims.

The purpose of this Article is two-fold. First, this Article will examine the potential effect of *St. Mary's* at the crucial pre-trial stage of litigation. Secondly, this Article will explore the two existing models of proof in individual disparate treatment cases particularly in light of *St. Mary's*. Section I of this Article will trace the evolution of the model of proof in circumstantial disparate treatment cases from *McDonnell Douglas Corp. v. Green*[27] through *United States Postal Service Board of Governors v. Aikens*.[28] Section II of this Article will analyze *St. Mary's* and the vitriolic interchange between the majority and the dissent. Section III will discuss the practical implications of the case and the importance of characterizing evidence as "direct" so as to avoid application of the newly refashioned circumstantial model. Section III will also illustrate that the impact of *St. Mary's* will likely be felt most deeply by litigants at the summary judgment stage. If a plaintiff can withstand the employer's motion for summary judgment and obtain a jury trial, the impact of *St.*

26. *See supra* note 2.
27. 411 U.S. 792 (1973).
28. 460 U.S. 711 (1983).

Mary's in jury trials should be nominal. Section IV will discuss the proposed legislation to override *St. Mary's* and the questions that it leaves unanswered, at least in its current form.

One's initial characterization of *St. Mary's* largely depends upon one's political philosophy and the degree to which one believes that subtle discrimination still exists in the workplace. The ultimate characterization and effect of the case lies in the hands of the judges who must interpret the majority's somewhat cryptic discourse. The decision's potential consequences mandate a careful analysis of the twenty-year development of the model of proof in individual discrimination cases, the changes implemented by the Civil Rights Act of 1991, and an understanding of the application of *St. Mary's* at the crucial pre-trial stage of litigation.

II. AN HISTORICAL OVERVIEW: INDIVIDUAL DISPARATE TREATMENT CASES

Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment because of race, sex, color, religion, and national origin.[29] An employer must not discriminate on these bases in hiring, firing, promotion, compensation, or any other terms and conditions of employment.[30]

Discrimination cases fall into two broad categories: disparate impact and disparate treatment. An important distinction between the two categories is that the former category requires no proof of motive or intent to discriminate, while the latter category does.[31] Disparate treatment

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29. 42 U.S.C. § 2000e-2(a) (1988). Section 2000e-2(a) states:

> It shall be an unlawful employment practice for an employer—
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> (1) to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's face, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex or national origin.

Id.

30. *Id.*

31. Disparate impact was recognized by the Court in Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971). Disparate impact does not concern itself with motivation. Rather, disparate impact cases are concerned with the disproportionate result of an employer's practices, typically some type of selection device such as an aptitude test. The plaintiff's prima facie case consists of identifying the facially neutral practice or device and statistically demonstrating its significant disparate impact upon the members of the plaintiff's protected classification.

In Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989), the Court assigned

cases may take the form of a class action suit but more commonly occur when an individual files suit.[32] These cases generally arise when an indi-

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only a burden of production to the employer to justify the challenged practice by showing that the "practice serves, in a significant way, the legitimate employment goals of the employer." *Id.* at 659. The Court added that the practice need not be "essential" or "indispensable" to satisfy this burden. *Id.* If the employer meets its burden of production, the plaintiff might still prevail by persuading the trial court that less discriminatory alternatives existed which were equally effective as the challenged practice. *Id.* at 660-61. The Court remarked that "the cost or other burdens of the proposed alternative selection devices [were] relevant in determining whether they would be equally as effective . . . ." *Id.* at 661.

Commentators for the most part were outraged at what they perceived to be an overruling of 18 years of post-*Griggs* precedent holding that the employer had the burden of proof. *See, e.g.*, Robert Belton, *The Dismantling of the Griggs Disparate Impact Theory and the Future of Title VII: The Need for a Third Reconstruction*, 8 YALE L. & POL'Y REV. 223 (1990).

The Civil Rights Act of 1991, in large part a response to *Wards Cove*, shifted the burden of persuasion to the employer to justify the challenged practice. Once the complainant "demonstrates" that a particular employment practice causes a disparate impact, the employer must "demonstrate" that the challenged practice is justified. 42 U.S.C. § 2000e-2(k)(1)(A)(i) (Supp. 1991). The term "demonstrates" is defined to mean "meets the burdens of production and persuasion." *Id.* § 2000e(m).

For a detailed discussion of *Wards Cove* and the effect of the Civil Rights Act of 1991 on disparate impact cases, see Kingsley R. Browne, *The Civil Rights Act of 1991: A "Quota Bill," a Codification of Griggs, a Partial Return to Wards Cove, or all of the Above?* 43 CASE W. RES. L. REV. 287 (1993).

32. Unless otherwise stated in the text, when this Article refers to a disparate treatment case, it refers to a case brought by an individual. "Systemic" disparate treatment cases occur when a group of plaintiffs allege that differential treatment was the employer's routine operating procedure. These are also called "pattern or practice" cases. *See* International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977). Statistical evidence plays the key role in demonstrating that an employer has engaged in a pattern or practice of discrimination. Plaintiffs typically attempt to demonstrate that the observed representation of women or minorities in the workforce is lower than the representation that would be expected if employment decisions were made randomly with respect to race or sex. Most courts find that disparities of more than two standard deviations from the mean are statistically significant.

In addition, most courts expect to see some anecdotal testimony concerning individual instances of discrimination. *See, e.g.*, Sheehan v. Purolator, Inc., 839 F.2d 99, 103 (2d Cir.), *cert. denied*, 488 U.S. 891 (1988). A few courts, however, have held that if the statistical evidence is strong enough, anecdotal evidence is not required. *See, e.g.*, Segar v. Smith, 738 F.2d 1249, 1296 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1115 (1985). Importantly, once the plaintiff establishes the prima facie case, the burden of proof shifts to the defendant. The defendant employer must then prove the falsity of the plaintiff's assumptions. For an in-depth criticism of the reliance on statistics by courts in pattern or practice cases, see Kingsley R. Browne, *Statistical Proof of Discrimination: Beyond "Damned Lies"*, 68 WASH. L. REV. 477 (1993).

vidual in a protected class is treated less favorably than a similarly situated person outside that protected group. For example, a discrimination action may result when a female is not hired for a job and the job is given to a male of similar or lesser qualifications. In such a case, the female applicant would not be required to provide "direct" proof of disparate treatment.[33] Instead, the female applicant could establish intent to discriminate by inference through the use of "circumstantial" evidence. Indeed, the vast majority of disparate treatment cases involve the use of inferential proof. The Supreme Court has recognized that there "will seldom be 'eyewitness' testimony as to the employer's mental processes."[34] In today's litigious environment, even an employer of minimal legal sophistication is likely to refrain from providing a plaintiff with "smoking gun" evidence such as "You'll never make partner because you are a woman."[35] Thus, the individual plaintiff whose allegations are supported by mere circumstantial evidence faces the difficult task of proving the state of mind or discriminating intent of the defendant.[36]

In 1973, a unanimous Supreme Court established the proof structure for these common types of discrimination cases in *McDonnell Douglas Corp. v. Green*.[37] The Court easily could have equated Title VII cases

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On the other hand, in individual disparate treatment cases, statistical evidence is useful, although not essential. The plaintiff may buttress his or her case by using statistics to show that the employer routinely treats people of different classifications differently.

33. United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 717 (1983). For a more detailed discussion of the distinction between "direct" and "indirect" or "circumstantial" evidence, see *infra* notes 220-23 and accompanying text. This distinction is crucial as it dictates the model of proof that will govern the case and potentially its outcome.

34. *Aikens*, 460 U.S. at 716.

35. *See, e.g.*, Thornbrough v. Columbus & G.R.R., 760 F.2d 633, 638 (5th Cir. 1985) ("Unless the employer is a latter-day George Washington, employment discrimination is as difficult to prove as who chopped down the cherry tree . . . . Employers are rarely so cooperative as to include a notation in the personnel file, 'fired due to age . . . .'").

36. "The law often obliges finders of fact to inquire into a person's state of mind . . . ." *Aikens*, 460 U.S. at 716-17. "It is true that it is very difficult to prove what the state of a man's mind at a particular time is, but if it can be ascertained, it is as much a fact as anything else." *Id.* (quoting Edgington v. Fitzmaurice, 29 Ch. Div. 459, 483 (1885)).

In addition, discrimination may also occur as a result of unconscious prejudice. Thus, "state of mind" is not a good descriptor of the "intent" involved in such a case. The circumstantial facts surrounding an employment decision may lead a reasonable fact finder to infer "intent" even though the employer never consciously "intended" to discriminate.

37. 411 U.S. 792 (1973). This same proof framework is also used in age discrimination cases under the Age Discrimination in Employment Act, 29 U.S.C. § 621, and in § 1983 and § 1981 cases. *See* Richmond v. Board of Regents of Univ. of Minneso-

with other ordinary civil actions and simply held that in order to prevail at trial the plaintiff would be required to prove by a preponderance of the evidence that the employer intentionally discriminated.[38] Instead, the Court chose to fashion a proof structure seemingly unique to Title VII.[39] This structure continues to bedevil lower courts and the Supreme Court itself, as evidenced in *St Mary's*.

The three-part analytical framework first enunciated in *McDonnell Douglas* in 1973 was later refined in 1981 in *Texas Department of Community Affairs v. Burdine*.[40] In 1983, the Court again addressed the framework in *United States Postal Service Board of Governors v. Aikens*[41] but added little clarity to the model. For ten years, until the *St. Mary's* decision in 1993, no major Supreme Court case addressed the model in detail. A review of the model of proof as it stood prior to *St. Mary's* is necessary to explore the ramifications of the Court's most recent pronouncement and the apparent pro-business objectives the Court sought to achieve.

A. The Prima Facie Case

In *McDonnell Douglas*, the Court held that a plaintiff in a circumstantial individual disparate treatment case must first establish a prima facie case of discrimination.[42] This prima face case creates a rebuttable pre-

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ta, 957 F.2d 595, 598 (8th Cir. 1992). The same framework will likely be used in many cases brought under the Americans with Disabilities Act.

In Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981), the Court stated that "the allocation of burdens . . . is intended progressively to sharpen the inquiry into the elusive factual question of intentional discrimination." *Id.* at 255 n.8.

38. In fact, prior to *McDonnell*, the model of proof appeared to be simply this general civil model. *See, e.g.*, Frockt v. Olin Corp., 344 F. Supp. 369, 370 (S.D. Ind. 1972); Ochoa v. Monsanto Co., 335 F. Supp. 53, 59 (S.D. Tex. 1971); Andres v. Southwestern Pipe, Inc., 321 F. Supp. 895, 898 (W.D. La. 1971); Dewey v. Reynolds Metals Co., 429 F.2d 324, 328 (6th Cir. 1970). Each of the cited decisions resulted in a judgment for the employer on the basis that the plaintiff did not sustain his or her burden of proof.

39. The Eighth Circuit's opinion created, albeit imprecisely, the model adopted by the Supreme Court. *See* Green v. McDonnell Douglas Corp., 463 F.2d 337, 343-44 (8th Cir. 1972). The briefs submitted to the Supreme Court, including the amici briefs, failed to address the policy reasons for adopting a unique proof scheme.

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

41. 460 U.S. 711 (1983).

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

sumption of intentional discrimination and is a minimal burden for most plaintiffs to achieve.[43] For example, in a "failure to hire" case, the female plaintiff must show that (1) she belongs to a protected group under Title VII,[44] (2) she applied for and was qualified for a job for which the employer was seeking applicants, (3) despite her qualifications, she was rejected, and (4) after her rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.[45] This threshold showing "eliminates the most common nondiscriminatory reasons" for the challenged employment action: the plaintiff's lack of qualifications or the employer's lack of an available position.[46]

The *McDonnell Douglas* Court then took an important step in its formulation of a model of proof. The Court explained that the establishment of a prima facie case creates a presumption based on circumstantial evidence that the employer acted with a discriminatory motive.[47] It is unclear why the Court deemed it necessary to create this presumption in discrimination cases. The Court failed to adequately explain its adoption of the proof allocation scheme. The Court merely reasoned that the scheme was created to assure efficient and trustworthy workmanship "through fair and facially neutral employment and personnel decisions."[48] Subsequent opinions justified the scheme as "eliminat[ing] the most common nondiscriminatory reasons for the plaintiff's rejection"[49] and "focusing the factual issue with sufficient clarity so that plaintiff will have a full and fair opportunity to demonstrate pretext."[50] The Court lat-

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43. "The burden of establishing a prima facie case of disparate treatment is not onerous." *Burdine*, 450 U.S. at 253.

44. In reality, every person is a member of some protected group under Title VII as everyone has a gender and a race. *See* McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976) (white employees could maintain Title VII and § 1981 action for racial discrimination when they were disciplined differently than black co-worker for same offense).

45. *McDonnell*, 411 U.S. at 802. The Court noted that the specific elements of the prima facie case would vary in Title VII cases in accordance with the employment action at issue. *Id.* at 802 n.2. The plaintiff must establish these elements by a preponderance of the evidence.

46. *See Burdine*, 450 U.S. at 253-54 & 254 n.6.

47. *McDonnell Douglas*, 411 U.S. at 802. The Court later confirmed in Trans World Airlines, Inc. v. Thurston, 469 U.S. 111 (1985) that the model does not apply to cases where the plaintiff produces direct evidence of discrimination. *Id.* at 121. *Thurston* involved an employer's facially discriminatory policy which constituted direct evidence of discrimination.

48. *McDonnell Douglas*, 411 U.S. at 801.

49. *See* International Bd. of Teamsters v. United States, 431 U.S. 324, 358 n.44 (1977); *see also Burdine*, 450 U.S. at 254.

50. *Burdine*, 450 U.S. at 255-56; *see also* Furnco Constr. Corp. v. Waters, 438 U.S.

er stated in *Furnco Construction Co. v. Waters*[51] that a prima facie showing "is simply proof of actions taken by the employer from which we infer discriminatory animus because experience has proved that in the absence of any other explanation, it is more likely than not that those actions were bottomed on impermissible considerations."[52] In order to assist plaintiffs who only have circumstantial evidence, the Court was willing to assume that employers generally act with some reason and not in a totally arbitrary manner.[53] Importantly, the establishment of a presumption effectively compels an explanation from an employer. If the trier of fact believes the plaintiff's prima facie evidence and the employer remains silent in the face of the presumption, the court must enter judgment for the plaintiff because no issue of fact remains in the case.[54] Thus, despite the barebones nature of the prima facie case, if it stands alone and unrebutted, the plaintiff will prevail.

567, 577 (1978). *See generally* Theodore Y. Blumoff & Harold S. Lewis, Jr., *The Reagan Court and Title VII: A Common-Law Outlook on a Statutory Task*, 69 N.C. L. REV. 1, 73-74 (1990).

51. 438 U.S. 567 (1978).

52. *Id.* at 579-80. In *Furnco*, the Court explained that it was willing to make the presumption largely because:

> We know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting. Thus, when all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, who we generally assume acts only with some reason, based his decision on an impermissible consideration such as race.

Id. at 577.

53. *Id.* at 577-78. If in fact an employment decision was arbitrary—that is, it occurred for no reason—it would not be illegal. Perhaps the Court assumes that most fact finders would not find credible an employer's statement that it acted arbitrarily. Thus, the fact finder would likely infer discrimination from the lack of an explanation.

54. *Burdine*, 450 U.S. at 254. The Court stated:

> The phrase "prima facie case" not only may denote the establishment of a legally mandatory, rebuttable presumption, but also may be used by courts to describe the plaintiff's burden of producing enough evidence to permit the trier of fact to infer the fact at issue . . . . *McDonnell Douglas* should have made it apparent that in the Title VII context we use 'prima facie case' in the former sense.

Id. at 254 n.7 (citing 9 JOHN HENRY WIGMORE, EVIDENCE § 2494 (3d ed. 1940)).

B. *Rebuttal of the Presumption*

Given the consequences of remaining silent, employers seek to offer whatever evidence is necessary in order to escape an adverse summary judgment.[55] For many years after *McDonnell Douglas*, courts struggled with the nature of the employer's burden once the prima facie case was established. Simply put, the issue was whether the employer had either a burden of production or one of persuasion. *McDonnell Douglas* seemed to place a burden of persuasion on the employer, holding that once the plaintiff has established a prima facie case "[t]he burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection."[56] This "articulation" would "discharge the [employer's] burden of proof."[57] In a subsequent case, the Court again held that the employer's burden is one of "*proving* that he based his employment decision on a legitimate consideration and not an illegitimate one such as race."[58] Almost all of the lower courts interpreted the Supreme Court's use of the terms "burden of proof" and "proving" as meaning that the employer has a burden of production *and* persuasion.

In *Texas Department of Community Affairs v. Burdine*,[59] however, the Court expressly held that the burden of persuasion did not shift to the defendant.[60] The Court reasoned that because the plaintiff utilizes circumstantial evidence to create the presumption of discrimination, the corresponding burden on the employer is relatively light and should not be a burden of persuasion.[61] Rather, the defendant is "to rebut the presumption of discrimination by producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate nondiscriminatory reason."[62] The Court continued by stating that the defendant must "clearly set forth, through the introduction of admissible evidence, the

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55. *See* FED. R. CIV. P. 50.

56. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

57. *Id.* at 803.

58. Furnco Constr. Co. v. Waters, 438 U.S. 567, 577 (1978) (emphasis added). The Court attempted, albeit imprecisely and unsuccessfully, to define "articulation" in both *Furnco* and *Board of Trustees of Keene State v. Sweeney*, 439 U.S. 24, 28-29 (1978).

59. 450 U.S. 248, 257 (1981).

60. *Id.* at 257-58.

61. *Id.* at 255.

62. *Id.* at 254-55.

reasons for the plaintiff's rejection."[63] The Court further added that the defendant's explanation must be "clear and reasonably specific"[64] and "sufficient to raise a genuine issue of fact as to whether it discriminated against the plaintiff."[65]

If the defendant carries its burden of production, "the presumption raised by the prima facie case is rebutted, and the factual inquiry proceeds to a new level of specificity."[66] Further, the "ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff."[67] The Court stated that "[t]he McDonnell Douglas division of intermediate evidentiary burdens serves to bring the litigants and the court expeditiously and fairly to this ultimate question."[68]

Burdine's characterization of the defendant's burden as one of production clearly is consistent with Rule 301 of the Federal Rules of Evidence.[69] Rule 301 unequivocally states:

> [A] presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of risk of nonpersuasion, which remains through the trial upon the party on whom it was originally cast.[70]

However, even though the presumption disappears when rebutted, the fact finder who is deciding the ultimate issue of discrimination can "consider evidence previously introduced by the plaintiff to establish a prima facie case."[71] In other words, while the presumption is not resurrected,

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63. *Id.* at 255. The explanation must be legally sufficient to justify a judgment for the defendant. In other words, the employer need only produce admissible evidence which would allow the trier of fact rationally to conclude that the employment decision had not been motivated by discriminatory animus. *Id.* at 255, 257. Therefore, an articulation not admitted into evidence will not suffice. *Id.* at 255 n.9.

64. *Id.* at 258.

65. *Id.* at 254-55.

66. *Id.* at 255.

67. *Id.* at 253.

68. *Id.* at 248.

69. FED. R. EVID. 301.

70. *Id.*

71. *Burdine*, 450 U.S. at 255 n.10. The *Burdine* Court elaborated on the potential weight of evidence used to establish the plaintiff's prima facie case. The Court stated:

> In saying that the presumption drops from the case, we do not imply that the trier of fact no longer may consider evidence previously introduced by the plaintiff to establish a prima facie case. A satisfactory explanation by the defendant destroys the legally mandatory inference of discrimination arising

the evidence put on at trial by the plaintiff in the course of proving the prima facie case retains its probative value and in fact may assist the plaintiff in proving discrimination.

C. *Pretext*

Assuming that the defendant introduces evidence of a legitimate nondiscriminatory reason, the *McDonnell Douglas* Court stated that the plaintiff "must be afforded a fair opportunity to demonstrate that petitioner's assigned reason . . . was a pretext or discriminatory in its application."[72] *Burdine* stated that "this burden now merges with the ultimate burden of persuading the court that she has been the victim of intentional discrimination."[73] Significantly, the *Burdine* Court added that the plaintiff "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.*"[74] This language, clear on its face, is written in the disjunctive and appeared to allow plaintiffs *either* of two ways to prevail: by "directly"[75] proving discrimination or by proving pretext.

McDonnell Douglas stated that a plaintiff's pretext evidence could be used to establish either that similarly situated employees were treated differently than the plaintiff, prior treatment of the plaintiff, or statistical evidence revealing disparities relating to the protected classification of the plaintiff.[76] Importantly, most individual discrimination cases turn on the pretext issue.[77] Thus, the interpretation of this stage of the model is

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> from the plaintiff's initial evidence. Nonetheless, this evidence and inferences properly drawn therefrom may be considered by the trier of fact on the issue of whether the defendant's explanation is pretextual. Indeed, there may be some cases where the plaintiff's initial evidence, combined with effective cross-examination of the defendant, will suffice to discredit the defendant's explanation.

Id.

72. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 807 (1973).

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

74. *Id.* (emphasis added) (citing *McDonnell Douglas*, 411 U.S. at 804-05).

75. The term "directly" is used imprecisely. It is unclear whether the term describes the nature of the evidence used to persuade the fact finder on the ultimate issue or whether it describes proceeding "directly" to the ultimate issue of discrimination, skipping the intervening issue of pretext.

76. *McDonnell Douglas*, 411 U.S. at 804-05. The Court later clarified that pretext evidence is not limited to certain types but may take a variety of forms. *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989).

77. *See, e.g.*, Villanueva v. Wellesley College, 930 F.2d 124, 127 (1st Cir.) ("As the first two elements of the *McDonnell Douglas* model are quite easy to meet, it is not surprising that most cases, like this one, come to rest on the third step."), *cert. de-*

crucial to the ability of plaintiffs to prevail or, conversely, for employers to successfully defend a discrimination lawsuit.

For some ten years after *McDonnell Douglas* was decided, lower courts held that, *as a matter of law*, a plaintiff who established that a defendant's proffered reasons were pretextual would prevail. *Burdine* was often cited by lower courts to support the rule that a finding of pretext by the fact finder was, *in itself*, proof of discrimination sufficient to compel the court to enter judgment for the plaintiff.[78] The position that proof of pretext mandates judgment for the plaintiff has been termed the "pretext-only" view.[79]

Other courts, however, began to question the "pretext-only" interpretation of *Burdine*. A competing view of the meaning of "pretext" began to emerge in several circuit courts during the 1980s.[80] This view, often referred to as "pretext-plus,"[81] holds that while the plaintiff still must prove pretext, proof of pretext does not automatically equate with proof of discrimination.[82] These courts relied on language from *Burdine* which

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nied, 112 S. Ct. 181 (1991). *See generally* Hannah A. Furnish, *Formalistic Solutions to Complex Problems: The Supreme Court's Analysis of Individual Disparate Treatment Cases Under Title VII*, 6 INDUS. REL. L.J. 353, 357-58 (1984).

78. At the time *St. Mary's* was decided by the Supreme Court, the "pretext-only" position found support in decisions of the Second, Third, Fifth, Sixth, Eighth, and District of Columbia Circuits. *See, e.g.*, Ibrahim v. New York State Dep't of Health, 904 F.2d 161, 168 (2d Cir. 1990); Chipollini v. Spencer Gifts, Inc., 814 F.2d 893, 898-900 (3d Cir.) (en banc), *cert. dismissed*, 483 U.S. 1052 (1987); Thornbrough v. Columbus & G. R. R., 760 F.2d 633, 639-40, 646-47 (5th Cir. 1975); Tye v. Board of Educ., 811 F.2d 315, 320 (6th Cir.), *cert. denied*, 484 U.S. 924 (1987); Hicks v. St. Mary's Honor Ctr., 970 F.2d 487, 492-93 (8th Cir. 1992) (case below); King v. Palmer, 778 F.2d 878, 881 (D.C. Cir. 1985). However, inconsistencies existed among cases within two of these circuits. *Compare Thornbrough*, 760 F.2d at 633 *with* Bienkowski v. American Airlines, Inc., 851 F.2d 1503, 1508 & n.6 (5th Cir. 1988); *compare Tye*, 811 F.2d at 315 *with* Galbraith v. Northern Teleco, Inc., 944 F.2d 275, 282-83 (6th Cir. 1991), *cert. denied*, 503 U.S. (1992).

79. *See generally* 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. 59 (1991).

80. *See id.* at 81-100.

81. *See id.* at 71-81.

82. The First, Fourth, Seventh, Tenth, and Eleventh Circuits held, at least in dicta, that proof of pretext would not in itself compel, or in some cases even allow, judgment for the plaintiff. *See, e.g.*, Goldman v. First Nat'l Bank, 985 F.2d 1113 (1st Cir. 1993); Holder v. City of Raleigh, 867 F.2d 823, 827-28 (4th Cir. 1989); Benzies v. Illinois Dep't of Mental Health & Dev. Disabilities, 810 F.2d 146, 148 (7th Cir.) (dictum), *cert. denied*, 483 U.S. 1006 (1987); EEOC v. Flasher Co., 986 F.2d 1312, 1321 (10th

stated that "the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a *pretext for discrimination.*"[83] Thus, according to these courts, a plaintiff must be careful to demonstrate that the employer's articulated reason was a *pretext for discrimination* and not merely pretext in the generic sense. For example, a Seventh Circuit decision held that "[i]t is easy to confuse 'pretext for discrimination' with 'pretext' in the more common sense meaning any fabricated explanation for an action, and to confound even this watery use of 'pretext' with a mistake or irregularity."[84]

In these "pretext-plus" courts, the plaintiff not only had to negate the employer's proffered reason but had to affirmatively demonstrate that the true reason was discriminatory intent. The plaintiff could not prevail simply by persuading the fact-finder judge that the employer's proffered reasons were false. Instead, the plaintiff was *required to adduce additional evidence of discrimination* because a false reason could simply be covering up some legitimate reason. For example, in the 1992 case of *EEOC v. Flasher*,[85] the Tenth Circuit stated that "[p]roffered reasons may be a pretext for a host of motives, both proper and improper, that do not give rise to liability under Title VII."[86] As a result of this reasoning, fact finder judges found numerous nondiscriminatory reasons lurking behind those reasons actually proffered by the employer. These reasons included fear of violence by a discharged employee's boyfriend,[87] nepotism,[88] and good faith errors in business judgment.[89]

Cir. 1992) (dictum); Clark v. Huntsville City Bd. of Educ., 717 F.2d 525, 529 (11th Cir. 1983).

83. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981) (emphasis added).

84. Pollard v. Rea Magnet Wire Co, Inc., 824 F.2d 557, 559 (7th Cir. 1987); *see also* Galbraith v. Northern Telecom, 944 F.2d 275 (6th Cir. 1991), *cert. denied*, 112 S. Ct. 1497 (1992).

85. 986 F.2d 1312 (10th Cir. 1992).

86. *Id.* at 1321. The Tenth Circuit added:

> Human relationships are inherently complex. Large employers must deal with a multitude of employment decisions, involving different employees, different supervisors, different time periods and an incredible array of facts that will inevitably differ even among seemingly similar situations. The law does not require, nor could it ever realistically require, employers to treat all of their employees all of the time in all matters with absolute, antiseptic, hindsight equality.

Id. at 1319.

87. *See Galbraith*, 944 F.2d at 281.

88. *See* Holder v. City of Raleigh, 867 F.2d 823, 827 (4th Cir. 1989).

89. *See* Freeman v. Package Mach. Co., 865 F.2d 1331, 1341 (1st Cir. 1988).

In the vast majority of pretext-plus cases, the defendant employer has prevailed.[90] The defendant employer prevailed regardless of whether the plaintiffs relied solely on an attempt to prove pretext[91] or whether the plaintiffs introduced other credible evidence from which the trier of fact could infer discrimination.[92] The requirements that a plaintiff have "additional evidence of discrimination" and negate concealed reasons proved almost insurmountable for most plaintiffs. As a result, plaintiffs rarely prevailed in pretext-plus jurisdictions.[93]

The pretext-plus courts often justified the higher burden on the plaintiffs by stating their concern for the ability of employers to exercise business judgment.[94] The pretext-plus courts reasoned that even though an employer's proffered reason was not credible, the employer's error in the employment action simply was a mistake in business judgment even if that judgment was made "arbitrarily or with ill will."[95] These courts often interpreted discrimination claims as attacks on business judgment and, therefore, refused to interfere with the subjective domain of business. However, the pretext-plus courts never acknowledged the possibility that the "mistakes" in business judgment may not have been mistakes at all, but rather decisions made with discriminatory intent.

The divergence between the pretext-only and pretext-plus circuits often affected the ability of similarly-situated plaintiffs to prevail. As such, the dichotomy clearly necessitated clarification by the United States Supreme Court.

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90. *See, e.g.*, EEOC v. Flasher Co., 986 F.2d 1312 (10th Cir. 1992); Galbraith v. Northern Telecom, Inc., 944 F.2d 275 (6th Cir. 1991), *cert. denied*, 112 S. Ct. 1497 (1992); Medina-Munoz v. R.J. Reynolds Tobacco Co., 896 F.2d 5 (1st Cir. 1990); Holder v. City of Raleigh, 867 F.2d 823 (4th Cir. 1989); Benzies v. Illinois Dep't of Mental Health & Dev. Disabilities, 810 F.2d 146 (7th Cir.), *cert. denied*, 483 U.S. 1006 (1987).

91. *See, e.g.*, *Medina-Munoz*, 896 F.2d at 5; *Benzies*, 810 F.2d at 146.

92. *See, e.g.*, Villanueva v. Wellesley College, 930 F.2d 124 (1st Cir.), *cert, denied*, 112 S. Ct. 181 (1991); *Galbraith*, 944 F.2d at 275; *Holder*, 867 F.2d at 823; Sims v. Cleland, 813 F.2d 790 (6th Cir. 1987) (defendant prevailed although plaintiff proved that one of the proffered reasons was pretextual and introduced direct evidence of sex-based animus). In *Sims*, the court arguably should have applied the motivating factor model instead of the *McDonnell Douglas* model.

93. For a detailed discussion of several pretext-plus decisions, see generally Lanctot, *supra* note 79.

94. *See, e.g.*, Freeman v. Package Mach. Co., 865 F.2d 1331, 1341 (1st Cir. 1988) (stating that "the claimant needed to show more than good faith errors in an employer's business judgment are not the stuff of ADEA transgressions").

95. Gray v. New England Tel. & Tel. Co., 792 F.2d 251, 255 (1st Cir. 1986).

III. THE *ST. MARY'S* DECISION

The Supreme Court had not issued an opinion refining the *McDonnell* model since *Aikens* was decided in 1983. However, the clear split in the lower courts as to the plaintiff's burden of proof led to the granting of certiorari in *St. Mary's Honor Center v. Hicks*.[96]

St. Mary's brought the divergent views and a seemingly narrow inquiry squarely before the Supreme Court. Specifically, the Court addressed the issue of whether a judgment in favor of the plaintiff is mandatory when a plaintiff proves that an employer's proffered reason for its employment action is false. A bitterly divided Court responded in the negative. In doing so, the Court furthered the debate over the nature of evidence needed in a circumstantial discrimination case. Furthermore, the Court left many questions about pretrial and trial procedure in these cases. Intriguingly, the Court did not align itself completely with the extreme evidentiary requirements of lower pretext-plus courts. Instead, the Court fashioned its own unique version of the "pretext-plus" doctrine.

Justice Scalia wrote for the five-person majority and was joined by Chief Justice Rehnquist and Justices O'Connor, Kennedy, and Thomas. Justice Scalia stated that once a plaintiff makes out a prima facie case of discrimination, the employer must put forward evidence of reasons which, if believed by the trier of fact, would support a finding that unlawful discrimination was not the reason for the challenged action.[97] However, once the employer enunciates such a nondiscriminatory reason, the presumption raised by the prima facie case drops out, and even if the plaintiff proves the nondiscriminatory reason to be pretextual, the plaintiff must still prove that race or another protected classification motivated the challenged action.[98] Significantly, the majority adopted its own unique version of the pretext-plus analysis, one which should *not* lead to the extreme results found in prior lower court pretext-plus opinions.

Justice Souter wrote an unusually long and angry dissent and was joined by Justices White, Blackmun, and Stevens. Justice Souter argued that the majority's burden of proof was "unfair to plaintiffs,"[99] "unworkable in practice,"[100] and would reward employers for lying about their employment decisions.[101] Justice Souter reasoned that the majority's framework allows the fact finder to "roam the record, searching for some

96. 113 S. Ct. 2742 (1993).
97. *Id.* at 2747.
98. *Id.* at 2747-48.
99. *Id.* at 2761.
100. *Id.*
101. *Id.* at 2763.

nondiscriminatory explanation that the employer has not raised and that the employee has had no fair opportunity to disprove."[102] According to Justice Souter, the majority distorted precedent and ignored the central purpose of the *McDonnell Douglas* structure, which was to narrow the factual inquiry by focusing on the non-discriminatory reasons articulated by the employer.[103] Despite the combative and vitriolic nature of the opinions, Justice Scalia's statement of the underlying dispute and prior proceedings was generally accepted by the dissent.

A. Facts and Proceedings Below

St. Mary's Honor Center is an adult halfway house operated by the Missouri Department of Corrections and Human Resources (MDCHR).[104] Plaintiff, Melvin Hicks, an African-American, was hired as a correctional officer at St. Mary's and was subsequently promoted to a supervisory position.[105] Thereafter, the MDCHR investigated St. Mary's in response to complaints regarding poor maintenance, inadequate security, and other concerns at the facility.[106] Following this investigation, Hicks retained his position, but Defendant Steve Long became superintendent and John Powell became the new chief of custody and Hick's immediate supervisor.[107] Long and Powell are both white.[108]

Prior to the investigation and ensuing personnel changes, "Hicks had enjoyed a satisfactory employment record."[109] Soon thereafter, however, Hicks "became the subject of repeated, and increasingly severe, disciplinary actions."[110] Hicks was later demoted from his supervisory position to correctional officer after allegedly failing to ensure that his subordinates properly logged their use of a St. Mary's vehicle. Finally, "he was discharged for threatening Powell during an exchange of heated words . . . ."[111]

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102. *Id.* at 2757.
103. *Id.* at 2761.
104. *Id.* at 2746.
105. *Id.*
106. Hicks v. St. Mary's Honor Ctr., 756 F. Supp. 1244 (E.D. Mo. 1991).
107. *St. Mary's*, 113 S. Ct. at 2746.
108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.* The District Court opinion further detailed the factual background of the actions against Hicks:

Hicks filed suit in federal court alleging that St. Mary's violated Title VII and that Steve Long violated 42 U.S.C. § 1983.[112] After a bench trial, the district court found in favor of St. Mary's and Long.[113] The Court of Appeals for the Eighth Circuit reversed and remanded,[114] and the Supreme Court granted certiorari.[115]

The district judge found that Hicks had established a prima facie case of discrimination. The court noted that Hicks was a member of a protected group, was qualified for his supervisory position, was first demoted

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1. On March 3, 1984, two white transportation officers, Ratliff and Slinkard, submitted a written report to Captain Powell about violations of institutional rules by employees under plaintiff's supervision. Hicks was suspended for five days, while the officers committing the infractions were not disciplined. Powell testified that it was his policy to discipline only the shift commander for violations occurring during his shift.

2. On March 19, 1984, Hicks permitted two correctional officers to use a St. Mary's vehicle for an emergency. Neither the officer nor the control center office logged the use of the car despite a rule requiring the logging. They were not disciplined, but Hicks was demoted—not for authorizing the use of the vehicle, but for failing to insure it was logged. The officers failing to log the use were not disciplined.

3. On March 21, 1984, two inmates were involved in a brawl in which one inmate was injured. Hicks directed the officer who took the injured inmate to the hospital to write a report. On March 21, Hicks drafted a memorandum notifying Powell of the fight and injury to an inmate. Powell then charged Hicks with failing to investigate the fight, and this led to Hick's demotion on April 19, 1984.

When he learned of his demotion during a meeting that included Long and Powell, Hicks was shaken and requested the rest of the day off. Long gave him permission to leave. Powell followed Hicks and provoked him by ordering him to open his locker so that Powell could obtain the shift commander's manual. Hicks refused, and the two exchanged heated words. Powell warned Hicks that his words could be perceived as a threat. This led to a recommendation from the disciplinary board for a three-day suspension which Long disregarded, instead recommending termination based on the severity and accumulation of plaintiff's violations. On June 7, 1984, Hicks was fired.

Hicks v. St. Mary's Honor Ctr., 756 F. Supp. 1244, 1246-50 (E.D. Mo. 1991).

112. *St. Mary's*, 113 S. Ct. at 2746. Section 1983 provides a method of seeking a federal remedy for violations of federally protected rights. *See* 42 U.S.C. § 1983 (1982). In order to state a cause of action under § 1983, a plaintiff must allege that some person, acting under color of state law, has deprived him of a federally protected right. *Id.; see also* Gomez v. Toledo, 446 U.S. 635, 640 (1980).

When § 1983 is used as a parallel remedy with Title VII in a racial discrimination suit, the elements of the cause of action are the same under both statutes. *See* Irby v. Sullivan, 737 F.2d 1418, 1431 (5th Cir. 1984).

113. *Hicks*, 756 F. Supp. at 1253.

114. Hicks v. St. Mary's Honor Ctr., 970 F.2d 487 (8th Cir. 1992).

115. St. Mary's Honor Ctr. v. Hicks, 113 S. Ct. 954 (1993).

and then fired, and replaced by a white person.[116] St. Mary's, the defendant employer, introduced evidence of a legitimate, nondiscriminatory reason for its actions. St. Mary's asserted that Hicks was demoted and discharged because of the severity and accumulation of violations of institutional rules.[117] However, the court found that Hicks was treated more severely "than his co-workers who committed equally severe or more severe violations."[118] Thus, the court asserted that the plaintiff proved pretext.[119]

The district judge, however, recognized the animosity that existed between Hicks and his supervisors, Long and Powell. The court stated:

> It is clear that John Powell had placed plaintiff on the express track to termination. It is also clear that Powell received the aid of Ed Ratliff and Steve Long in this endeavor. The question remains, however, whether the plaintiff's race played a role in their campaign . . . . It is not clear, however, that plaintiff's race was the motivation for the harsh discipline.[120]

On that basis, the judge concluded that Hicks did not carry his ultimate burden of proving "by direct evidence or inference that his unfair treat-

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116. *Hicks*, 756 F. Supp. at 1249-50.

117. *Id.* at 1246-50.

118. *Id.* at 1251. The trial court noted several major differences in the manner in which Hicks and white correctional officers were treated. For example, the court observed that:

> 1. Hicks was the only person disciplined for violations actually committed by his subordinates.
>
> 2. A white correctional officer, Turney, cursed Hicks, his supervisor, with highly profane language because of a poor service rating. No disciplinary action was taken against the white officer because Powell concluded that Turney was "merely venting justifiable frustration." Hicks, who had been demoted, was not allowed to vent his frustration, but instead was terminated.
>
> 3. A white female shift commander violated one of the same rules that led to Hicks' five day suspension. No disciplinary action was taken against her. The same commander also was not disciplined when she left two security doors unlocked.

Id. at 1250. The district court stated that serious violations "were either disregarded or treated much more leniently" when committed by Hicks' co-workers. *Id.* at 1251. For example, Ed Ratliff, a white correctional officer, allowed an unescorted inmate to enter a locked office where the inmate could have accessed private files or secured a weapon. *Id.* The district court stated that "although the violation constituted [an] . . . obvious breach of security, Powell not only refused to discipline Ratliff but praised him for 'diffusing a volatile situation.'" *Id.*

119. *Id.* at 1250.

120. *Id.* at 1251.

ment was motivated by race."[121] The court further stated that "[i]n essence, although plaintiff has proven the existence of a crusade to terminate him, he has not proven that the crusade was racially rather than personally motivated."[122]

Justice Souter's dissent correctly points out that the district court did *not* find that personal animosity, which the court "failed to recognize might be racially motivated,"[123] was the true reason for the actions St. Mary's took.[124] Rather, the proffered reason was simply "a *possibility* in explaining that Hicks had failed to prove 'that the crusade [to terminate him] was racially rather than personally motivated.'"[125] In other words, the district court found that Hicks failed to prove racial motivation because an unarticulated reason *could* have caused the employment action.

The district court acknowledged that Hicks was not required to present direct evidence of racial discrimination in order to prevail.[126] However, the court found that Hicks' indirect evidence in the form of statistics relating to the hiring and firing of other black employees was insufficient to meet his evidentiary burden in the case.[127] Implicitly, the dis-

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121. *Id.* at 1252.

122. *Id.* The district court pointed to no evidence in support of its proposition. In fact, on cross-examination, John Powell denied that he had any difficulties with Hicks. *See* Brief for the United States and the Equal Employment Opportunity Commission at 93, St. Mary's Honor Ctr. v. Hicks, 113 S. Ct. 2742 (1993) (No. 92-602). Thus, the plaintiff had no reason to assume that he needed to rebut any inference that personal animosity toward him was the possible reason for his termination.

123. St. Mary's Honor Ctr. v. Hicks, 113 S. Ct. 2742, 2766 (1993) (Souter, J., dissenting). The district court's assertion that the discharge may have been due to "personality conflict" instead of discrimination warrants scrutiny because the personality conflict may have masked discriminatory intent. *See, e.g.*, Martin v. Thompson Tractor Co., 486 F.2d 510 (5th Cir. 1973). In *Martin*, the court stated that "[t]he question that really becomes a very tough one for the court stems from the fact that the words 'attitude,' 'good attitude,' or 'bad attitude,' or 'lack of cooperation' can very easily be the label to cover and conceal racially motivated prejudices and discriminations, in fact, under some other title that looks acceptable." *Id.* at 511-12.

It should be noted that personal conflict explanations place a heavy responsibility on the fact finder to determine whether otherwise acceptable explanations are merely cover-ups for discrimination. Such an inquiry is largely dependent upon the credibility of the parties.

124. *St. Mary's*, 113 S. Ct. at 2766 (Souter, J., dissenting) (emphasis added) (citing *Hicks*, 756 F. Supp. at 1252).

125. *Id.* (Souter, J., dissenting) (emphasis added) (quoting *Hicks*, 756 F. Supp. at 1252).

126. *Hicks*, 756 F. Supp. at 1251.

127. *Id.* The district court stated that "Plaintiff need not prove racial motivation by direct evidence; instead, plaintiff may offer circumstantial evidence sufficient to create an inference of racial motivation." *Id.* (citing Jaurequi v. Glendale, 852 F.2d 1128, 1134 (9th Cir. 1988)).

In holding that Hicks failed to meet his burden of proving discriminatory intent,

trict court found that the differential treatment of Hicks, while disproving St. Mary's proffered reason for its actions, did not suffice to prove discriminatory disparate treatment.

The Eighth Circuit Court of Appeals reversed and directed judgment for Hicks.[128] The appellate court held that Hicks was entitled to a judgment as a matter of law once he proved that the defendants' proffered reasons for the adverse employment actions were pretextual.[129] According to the court, when the fact finder disbelieves the defendants' explanation, the defendants are in "no better position than if they had remained silent, offering no rebuttal to an established inference that they had unlawfully discriminated against plaintiff on the basis of his race."[130]

The Eighth Circuit held that "personal motivation" could not suffice as a legitimate, nondiscriminatory reason because the defendants had never offered any evidence to substantiate such a claim.[131] Thus, the plaintiff's opportunity to prove pretext was necessarily and successfully focused only on the reasons advanced by the defendants—the severity and accumulation of violations.[132] In other words, the district judge erred when he even considered a motivation that was unarticulated by the employer.

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the district court made the following factual findings:

1. In 1984, twelve blacks were terminated while only one white was terminated. However, in 1984, Steve Long also hired thirteen blacks. *Id.* at 1252. Thus, the apparent disproportionate firings of blacks did not support an inference of racial discrimination because the number of black employees at St. Mary's remained constant during 1984. *Id.*

2. Prior to the personnel changes, one white and five blacks held supervisory positions. *Id.* After Long became superintendent, four whites and two blacks held supervisory positions. *Id.* The figures would have been three blacks and three whites if the chief of custody position had been accepted by the black male to whom it was initially offered. *Id.* The court did not find these numbers unusual, particularly because the "full-scale removal of employees from supervisory positions is often required when an institution is being poorly run." *Id.*

3. The disciplinary review boards that reviewed Hicks' violations included black members. *Id.* The court felt that although demotion was a harsh remedy for failing to insure the logging of a vehicle, the disciplinary review board which recommended this discipline was composed of two blacks and two whites. *Id.* This composition apparently negated any inference of discriminatory treatment. *Id.*

128. Hicks v. St. Mary's Honor Ctr., 970 F.2d 487, 493 (8th Cir. 1992).

129. *Id.* 970 F.2d at 487.

130. *Id.* at 492.

131. *Id.* Although the court refused to definitively rule on the issue, the court questioned whether such a "hypothetical reason based upon *personal* motivation even could be stated and still be 'legitimate' and 'non-discriminatory.'" *Id.*

132. *Id.*

In the Eighth Circuit's pretext-only view, the articulation of the nondiscriminatory reason defined the parameters of the trial.

The court relied heavily on the language of *Burdine*,[133] reasoning that the plaintiff satisfied the ultimate burden of persuasion by proving that the defendant's proffered nondiscriminatory reasons were not the true reasons for the adverse employment action.[134] According to the court, "No additional proof of discrimination is required,"[135] and the plaintiff was therefore "entitled to judgment as a matter of law."[136] On that basis, the court stated that *McDonnell Douglas*, *Burdine*, and *Aikens* "make clear that plaintiff may succeed by proving pretext."[137]

B. The Majority Opinion

The five-person Supreme Court majority disagreed vehemently with the Eighth Circuit's characterization of Supreme Court precedent. The majority reversed the Eighth Circuit and explicitly held that the plaintiff was not entitled to judgment as a matter of law when he proved that the employer's asserted reasons for its actions were pretextual.[138] According to the Supreme Court, proof of pretext does not equal proof of discrimination. As will be developed below, the Court unfortunately created as many questions as it answered.

One is struck on an initial reading of the case at the majority's apparent discomfort with the model and with prior Court precedent. One has to wonder whether the initial discussions among the majority justices and their clerks centered on how to simply dispense with the model. At some point, though, the collective decision was made to retain the model but to render it almost meaningless by gutting its effect. In fact, for all practical purposes, the model of proof in circumstantial discrimination cases has come full circle to its pre-*McDonnell Douglas* form which simply asks: "Did the defendant intentionally discriminate against the plaintiff?"

St. Mary's is not a statutory interpretation case but rather a "precedent interpretation" case. Much of the majority's opinion is spent discrediting the dissent's view of Court precedent. For example, the majority defensively states that "[w]e mean to answer the dissent's accusations in detail, by examining our cases, but at the outset it is worth noting the utter implausibility that we would ever have held what the dissent says we

133. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981).

134. *Hicks*, 970 F.2d at 493 (citing *Burdine*, 450 U.S. at 256).

135. *Id.*

136. *Id.* at 492.

137. *Id.* at 493.

138. St. Mary's Honor Ctr. v. Hicks, 113 S. Ct. 2747, 2749 (1993).

held."[139] Despite the "utter implausibility" of the dissent's reading of precedent, much of the majority opinion is spent, albeit reluctantly, in explaining away the language from *Burdine* which was relied upon by pretext-only courts. Justice Scalia wrote of his hesitation to scrutinize precedent:

> It is to [the dicta of the Court's opinions] that we now turn—begrudgingly, since we think it generally undesirable, where holdings of the Court are not at issue, to dissect the sentences of the United States Reports as though they were the United States Code.[140]

In a manner reminiscent of several decisions in the 1988 Term, the majority "reread" statements from precedent to reconstruct the procedural framework for litigating a Title VII dispute.

1. The Effects of the Presumption Established by the Prima Facie Case

The majority noted that Hicks did present sufficient evidence to establish the "minimal" prima facie case and that the defendants did not challenge the prima facie case.[141] The majority did, however, detail the effects of the presumption created by the prima facie case. Justice Scalia wrote that "[t]o establish a 'presumption' is to say that a finding of the predicate fact (here, the prima facie case) produces 'a required conclu-

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139. *Id.* at 2750.

140. *Id.* at 2751.

141. *Id.* at 2747. Despite its characterization of the prima facie case as "minimal," the majority later paved the way, at a minimum, for employers to ask for a jury issue on the existence of the elements of the prima facie case. The Court stated:

> If the defendant has failed to sustain its burden (of production) but reasonable minds could differ as to whether a preponderance of the evidence establishes the facts of a prima facie case, then a question of fact *does* remain, which the trier of fact will be called upon to answer.

Id. at 2748. Employers may also assert the quoted language to support a motion for summary judgment for failure to state a claim (the prima facie case) or during trial to support a motion for judgment as a matter of law on the same basis. It is intriguing, in itself, that the majority felt compelled to address the sufficiency of a prima facie case.

Previous Supreme Court cases took a lenient view toward the establishment of the prima facie case. Typically, the only element of the prima facie case that might create a fact issue is whether the plaintiff was qualified for the job. In § 1981 actions, the Court has made it clear that the plaintiff does not have to prove he was *better* qualified than the person actually hired for the job. Patterson v. McLean Credit Union, 491 U.S. 164, 187-88 (1989).

sion in the absence of explanation' (here, the finding of unlawful discrimination)."[142] The role of the prima face case is to "forc[e] the defendant to come forward with some response . . . ."[143] Once the presumption fills that role, it "simply drops out of the picture."[144]

Justice Scalia stressed that while the burden of production shifts to the defendant, "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff."[145] In this regard, the presumption of discrimination arising from the prima facie case is an ordinary presumption. As such, it operates like all presumptions arising under Rule 301 of the Federal Rules of Evidence. The majority quoted Rule 301 in its entirety:

> In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains through the trial upon the party on whom it was originally cast.[146]

The Court's analysis of the effect of the presumption did not change prior Court opinions. Rather, the Court correctly reiterated that the *McDonnell Douglas* presumption was not a unique presumption and that it operated like all other presumptions under the Federal Rules of Evidence. Once rebutted, the presumption of discrimination is gone.

2. The Nature and Effect of the Defendant's Burden of Production

In order to rebut the presumption, the defendant "'must clearly set forth, through the introduction of admissible evidence,' reasons for its actions which, *if believed by the trier of fact*, would support a finding that unlawful discrimination was not the cause of the employment action."[147] The employer satisfies its burden of production "by producing *evidence* (whether ultimately persuasive or not) of nondiscriminatory reasons."[148] In writing for the majority, Justice Scalia stated that:

> In the nature of things, the determination that a defendant has met its burden of production (and thus rebutted any legal presumption of intentional discrimination)

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142. *St. Mary's*, 113 S. Ct. at 2747 (quoting 1 DAVID W. LOUISELL & CHRISTOPHER B. MUELLER, FEDERAL EVIDENCE § 67, at 536 (1977)).

143. *Id.* at 2749.

144. *Id.* The dissent did not question this interpretation of the effect of the presumption.

145. *Id.* at 2747 (citing Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981)).

146. FED. R. EVID. 301.

147. *St. Mary's*, 113 S. Ct. at 2747 (quoting *Burdine*, 450 U.S. at 254-55)).

148. *Id.* at 2748.

> *can involve no credibility assessment.* For the burden-of-production determination necessarily precedes the credibility-assessment stage.[149]

Thus at the close of the defendant's evidence, the trial judge must determine whether the employer's reason, if believed by the fact finder, would support a conclusion that discrimination did not cause the action at issue. However, the judge cannot examine the credibility of the reason. Any nondiscriminatory reason offered, if believed, will likely support a finding of fact of no discrimination. Thus, it appears that any reason, even a clearly manufactured one, will suffice to rebut the presumption.

Once again, as in the Court's articulation of the prima facie case, the Court's discussion of the nature of the rebuttal evidence did *not* change prior law. Rather, the Court's reinterpretation of the next stage of the model calls into question the necessity for the existence of steps one and two.

3. Stage Three: Pretext Redefined

According to the majority, once the employer rebuts the presumption, the *McDonnell Douglas* framework is no longer relevant.[150] The presumption, having fulfilled its role of forcing the defendant to come forward with some response, "simply drops out of the picture."[151] Significantly, after the rebuttal, "the trier of fact proceeds to decide the ultimate question: whether plaintiff has proven 'that the defendant intentionally discriminated against [him]' because of his race."[152]

Thus, the third prong of the model has been rewritten to adopt a form of the "pretext-plus" view. The factfinder's rejection of the defendant's reason does *not compel* judgment for the plaintiff. The majority strenuously insisted that "nothing in the law would permit us to substitute for the required finding that the employer's action was the product of unlawful discrimination, the much different (and much lesser) finding that the employer's explanation of its action was not believable."[153]

As a result, the third step of the model of proof is comprised of the larger question: Did the defendant intentionally discriminate? The determination of whether the employer's proffered reason is credible is sub-

149. *Id.* (emphasis added).
150. *Id.* at 2749.
151. *Id.* (citing *Burdine*, 450 U.S. at 255).
152. *Id.* (quoting *Burdine*, 450 U.S. at 253).
153. *Id.* at 2751.

sumed within the larger question of whether the defendant intentionally discriminated. *Burdine's* statement that the burden to prove the proffered reason false "now merges with the ultimate burden of persuading the court that she has been the victim of intentional discrimination" is read by Justice Scalia to support his refashioning of the third prong.[154] The merger language does not mean that the "little fish swallows the big one."[155] Rather, Justice Scalia states that "a more reasonable reading is that proving the employer's reason false becomes part of (and often considerably assists) the greater enterprise of proving that the real reason was intentional discrimination."[156]

Importantly, and possibly the key to the ultimate effect of the case, the Court recognized that the factfinder's disbelief of the employer's proffered reasons together with the elements of the prima facie case might suffice to show intentional discrimination.[157] The Court added that "even though (as we say here) rejection of the defendant's proffered reasons is enough at law to *sustain* a finding of discrimination, *there must be a finding of discrimination.*"[158] It is in this discourse that the Court apparently parts company with the extreme views of many lower pretext-plus courts which never would infer discrimination from the prima facie case and proof of falsity but would instead require additional evidence of discriminatory animus.

Thus, for the majority of the Court, it appears that *in some cases*, proof of falsity of the employer's explanation *may* raise an inference of the ultimate issue of discrimination. Such an inference would permit, yet not compel, a factual finding of discrimination. In other words, in some cases, proof of pretext *could* suffice as proof of pretext of discrimination.

While vociferously defending its reading of precedent, the Supreme Court majority struggled with reconciling other language from *Burdine* with its pretext-plus view. Much of the interpretation of precedent degenerates into a game of semantics. For example, *Burdine* states that once the employer has met its burden of production "the factual inquiry proceeds to a new level of specificity."[159] Many lower courts and the dissent in *St. Mary's* interpret this to mean that the issues are narrowed and focused at this point, and the factual inquiry is reduced to whether the employer's asserted reason is true or false, and if false, the defendant loses.[160] The *St. Mary's* majority, on the other hand, stated that "the

154. *Id.* at 2752 (citing *Burdine*, 450 U.S. at 256).

155. *Id.*

156. *Id.*

157. *Id.* at 2749.

158. *Id.* at 2749 n.4.

159. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 255 (1981).

160. *St. Mary's*, 113 S. Ct. at 2761 (Souter, J., dissenting). The dissent reiterates

'new level of specificity' may also (as we believe) refer to the fact that the inquiry now turns from the few generalized factors that establish a prima facie case to the specific proofs and rebuttals of discriminatory motivation the parties have introduced."[161] But in fact, the majority's inquiry did not turn to the "specific" rebuttals of the defendant. By the majority's own language, the plaintiff must "disprove all other reasons suggested, *no matter how vaguely* in the record."[162]

This is not the only language of *Burdine* that the majority found problematic. The majority further struggled with the assertion that a plaintiff may succeed "either directly by persuading the court that a discriminatory reason more likely motivated the employer *or* indirectly by showing that the employer's proffered explanation is unworthy of credence."[163] The majority reluctantly conceded that "[we] must agree with the dissent on this one: The words bear no other meaning but that the falsity of the employer's explanation is *alone enough* to compel judgment for the plaintiff."[164] However, the Court continued that the statement renders inexplicable *Burdine*'s explicit reliance upon authorities setting forth the classic law of presumptions.[165] The Court further reasoned that the offending "dictum" could not be reconciled with other language in *Burdine* such as the statement that "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff."[166] As a result of these inconsistencies and others cited by the Court, the majority concluded that the *Burdine* dictum at issue must be "regarded as inadvertence, to the extent that it describes disproof of the defendant's reason as a totally independent, rather than an auxiliary, means of proving unlawful intent."[167]

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that the Court repeatedly has identified the "compelling reason for limiting the factual issues in the final stage of a *McDonnell Douglas* case as 'the requirement that the plaintiff be afforded a full and fair opportunity to demonstrate pretext.'" *Id.* (Souter, J., dissenting) (citing *Burdine*, 450 U.S. at 256).

161. *Id.* at 2752.

162. *Id.* at 2755-56 (emphasis added).

163. *Burdine*, 450 U.S. at 256 (emphasis added). This excerpt is the seminal language in *Burdine* which was relied on by many pretext-only courts.

164. *St. Mary's* 113 S. Ct. at 2752.

165. *Id.*

166. *Id.* at 2753 (citing *Burdine*, 450 U.S. at 253).

167. *Id.*

Justice Scalia reasoned that whatever doubt was created by *Burdine* was eliminated by *Aikens*,[168] which stated that "the ultimate question [is] discrimination *vel non*."[169] *Aikens*, according to Justice Scalia, correctly recognized that once the defendant satisfies its burden of production, the fact finder must then decide not whether that evidence is credible but "whether the rejection was discriminatory within the meaning of Title VII."[170] "It is not enough . . . to *disbelieve* the employer; the fact finder must *believe* the plaintiff's explanation of intentional discrimination."[171]

The dissent argued that the majority's reliance on *Aikens* was misplaced, as that case quoted *Burdine's* language that the plaintiff may prevail ""indirectly by showing that the employer's proffered explanation is unworthy of credence.""[172] The dissent further pointed out that the majority's reliance on *Aikens* was further weakened by *Aikens'* very next sentence, which directs the district court to "'decide *which party's* explanation of the employer's motivation it believed.'"[173] The *Aikens'* Court did not allow the fact finder to rule against the plaintiff based upon an explanation which was never offered by the employer.[174] Nonetheless, the majority selectively interpreted *Aikens* as the definitive case in support of the pretext-plus position.

C. The Consequences of the Majority Holding

The majority then devoted a significant effort to counter the dire consequences which were predicted by Justice Souter's dissent. First, Justice Scalia countered the dissent's suggestion that the majority rule was adopted "'for the benefit of employers who have been found to have given false evidence in a court of law,' whom we 'favor' by 'exempting them from responsibility for lies.'"[175] Justice Scalia responded that simply because an employer's proffered explanation is disbelieved does not mean that those employers are necessarily perjurers or liars.[176] The Court did recognize, however, that some employers, or at least their employees, will be lying.[177] Nonetheless, the majority stated that even if the Court

168. United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711 (1983).

169. *Id.* at 714.

170. *St. Mary's* 113 S. Ct. at 2753 (quoting *Aikens*, 460 U.S. at 714-15).

171. *Id.* at 2754.

172. *Id.* at 2765 (quoting *Aikens*, 460 U.S. at 716 (quoting *Burdine*, 450 U.S. at 256)).

173. *Id.* (quoting *Aikens*, 460 U.S. at 256).

174. *Id.*

175. *Id.* at 2754 (quoting *id.* at 2762 (Souter, J., dissenting)).

176. *Id.*

177. *Id.*

could identify the perjurers, Title VII is not a cause of action for perjury and does not mandate judgment for plaintiffs in the case of a lie.[178] While emotionally unappealing, the majority was procedurally correct in recognizing that a lie need not always equal discrimination.

The majority was also undaunted by the plaintiff's suggestion that "a defendant which unsuccessfully offers a 'phony' reason cannot logically be in a better legal position [i.e. the position of having overcome the presumption from the plaintiff's prima facie case] than a defendant who remains silent, and offers no reasons at all for its conduct."[179] Justice Scalia countered that the "books are full of procedural rules that place the perjurer (initially at least) in a better position than the truthful litigant who makes no response at all."[180] For example, Justice Scalia pointed to parties who avoid default judgments by deceitfully responding to claims, who avoid judgment on the pleadings by untruthful denials of critical averments in a complaint, and who avoid summary judgment by creating an issue of fact with false affidavits.[181] In all of these situations, including the *McDonnell Douglas* model, "perjury may purchase the defendant a chance at the fact finder,"[182] though it may create other substantial risks such as sanctions under Rules 11 and 56(g) or 18 U.S.C. § 1621.[183] Under the majority's model, perjury does allow the rebuttal of the presumption of discrimination arising from the prima facie case. In a jury trial, however, if the jurors believe the employer is lying, they may believe the lie is a coverup for discrimination.

Justice Scalia provides a less than satisfactory response to the dissent's concern that the plaintiff is now "'saddled with the tremendous disadvantage of having to confront, not the defined task of proving the employer's stated reasons to be false, but the amorphous requirement of disproving all possible nondiscriminatory reasons that a fact finder might find lurking the record.'"[184] Justice Scalia stated that the dissent's apprehension arises from a fundamental misunderstanding of the *McDonnell Douglas* procedure. Justice Scalia explained that the employer's "articulated reasons" do not exist apart from the record. In other words, "the

178. *Id.* at 2754-55.

179. *Id.* at 2755 (quoting Brief for Respondent Melvin Hicks at 21, St. Mary's Honor Ctr. v. Hicks, 113 S. Ct. 2742 (1993) (No. 92-602)).

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.* (quoting *id.* at 2762 (Souter, J., dissenting)).

defendant's 'articulated reasons' *themselves* are to be found 'lurking in the record.'"[185] The articulated reasons are simply those suggested by the record; they need not be pled in any formal sense. A literal reading of the majority decision suggests that the plaintiff's responsibility is to anticipate and counter any plausible explanation which can be inferred by the defendant's evidence. Again, however, as a practical matter, most juries are likely to consider only reasons that are explicitly articulated by the defendant employer.

The effect of the majority's language on *St. Mary's* itself, which involved a district court fact finding of no discrimination, is unclear. The district judge originally ruled against the plaintiff based on the fact that a personality conflict *might* be the real explanation for the employment action. The existence of a personality conflict was never suggested by the defendant and, in fact, was expressly denied by a major defense witness.[186] Nonetheless, because the fact finder believed that it *might* have caused the action, the lower court ruled that the plaintiff failed to prove discrimination by a preponderance of the evidence.

The disposition of the case by the majority is, in itself, intriguing. The majority did not affirm the trial court's factual finding on the ultimate issue, but instead remanded the case for a determination of whether the court's finding was clearly erroneous.[187] In turn, when it received the case from the Supreme Court, the Eighth Circuit remanded the case back to the district court.[188] The remand by the Eighth Circuit to the district court included a tongue-in-cheek instruction to apply the "Supreme Court's newly clarified analytical scheme."[189] Significantly, the Eighth Circuit quoted the majority's statement that the "factfinder's disbelief of the reasons put forward by the defendant may, together with the elements of the prima facie case, suffice to show intentional discrimination."[190] Importantly, the Eighth Circuit stated that:

> [T]he district court may decide to hold an evidentiary hearing in order to permit the parties to present additional evidence on the now-critical question of personal animosity. For example, Hicks may be able to demonstrate that defendants were

185. *Id.*

186. *See* Brief for Respondent Melvin Hicks at App. 46, St. Mary's Honor Ctr. v. Hicks, 113 S. Ct. 2742 (1993) (No. 92-602). At trial, John Powell flatly denied any personal difficulty with Hicks. *Id.* Further, not one of the defendants' 41 proposed findings of fact or conclusions of law alleged that any of the defendants harbored personal animus toward Hicks. *Id.*

187. *St. Mary's* 113 S. Ct. at 2756.

188. Hicks v. St. Mary's Honor Ctr., 2 F.3d 265 (8th Cir. 1993).

189. *Id.* at 267.

190. *Id.* at 266-67 (quoting *St. Mary's*, 113 S. Ct. at 2749).

> not motivated by personal animosity or that defendants' personal animosity was itself racially motivated.[191]

The remand keeps Hicks' chances of winning a judgment alive even though his proof is comprised solely of his prima facie case and proof that the reasons proffered by St. Mary's were false. The remand is logical given the Supreme Court's recognition that an inference of discrimination may be created by proof that the employer's proffered reason is false. However, one must speculate that the district judge's conclusion inevitably will remain the same as he presumably found nothing in the plaintiff's proof of falsity of the employer's articulated reason from which to infer discrimination. As for the district judge, the differential disciplinary treatment of Hicks, a black man, from other white employees was insufficient to prove discrimination. The workplace statistics regarding blacks, which showed fairly equal racial treatment in the judge's view, apparently negated any inference of discrimination arising from the differential treatment.

The district court should, as suggested by the Eighth Circuit, hold an evidentiary hearing. Otherwise, Hicks will have no opportunity to produce evidence showing that the alleged "personality conflict," first articulated by the district court six months after trial, is unworthy of credence.[192] Clearly, on remand, Hicks should be afforded the opportunity to discredit this hypothesized reason.

If on remand Hicks is afforded this opportunity, he could introduce expert testimony to establish the effects of racial stereotyping behavior similar to the expert testimony introduced and accepted by the Supreme Court in *Price Waterhouse v. Hopkins*.[193] In *Price Waterhouse*, the Court found that employment action based on sex stereotyping was a form of sex discrimination.[194]

D. The Dissent

In a lengthy and bitter dissent, Justice Souter stated that the majority inexplicably cast aside the *McDonnell Douglas* framework, thereby rendering it meaningless.[195] The *McDonnell Douglas* framework, as summarized in *Burdine*, itself stated the purpose of the framework: "progres-

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191. *Id.* at 267.
192. *St. Mary's* 113 S. Ct. at 2766 (Souter, J., dissenting).
193. Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).
194. *Id.* at 235-36.
195. *St. Mary's* 113 S. Ct. at 2757 (Souter, J., dissenting).

sively to sharpen the inquiry into the elusive factual question of intentional discrimination."[196] *Burdine* also recognized that the employer's articulation requirement serves "to frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext."[197] The dissent concluded that the majority's rule results in a framing of nothing and a sharpening of nothing, rendering meaningless *Burdine's* censure that the employer's explanation "must be clear and reasonably specific."[198] Justice Souter pointed out that it is "unfair and utterly impractical to saddle the victims of discrimination with the burden of either producing direct evidence of discriminatory intent or eliminating the entire universe of possible nondiscriminatory reasons for a personnel decision."[199]

Both the majority and dissent agree in their conclusion that, under the majority's scheme, once the employer rebuts the prima facie case, the *McDonnell Douglas* framework is irrelevant and the case is once again back to addressing the ultimate issue: whether the plaintiff has proven the intentional discrimination against him.[200] Thus, concludes the dissent, the majority "transforms the employer's burden of production from a device used to provide notice and promote fairness into a misleading and potentially useless ritual."[201]

The dissent believed that the legislative purpose in adopting Title VII will be frustrated by the majority's opinion, as some workers will be deterred from suing because of the uncertainties of success. Those who do file lawsuits will likely find a waste of time, effort, and money.[202] Pretrial discovery will become more extensive as a much wider range of facts could prove both relevant and important at trial. Likewise, trials promise to be "tedious affairs"[203] as plaintiffs will seek to address any conceivable explanation for the employer's actions that might be suggested by the evidence, however vague.[204]

Justice Scalia commented that the dissent's reading of precedent was utterly implausible. In response, Justice Souter pointed out that the "implausible" view was shared by the Solicitor General and the Equal Employment Opportunity Commission[205] charged with implementing and

196. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 255 n.8 (1981).

197. *Id.* at 255-56.

198. *St. Mary's*, 113 S. Ct. at 2757 (Souter, J., dissenting) (citing *Burdine*, 450 U.S. at 258).

199. *Id.* at 2758 (Souter, J., dissenting).

200. *Id.* at 2749, 2761 (Souter, J., dissenting).

201. *Id.* at 2761 (Souter, J., dissenting).

202. *Id.* at 2763 (Souter, J., dissenting).

203. *Id.* (Souter, J., dissenting).

204. *Id.* (Souter, J., dissenting).

205. *Id.* at 2765 (Souter, J., dissenting). Indeed, in its most recent policy guidance,

enforcing Title VII, and more than half of the Courts of Appeals.[206] Justice Souter noted that Congress had taken no action to indicate that the Court was mistaken in *McDonnell Douglas* or *Burdine* unlike the recent legislative response to Title VII interpretations which Congress did believe to be mistaken.[207]

The dissent then pointed to the primary problem of the majority's opinion: the failure to address the practical question of how a plaintiff without direct evidence can meet the "ultimate burden" of proving discrimination.[208] The plaintiff no longer has the defined task of proving the employer's stated reasons to be false but rather the "amorphous requirement of disproving all possible nondiscriminatory reasons that a fact finder might find lurking in the record."[209] The majority clearly stated that the plaintiff's responsibility is to "disprove all other reasons suggested, no matter how vaguely, in the record."[210] One must ask whether the majority's holding indeed nullifies the *McDonnell Douglas* model. It is questionable as to whether the model should exist at all when, at the end of stage two, the ultimate issue of discrimination is the question to be answered. The Court in its interpretation of *McDonnell Douglas'* scheme of ordering the evidence has come full circle to the original civil model which asks: "Did the defendant intend to discriminate?" The *McDonnell Douglas* model of proof, post-*St. Mary's*, offers little more than a methodology for ordering proof at trial.

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the EEOC explicitly reaffirmed the pretext-only view of the *McDonnell Douglas* model. *See* Recent Developments in Disparate Treatment Theory, EEOC Advance Policy Guidance No. 915.002 (approved by 4-0 vote July 7, 1992), Lab. L. Rep. (CCH) 449 Issue No. 493, Part 2 (July 20, 1992).

206. *St. Mary's*, 113 S. Ct. at 2765 (Souter, J., dissenting).

207. *Id.* (Souter, J., dissenting). Congressional inaction was cited in two Supreme Court cases as evidence of congressional endorsement of the Court's rulings on affirmative action schemes. *See* Johnson v. Santa Clara Transp. Agency, 480 U.S. 616, 629 n.7 (1987); United Steelworkers of Am. v. Weber, 443 U.S. 193, 204-07 (1979). *But see Johnson*, 480 U.S. at 672 (Scalia, J., dissenting) ("I think we should admit that vindication by congressional inaction is a canard.").

208. *St. Mary's*, 113 S. Ct. at 2761 (Souter, J., dissenting).

209. *Id.* at 2762 (Souter, J., dissenting).

210. *Id.* at 2756.

IV. THE PRACTICAL IMPLICATIONS OF *ST. MARY'S*

The practical implications of the pretext-plus view adopted by the majority will quickly be felt by the parties at the pre-trial stage of litigation. Importantly, because discrimination cases are necessarily fact-intensive, plaintiff's counsel will want to request in its pleadings that a jury be the fact finder in the case.[211] As will be developed below, having a jury decide the ultimate issue of discrimination will help the plaintiff avoid the potentially negative implications of *St. Mary's*.[212]

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211. The ability to obtain a jury in Title VII cases in which the cause of action arose pre-Civil Rights Act of 1991 will be impacted by the Court's decision on the issue of retroactivity. Some lower court decisions suggest that the addition of a jury trial provision is a procedural rather than a substantive change in the law. As such, even litigants with pre-Civil Rights Act claims should be able to amend their pleadings to request a jury trial. *See, e.g.*, Brown v. Amoco Oil Co., 793 F. Supp. 846, 851 (N.D. Ind. 1992).

212. The analysis in the "Practical Implications" section assumes that the lawsuit has been filed in federal court. Increasingly, plaintiffs are filing discrimination lawsuits in state court based on state statutes parallel to Title VII. Litigating a discrimination case in state court could yield a plaintiff numerous advantages:

1. Some state courts may apply pre-*St. Mary's* law, particularly if state precedent following the pretext only model is well-established.

2. State courts will always entertain jurisdiction over state tort claims such as intentional infliction of mental anguish causes of action which may provide unlimited punitive damage awards. Federal courts, on the other hand, have discretion as to whether they will entertain supplemental (or pendant) jurisdiction over common law state claims. *See* 28 U.S.C. § 1367 (1993). Even if the federal court does entertain jurisdiction over the state claims, a federal court's interpretation of relevant state law may differ from that of state courts.

3. State summary judgment rules may make summary judgment more difficult for the movant employer than under federal summary judgment rules. For example, in federal court a defendant seeking summary judgment bears the initial burden of informing the district court of the basis for its motion and identifying the absence of evidence to support an essential element of the plaintiff's case. *See* Celotex Corp. v. Catrett, 477 U.S. 317 (1986). The burden then shifts to the nonmovant plaintiff to produce sufficient evidence to allow reasonable jurors to find "by a preponderance of the evidence that the plaintiff is entitled to a verdict." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). On other hand, state procedural rules may make a defendant movant's burden substantially greater. In Texas, for example, the defendant cannot succeed simply by identifying an absence of evidence to support an essential element of the plaintiff's case. Instead, the defendant must produce summary judgment proof conclusively negating an essential element of the plaintiff's claim. Casso v. Brand, 776 S.W.2d 551, 555-56 (Tex. 1989).

4. State courts may provide juries more hospitable to discrimination claims than juries in federal courts. In many state courts, counsel, not the court, conduct voir dire of the jury panel. In federal court, the judge usually conducts the voir dire although counsel may submit prepared questions. FED. R. CIV. P. 47(a). In addition, the demographics of the jury pool in state court may favor a plaintiff, depending on the method and geographical locale from which the pool is drawn in a given state.

5. Some federal courts may be more inclined to reduce damage awards than

A. Pre-Trial

1. Discovery

Despite the dissent's dire predictions to the contrary, a plaintiff's discovery strategy post-*St. Mary's* should not change. If a jury is the fact finder, a plaintiff should continue to be able to limit discovery to exploring and ultimately attempting to discredit those reasons clearly articulated by the employer for the employment action. If the plaintiff successfully proves that the articulated reasons are false, most juries probably will infer that the false reason is, in fact, a coverup for discrimination. Otherwise, why wouldn't the employer simply tell the true nondiscriminatory reason for the action? As such, the dissent's dire prediction that pretrial discovery will become more expensive for the plaintiff who now needs to turn over every stone of possible motivation is unfounded in the context of jury trials.

In the few cases which may be tried by the court, the dissent's prediction of expanded discovery is perhaps more accurate, at least in theory. Pre-*St. Mary's* cases illustrate, as discussed above, the willingness of some trial judges to latch on to any possible nondiscriminatory reason, however vaguely suggested in the record. Because *St. Mary's* mandates that a plaintiff negate the vaguest of reasons suggested by the record, plaintiff's counsel theoretically should try to identify and explore any subtle motivations that a judge as fact finder might infer were possible causes for the employment action. However, as in *St. Mary's*, the subtle motivation may sometimes be so subtle that neither party anticipates it will be relied upon by the judge until after the decision issues. As a practical matter, even with a fact-finder judge, a plaintiff's mechanical approach to discovery will probably not be any different than it was before *St. Mary's*. As in the past, a plaintiff's interrogatories to the defendant will include asking the defendant to state why the plaintiff was discharged, not hired, etc. As in the past, a plaintiff will also ask the defendant to identify persons with knowledge of relevant facts. As before, a plaintiff will either interview or depose these persons to discern what they know. These basic tenets of discovery will not change. What *could*

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would a state court. *See, e.g.*, Murray v. Ramada Inns, Inc., 843 F.2d 831 (5th Cir. 1988) (reducing wrongful death award from $250,000 to $25,000).

These differences between federal and state practices, as well as many others, may affect a plaintiff's ability to prevail in discrimination cases. As such, plaintiff's counsel should carefully weigh the advantages of filing a discrimination action in state court.

change is that a plaintiff's attorney might feel obligated to track down unarticulated, but speculative, reasons for the employer's action. For example, in some cases, this obligation could translate into the need to take additional depositions.

In reality, however, exploring rabbit trails of unarticulated motivations will not protect a plaintiff from a fact finder who is intent on finding no discrimination. Thus, in both jury trials and bench trials, it is difficult to conceive how *St. Mary's* will affect the traditional discovery conducted by plaintiffs in discrimination cases.[213]

2. Circumstantial Evidence v. Direct Evidence: Escaping the *McDonnell Douglas* Model

Importantly, at the pre-trial stage, plaintiff's counsel will want to search for any evidence that could constitute "direct" evidence so as to bring the plaintiff's case under the more favorable motivating factor model adopted in the Civil Rights Act of 1991.[214] Regardless of whether Con-

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213. If additional discovery does appear warranted, plaintiff's counsel should consider that the amended Federal Rules of Civil Procedure, effective on December 1, 1993, contain presumptive discovery limits and in some cases may affect plaintiff counsel's ability to conduct additional discovery. For example, the amended Rules, designed to alleviate the expense and abuse of discovery, presumptively limit parties to 10 depositions per side and 25 interrogatories per party. *See* FED. R. CIV. P. 30, 31, 33. These presumptive limits will not affect most employment discrimination cases even with the Court mandate to negate the vaguest of evidence. But in those few cases in which the presumptive limits do pose a problem, counsel will have to engage in a time-consuming motion practice to overcome the presumptive limits.

214. 42 U.S.C. § 2000e-2(m) (Supp III. 1991). "Except as otherwise provided in this title, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was *a motivating factor* for any employment practice, even though other factors also motivated the practice." *Id.* (emphasis added).

Significantly, the term "motivating factor" is left undefined by the Act. The motivating factor model had its genesis in the Supreme Court's decision in Price Waterhouse v. Hopkins, 490 U.S. 228 (1989). In that plurality opinion, the Court stated that the *McDonnell Douglas* model was inappropriate for cases which consist of both illegitimate and legitimate reasons for the employer's actions. The Court stated:

> In saying that gender played a motivating part in an employment decision, we mean that, if we asked the employer at the moment of the decision what its reasons were and if we received a truthful response, one of those reasons would be that the applicant or employee was a woman.

Id. at 250.

The Court added that proof of sex-based stereotypes can constitute proof of an illegitimate motive and thus prove that gender was a motivating factor in the employment decision. *Id.*

Justice O'Connor's concurrence distinguished *McDonnell Douglas*, where the plaintiff presented no direct evidence, from such cases as *Price Waterhouse*, where the

gress eventually overrides *St. Mary's* and the difficulties it creates for plaintiffs, the first goal of plaintiff's counsel is to avoid application of the *McDonnell Douglas* model altogether, if possible.[215]

Even before *St. Mary's*, the motivating factor model was much more favorable for plaintiffs. Significantly, liability attaches after the plaintiff has shown that the protected classification was a discriminatory motivating factor in the employment action. At that point, the court may grant declaratory relief, injunctive relief, and attorney's fees.[216] The employer then has the opportunity to prove by a preponderance of the evidence that the same decision would have been made even absent the discriminatory motive. If successful, the defendant will avoid paying any other damages, such as compensatory and punitive damages, and back pay.

Importantly, the type of evidence that will bring a case under the motivating factor model is far from clear, leaving great latitude for advocacy. The motivating factor test may require what is often mistakenly termed "direct" evidence. The Civil Rights Act of 1991, however, gives absolutely no guidance on this crucial issue. In *Price Waterhouse*,[217] the Supreme Court adopted the predecessor "mixed-motive" model and allowed sex stereotyping to suffice as evidence which would put a case under this

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plaintiff offered direct evidence. Justice O'Connor stated that without direct evidence, there is no justification for shifting the burden of persuasion. *Id.* at 277 (O'Connor, J., concurring). As a result, she would not allow stray remarks in the workplace, statements by non-decisionmakers, or statements by decisionmakers unrelated to the employment decisional process to satisfy the plaintiff's burden. *Id.* (O'Connor, J., concurring).

215. Even if Congress acts to override *St. Mary's*, the motivating factor model is still much more favorable for the plaintiff.

216. The Civil Rights Act of 1991 states:

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

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

217. Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

pro-plaintiff model.[218] The plurality did not label the sex stereotyping as direct evidence but simply treated it as the type of evidence which would invoke the "mixed motive" model.[219]

However, in *Price Waterhouse*, Justice O'Connor's concurrence stated that "direct" evidence was necessary to invoke the new model and presumably agreed that the evidence in the case was direct.[220] But in fact, the evidence presented in *Price Waterhouse* was *not* direct evidence in the hornbook definition sense. Direct evidence is evidence which, if believed, resolves a matter in issue. For example, a witness' testimony that he saw A stab B is direct evidence of whether A did indeed stab B.[221] The evidence in *Price Waterhouse* consisted of statements by a decisionmaking partner that the female plaintiff needed to "walk more femininely, talk more femininely, wear make-up, have her hair styled, and wear jewelry" to make partner.[222] This evidence clearly is circumstantial evidence, evidence which requires additional reasoning to reach the proposition to which it is directed.[223] The finder of fact is required *to infer* from the partner's statement that the reason the plaintiff failed to make partner was because the employer based his decision on impermissible sexual stereotyping. Nonetheless, the Supreme Court did not characterize the evidence as circumstantial, a characterization which would have led to application of the *McDonnell Douglas* model. Instead, the Court applied the pro-plaintiff mixed-motive model, the predecessor to the motivating factor model found in the Civil Rights Act of 1991.

Cognizant of the consequences of model selection, lower courts have had great difficulty in deciding what constitutes "direct" evidence and

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218. *Id.* at 252.

219. *Id.*

220. *Id.* at 276 (O'Connor, J., concurring) ("[A] disparate treatment plaintiff must prove *by direct evidence* that an illegitimate criterion was a substantial factor in the decision.") Justice O'Connor was the only Justice who required "direct" evidence, as the plurality never mentioned it. Nonetheless, lower courts have latched onto that word in determining the type of evidence needed to invoke the mixed-motive model.

In addition, Justice O'Connor's concurrence required a higher level of causation than did the plurality. Justice O'Connor asserted that the illegitimate criterion must be a "substantial factor" in the employment decision. *Id.* at 276 (O'Connor, J., concurring). On the other hand, the plurality's opinion limited its discussion to a "motivating factor," suggesting a lesser quantum of causation. *Id.* at 250. The Civil Rights Act of 1991 uses only "motivating factor" terminology. *See* 42 U.S.C. § 2000e-5g(2)(B) (Supp. III 1991).

221. 1 MCCORMICK ON EVIDENCE § 185, at 777 (John William Strong ed., 4th ed. 1992). In contrast, testimony that A fled the scene of the stabbing would be circumstantial evidence of the stabbing but direct evidence of the flight itself.

222. Price Waterhouse v. Hopkins, 490 U.S. 228, 235 (1989). This evidence, according to the Court, was the "coup de grace." *Id.*

223. MCCORMICK ON EVIDENCE, *supra* note 221, at 777.

what is "circumstantial" evidence, the latter dictating application of the *McDonnell Douglas* model. Two circuit court decisions illustrate the difficulties of model selection. Both *Bruno v. City of Crown Point*,[224] a Seventh Circuit decision, and *Barbano v. Madison County*,[225] a Second Circuit decision, dealt with evidence of interview questions asked only of women, including how many children the women planned to have and childcare arrangements. The Seventh Circuit evaluated the proof as indirect evidence under *McDonnell Douglas*.[226] In stark contrast, the Second Circuit treated the tainted interview as direct evidence of sex discrimination.[227] As one might anticipate, the defendant employer prevailed in *Bruno* while the plaintiff prevailed in *Barbano*. This illustration of inconsistency is only one of many. The often subtle and difficult distinction between "direct" and "indirect" or "circumstantial" evidence has confounded numerous lower courts as Justice Kennedy predicted in his dissent to *Price Waterhouse*.[228]

Some courts, in determining which model to invoke, are moving away from the imprecise labels of "direct" and "circumstantial" and are focusing instead on the probative value of the evidence. The movement away from the often misused labels of "direct" and "circumstantial" towards an assessment of the evidence's probative value is logical. Simply because evidence is "circumstantial" does not mean it has inferior probative value. As one treatise states:

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224. 950 F.2d 355 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 2998 (1992). The *Bruno* case involved questions of sex discrimination. Although the Seventh Circuit cited *Price Waterhouse*, the court never labeled the sex stereotyping questions as direct evidence of discrimination. Instead, the court ultimately concluded that "[t]here was no direct evidence of sex discrimination." *Id.* at 363.

225. 922 F.2d 139 (2d Cir. 1990).

226. *Bruno*, 950 F.2d at 363.

227. *Barbano*, 922 F.2d at 144-45. *See generally*, Tracy L. Bach, Note, *Gender Stereotyping in Employment Discrimination: Finding a Balance of Evidence and Causation Under Title VII*, 77 MINN. L. REV. 1251, 1269-75 (1993).

228. Price Waterhouse v. Hopkins, 490 U.S. 228, 291-92 (1989) (Kennedy, J., dissenting). Justice Kennedy stated that "trial courts will be saddled with the task of developing standards for determining when to apply the burden shift . . . . Confusion in the application of dual burden-shifting mechanisms will be most acute in cases brought under 42 U.S.C. § 1981 or the Age Discrimination in Employment Act (ADEA), where courts borrow the Title VII order of proof for the conduct of jury trials." *Id.* (Kennedy, J., dissenting). Now that Title VII intentional discrimination cases can be tried to a jury in federal court, confusion will likely reign in those trials as well.

> The distinction (between direct and circumstantial evidence) is conceptually useful, but it has no direct importance in passing on the relevance of the particular evidence. In this regard, it is worth noting that the fact that inferential value is an issue with respect to circumstantial but not direct evidence does not imply that the former is generally inferior. Both sorts of evidence are quite convincing on some occasions, but not nearly so telling in other instances.[229]

One recent Eighth Circuit decision, *Stacks v. Southwestern Bell Yellow Pages, Inc.*,[230] illustrates the movement away from evidence labels in discrimination cases. In *Stacks*, the court stated that "if the plaintiff can *demonstrate* that an illegitimate criterion was a motivating factor in the employment decision, the burden shifting formula set out in [*Price Waterhouse*] applies."[231] The Eighth Circuit then stated that it uses the term "demonstrate" advisedly "in order to avoid the 'thicket' created by some courts' use of the term 'direct evidence' to describe the plaintiff's initial burden of proof in a *Price Waterhouse* case."[232] The Eighth Circuit stated:

> We conclude that there is no restriction on the *type* of evidence a plaintiff may produce to demonstrate that an illegitimate criterion was a motivating factor in the challenged employment decision. The plaintiff need only present evidence, be it direct or circumstantial, sufficient to support a finding by a reasonable factfinder that an illegitimate criterion actually motivated the challenged decision.[233]

The court went on to cite evidence in a prior case consisting of a statement made by a decisionmaker to the effect "that older employees have problems adapting to new employment policies."[234] The *Stacks* court recognized that "in hornbook terms, this statement constitutes circumstantial evidence (in that it requires an inference from the statement proved to the conclusion intended) that a discriminatory motive played a motivating factor in the challenged employment decision."[235] However, the *Stacks* court accepted this as the type of evidence that will invoke the motivating factor model.[236] Significantly, the *Stacks* court chastised the district court, which apparently made no effort to invoke the motivating factor model.[237] The Eighth Circuit then remanded the case back to the lower court to consider application of the motivating

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229. MCCORMICK ON EVIDENCE, *supra* note 221, at 777 n.19 (citations omitted).

230. 996 F.2d 200 (8th Cir. 1993).

231. *Id.* at 201-02.

232. *Id.* at 201 n.1.

233. *Id.*

234. *Id.* (quoting Beshears v. Asbill, 930 F.2d 1348, 1354 (8th Cir. 1991)).

235. *Id.*

236. *Id.* The Court stated that "[w]e believe that the term 'direct evidence,' as used in *Beshears*, means only that the plaintiff must present evidence showing a specific link between discriminatory animus and the challenged decision." *Id.*

237. *Id.* at 202.

factor model particularly in light of the following statement from the district judge's findings:

> I think that [Hudson] may well have thought that women were the worst things that happened to Southwestern Bell Yellow Pages and that if he had his druthers, he wouldn't have any women there . . . . Yes, I have some problems with the way Ms. Stacks' attitude was being evaluated.[238]

In short, if a plaintiff produces sufficient evidence, either direct *or inferential*, from which a fact finder could conclude as a matter of fact that the employer was motivated in part by discrimination in making an adverse employment decision, the motivating factor model should be used by the trial court.[239] In order to invoke the motivating factor model, counsel for plaintiff should look for the following types of evidence throughout the discovery process:

1. Evidence of protected classification stereotyping;[240]
2. Evidence of actions or remarks of the employer that reflect a discriminatory attitude;[241]
3. Comments which demonstrate a discriminatory animus in the decisional process or comments uttered by individuals closely involved in employment decisions.[242]

These types of evidence should suffice to allow the case to be tried and the jury issues submitted under the motivating factor model. Stray remarks by a non-decisionmaker will not likely suffice as direct evidence.[243]

If plaintiff's counsel cannot find evidence from which to argue application of the motivating factor model, the logical step for the defendant's counsel, as a result of *St. Mary's*, will be to file a motion for summary judgment. The key player in this stage of litigation is the district judge who must grapple with the failure of the *St. Mary's* majority to give clear

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238. *Id.* at 203 (quoting Trial Tr. at 90-91).

239. *See* Candace S. Kovacic-Fleischer, *Proving Discrimination After* Price Waterhouse *and* Wards Cove: *Semantics v. Substance*, 39 AM. U. L. REV. 615, 624-28 (1990).

240. Price Waterhouse v. Hopkins, 490 U.S. 228, 235 (1989).

241. *See Stacks*, 996 F.2d at 202-03.

242. *Id.* at 203.

243. *See id.* at 202; *see also Price Waterhouse*, 490 U.S. at 277 (O'Connor, J., concurring) ("[S]tray remarks in the workplace . . . cannot justify requiring the employer to prove that its hiring or promotion decisions were based on legitimate criteria. Nor can statements by non-decisionmakers, or statements by decisionmakers unrelated to the decisional process itself, suffice to satisfy the plaintiff's burden in this regard").

guidance as to what evidence is necessary for a plaintiff to withstand a defendant employer's motion for summary judgment.

3. Defendants' Motions for Summary Judgment

Rule 56 of the Federal Rules of Civil Procedure permits the granting of summary judgment if there are no genuine issues of material fact or law present in the case.[244] In order to avoid the granting of a summary judgment motion, the adverse party must respond and set forth specific facts showing that there is a genuine issue for trial.[245] In deciding a motion for summary judgment, the district court should remember that all evidence of the nonmovant is to be believed and that the court must view the facts in the light most favorable to the nonmoving party.[246] The judge's inquiry is to determine whether there is more than a scintilla of evidence upon which a jury could reasonably find for the plaintiff.[247] If such evidence exists, there is a genuine issue of fact that requires a trial.[248]

In a *McDonnell Douglas* model case, a defendant employer is likely to move for summary judgment, particularly given the failure by the *St. Mary's* majority to address what type of evidence is necessary to prove the ultimate issue of discrimination. The basis for the motion will rarely be the alleged nonexistence of the prima facie case. Rather, the defendant will likely introduce evidence via affidavit or deposition of a legitimate, nondiscriminatory reason for the employment action. Prior to *St. Mary's*, pretext-plus courts routinely granted summary judgment for employers on the basis that, while the plaintiff may have raised a fact issue or even proven falsity of the employer's proffered reason, the plaintiff had no additional evidence of animus. This is tantamount to a re-

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244. *See* FED. R. CIV. P. 56(c). Rule 56(c) states that summary judgment may be granted if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Id.*

245. *See* FED. R. CIV. P. 56(e). Rule 56(e) states:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleadings, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

Id.

246. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986).

247. *Id.* at 248.

248. *Id.* at 257.

quirement for direct evidence which, by definition, does not exist in a circumstantial disparate treatment case.

However, in *St. Mary's*, Justice Scalia explicitly provided ammunition for a plaintiff to withstand an employer's motion for summary judgment, stating that:

> The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons, will permit the trier of fact to infer the ultimate fact of intentional discrimination, and the Court of Appeals was correct when it noted that, upon such rejection, "no additional proof of discrimination is required."[249]

Justice Scalia's remarks logically lead to this result: raising a genuine issue of fact regarding the credibility of the employer's proffered reasons *should* defeat the employer's motion for summary judgment. The resolution of the factual issue of whether the employer's reasons are true is material to the ultimate determination of whether the employer intentionally discriminated against the plaintiff. The Supreme Court has defined a material fact as one that affects the outcome of the case.[250] The creation of a genuine issue of material fact on the issue should preclude summary judgment because the issue of falsity of the employer's reason *might* affect the outcome of the case.

Clearly, it is within the fact finder's province to determine disputed issues, namely, whether the employer's proffered reason is credible and, ultimately, whether the defendant intentionally discriminated against the plaintiff.[251] In determining the employer's state of mind, it is crucial that the fact finder have the opportunity to assess the credibility of the witnesses' testimony and to observe their demeanor. The district judge must not usurp the role of the fact finder in determining the credibility and weight of statements.[252] The factual inquiry in a pretext case re-

249. St. Mary's Honor Ctr. v. Hicks, 113 S. Ct. 2742, 2749 (1993) (citation omitted).

250. *Anderson*, 477 U.S. at 248 ("[S]ubstantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.")

251. *See* Anderson v. Bessemer City, 470 U.S. 564, 573 (1985) (a district court's finding of discriminatory intent in an action brought under Title VII is a factual finding).

252. *Anderson*, 477 U.S. at 255 ("Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict.").

mains the determination of the intent of the defendant at the time of the alleged discriminatory action. This inquiry, dependent in large part upon the credibility of the parties, is not readily disposed of by summary judgment.

Undoubtedly, the ultimate issue of whether the defendant intentionally discriminated is a fact issue for the jury. Because a fact finder may infer discrimination from the prima facie case and proof of falsity, summary judgment cannot be granted for the employer when the plaintiff establishes the prima facie case and raises a fact issue on the employer's articulated reasons.

In support of this conclusion, in *Shager v. Upjohn Co.*,[253] Judge Posner stated:

> If the only reason an employer offers for firing an employee is a lie, the inference that the reason was a forbidden one, such as age, may rationally be drawn. This is the common sense behind the rule of McDonnell Douglas. It is important to understand, however, that the inference is not compelled. The trier of fact must decide after a trial whether to draw the inference. The lie may be concealing a reason that is shameful or stupid but not proscribed, in which event there is no liability . . . . The point is only that if the inference of improper motive can be drawn, there must be a trial.[254]

Judge Posner thus agrees with Justice Scalia's remarks in that the discrediting of the employer's reason *does* create an inference of discrimination, which may lead to a finding of discrimination.

Judge Posner's logic would seem to dictate the following domino effect. If a fact issue exists on whether the employer's articulated reason is credible, then the plaintiff should be entitled to a jury trial.[255] However, this conclusion begs the issue of what type of evidence will create such a fact issue. The decision belongs to the trial judge who will rule on the employer's motion for summary judgment. Unfortunately, lower courts' decisions regarding the probative value of evidence are far from uniform and often seem to turn on the individual proclivities of a given judge.[256]

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253. 913 F.2d 398 (7th Cir. 1990).

254. *Id.* at 401. In *Shager*, the Seventh Circuit reversed the lower court which had granted summary judgment to the employer. *Id.* at 399. On the other hand, Judge Posner wrote in another case that "the workload of the federal courts, and realization that Title VII is occasionally or perhaps more than occasionally used by plaintiffs as a substitute for principles of job protection that do not yet exist in American law, have led the courts to take a critical look at efforts to withstand defendants' motions for summary judgment." Palucki v. Sears, Roebuck & Co., 879 F.2d 1568, 1572 (7th Cir. 1989).

255. Of course, even if the plaintiff proves pretext at trial, judgment for the plaintiff is not compelled. That is the majority holding in *St. Mary's*. It is possible that a plaintiff may prove the employer's reason is pretextual but that a jury might not find that it was a pretext for discrimination.

256. There are numerous difficulties involved in determining whether circumstantial

In the recent pretext-plus Fifth Circuit case of *Moore v. Eli Lilly & Co.*,[257] the employer made a number of comments from which a fact finder could infer discriminatory animus based on age sufficient to create a genuine issue of fact concerning the falsity of the employer's proffered reason. The comments at issue included:

1. A series of questions by a supervisor concerning the ages of the current employees and whether they were going to retire soon;[258]
2. A comment made by a supervisor to the plaintiff that if he were in plaintiff's position, he would be out "seeing the world;"[259]
3. A comment made by a supervisor to the plaintiff while both were in the restroom that "he sure had a strong stream for an old man;"[260] and
4. Comments made by other supervisors to the plaintiff not to recommend people over thirty-five years of age for new sales positions.[261]

In affirming summary judgment for the employer, however, the Fifth Circuit held that these comments, as well as other evidence, did not establish a *nexus* between the plaintiff's age and his termination so as to create a genuine issue of fact concerning pretext.[262] This requirement of a "nexus" is wholly misplaced in the context of *circumstantial* evidence. The Fifth Circuit has confused direct evidence, which typically requires an evidentiary link between the discriminatory animus and the challenged decision, with circumstantial evidence. Any type of evidence which casts doubt on the employer's proffered explanation should suffice to defeat an employer's motion for summary judgment. The evidence need not in and of itself show discrimination. Rather, it need only cast doubt on the employer's story. A genuine factual dispute regarding the

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evidence has probative value. As one evidence treatise states:

> [H]ow can a judge know whether the evidence could reasonably affect an assessment of the probability of the fact to be inferred? In some instances, scientific research may show that the fact in issue is more likely to be true (or false) when such evidence is present than when it is not. Ordinarily, however, the answer must lie in the judge's own experience, general knowledge, and understanding of human conduct and motivation.

MCCORMICK ON EVIDENCE, *supra* note 221, at 778.

257. 990 F.2d 812 (5th Cir. 1993).

258. *Id.* at 817.

259. *Id.* at 818.

260. *Id.* at 818 n.28.

261. *Id.* at 818.

262. *Id.* at 817, 819.

credibility of the employer's articulated reasons is a factual dispute which a fact finder should resolve. In so doing, the fact finder may determine that the true reason for the action was discrimination. The U.S. Supreme Court has reiterated that at the summary judgment level "the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial."[263]

In addition, the Fifth Circuit in *Moore* violated the rule that "on motion for summary judgment, the ambiguities in a witness's testimony must be resolved against the moving party."[264] As one Seventh Circuit opinion put it, "[T]he task of disambiguating ambiguous utterances is for trial, not for summary judgment."[265] Instead, the Fifth Circuit improperly inferred legitimate purposes behind the first three statements and stated that the fourth comment was merely "'pottie humor.'"[266]

The Fifth Circuit also discounted evidence regarding inconsistencies in the employer's articulated reason for termination.[267] The Court held that "while the conflicting accounts indicate a factual dispute as to exactly *how* Moore was terminated, their existence does not provide direct (or even indirect) proof that he was fired because of *age*."[268] The court refused to acknowledge that the inconsistencies in the employer's proffered reasons for the termination might allow a fact finder to infer that the employer was attempting, inartfully, to cover up discrimination.

Other types of evidence should also raise a factual issue as to the falsity of the employer's stated reason. As suggested in *McDonnell Douglas*, evidence of comparative treatment of the plaintiff[269] and statistical

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263. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986).

264. *See, e.g.*, Binder v. Long Island Lighting Co., 933 F.2d 187, 191 (2d Cir. 1991).

265. Shager v. Upjohn Co., 913 F.2d 398, 402 (7th Cir. 1990).

266. Moore v. Eli Lilly & Co., 990 F.2d 812, 818 (5th Cir. 1993).

267. *Id.* at 819.

268. *Id.*

269. The majority opinion in *St. Mary's* does not discuss the probative value of evidence of differential treatment. However, Justice Scalia's hostility toward its probative value is revealed in *Carter v. Duncan-Huggins, Ltd.*, 727 F.2d 1225 (D.C. Cir. 1984), which was decided while Justice Scalia was still a member of the Court of Appeals for the District of Columbia Circuit. In an adamant dissent against the majority's finding of discrimination, Judge Scalia maintained that evidence of differential treatment does not constitute evidence of discrimination. *Id.* at 1239 (Scalia, J., dissenting). In *Carter*, the plaintiff, the first and only black employee of a company, produced evidence at trial that she had been treated differently than white employees. *Id.* at 1239-47. Judge Scalia stated, "The majority's analysis of the evidence involves a basic error of law—that evidence of differential treatment constitutes evidence of racial motivation for differential treatment." *Id.* at 1239 (Scalia, J., dissenting). He elaborated by stating that the numerous pieces of circumstantial evidence of differential treatment "are not circumstantial evidence of racial motivation, but only (if they

evidence revealing disparities relating to the protected classifications may assist the plaintiff in proving pretext.[270] Because this type of evidence assists a plaintiff in proving pretext, it should also assist a plaintiff in defeating an employer's motion for summary judgment and, in some cases, in supporting a jury's finding of discrimination. Although proving the falsity of the employer's reasons is subsumed into proving the ultimate issue of discrimination, the existence of a fact issue on the credibility of the employer's proffered explanation entitles the plaintiff to a jury.

However, raising a genuine issue of fact as to the credibility of the defendant's proffered reason may require more than just the plaintiff's conclusory affidavit that the articulated reason is false.[271] The Supreme

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were established) of an intent to disfavor [plaintiff]. That is not against the law." *Id.* at 1246 (Scalia, J., dissenting).

Justice Scalia's comments directly contradict the edict in *International Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977), where the Supreme Court described disparate treatment cases as those where "[t]he employer simply treats some people less favorably than others because of their race, color, religion, sex or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment." *Id.* at 335 n.15. Justice Scalia's position that differential treatment provides no probative evidence of discrimination is simply incorrect. Probative value should be given to comparative and statistical evidence. A plaintiff must have the opportunity to prove his case circumstantially as mandated by the Supreme Court. *See* United States Postal Serv. Bd. Of Governors v. Aikens, 460 U.S. 711, 714 n.3 (1983) ("As in any lawsuit, the plaintiff may prove his case by direct or circumstantial evidence. The trier of fact should consider all the evidence, giving it whatever weight and credence it deserves.")

270. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804-05 (1973). The First Circuit Court of Appeals issued a recent decision regarding the use of statistics which is akin to the Fifth Circuit's misplaced requirement of a nexus between the proffered pretext evidence and the discrimination. *See* LeBlanc v. Great Am. Ins. Co., 6 F.3d 836 (1st Cir. 1993). In *LeBlanc*, the First Circuit stated that there was "no evidence whatsoever to connect the statistics to Great American's specific decision to dismiss LeBlanc." *Id.* at 840. Again, such a nexus requirement is wholly inapplicable to circumstantial statistical evidence. The First Circuit is transposing direct evidence causation requirements onto circumstantial cases.

As one Fifth Circuit case has recognized, there may be some individual circumstantial cases in which the statistical evidence of discrimination is so compelling that the statistical evidence alone would suffice to prove discrimination. Walther v. Lone Star Gas Co., 977 F.2d 161 (5th Cir. 1992). In dictum, the court recognized that proving discriminatory intent "by statistics alone would be a challenging endeavor." *Id.* Nonetheless, the court did not preclude the possibility. *Id.*

271. *See* Rossy v. Roche Prod., Inc., 880 F.2d 621, 624 (1st Cir. 1989) (holding that summary judgment may be appropriate if the non-moving party rests merely upon conclusory allegation, improbable inferences, and unsupported speculation).

Court has stated that the "nonmovant may not rest upon the mere allegations or denials of his pleading, but . . . must set forth specific facts showing there is a genuine issue for trial."[272] On the other hand, as the Supreme Court stated in *Burdine*, "[T]here may be some cases where the plaintiff's initial evidence, combined with effective cross-examination of the defendant, will suffice to discredit the defendant's explanation."[273] This would suggest that a plaintiff with no circumstantial evidence of discrimination other than the prima facie case (such as statistics, differential treatment, or classification-related remarks) should not attempt to rely solely on a conclusory affidavit. Instead, the plaintiff should oppose the motion by providing deposition testimony of the cross-examination of defense witnesses. It may be possible through deposition cross-examination to create an issue of fact as to the credibility of the proffered reason, whereas a conclusory affidavit alone probably would not be competent summary judgment evidence.[274]

The district judge who is grappling with whether to grant or deny an employer's motion for summary judgment will find little guidance from pretext-plus precedent from lower courts. Unlike the *St. Mary's* majority, these courts took an extreme view of the plaintiff's evidentiary burden in a circumstantial case. Summary judgment opinions from most lower pretext-plus courts required far more than the creation of a fact issue on the employer's articulated reason. For example, in *Villanueva v. Wellesley College*,[275] the First Circuit stated that the plaintiff "must do more than cast doubt on the wisdom of the employer's justification; to defeat summary judgment the plaintiff must introduce evidence that the real reason for the employer's action was discrimination."[276] In the First Circuit's view, in order to create a dispute of material fact, a discrimination plaintiff must raise an inference of discriminatory motive underlying the pretextual explanation."[277] Under this view, the "mere showing that the employer's articulated reason may shield another (possibly nondiscriminatory) reason does not create a dispute of material fact."[278] In other words, even a plaintiff who can prove that the proffered reasons

272. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

273. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 256 n.10 (1983).

274. *See, e.g.*, Little v. Republic Ref. Co., 924 F.2d 93, 96 (5th Cir. 1991) (holding that an age discrimination plaintiff's own good faith belief that her age motivated her employer's action is of little value); Laurence v. Chevron, U.S.A., Inc., 885 F.2d 280, 285 (5th Cir. 1989) (holding that conclusory statements of age discrimination cannot support an inference that the defendant violated the Age Discrimination in Employment Act).

275. 930 F.2d 124 (1st Cir. 1991), *cert. denied*, 112 S. Ct. 181 (1981).

276. *Id.* at 127-28.

277. *Id.* at 128.

278. *Id.*

are false, not just raise a fact issue, cannot withstand the employer's motion for summary judgment.

The First Circuit's approach, however, is flawed. It *is* a material fact as to whether the employer's reason is credible, as proof of falsity together with the prima facie case could support a factfinder's determination of discrimination.[279] As a whole, pre-*St. Mary's* pretext-plus cases provide no instruction to the trial judge who is contemplating whether to grant or deny an employer's motion for summary judgment. In many of these decisions, summary judgment was granted and affirmed for the employer on the basis that the employee, while creating a fact issue on the credibility of the employer's proffered explanation, failed to adduce additional evidence of discriminatory animus.[280] This requirement, which is tantamount to mandating that a plaintiff possess direct evidence of discrimination in order to survive an employer's motion for summary judgment, clearly runs counter to the majority's directive in *St. Mary's*.

In the few months since *St. Mary's* was decided, several lower courts have relied heavily on *St. Mary's* "ammunition" language. In each of three district court cases, the court denied the employer's motion for summary judgment because the plaintiff created a material issue of fact regarding the falsity of the employer's proffered reason.[281] In each case, the court cited the "ammunition" language to find that the plaintiff was entitled to a jury trial.[282] Thus, at least some lower courts appear to be

279. The First Circuit Court itself is split as to whether a discrimination plaintiff must adduce evidence beyond that comprising the prima facie case and the rebuttal of the defendant's justification in order to prevail either at the summary judgment stage or at trial. *See* Connell v. Bank of Boston, 924 F.2d 1169, 1172 n.3 (1st Cir.) (holding that no such additional evidence is required; evidence when taken as a whole "must be sufficient for a reasonable factfinder to infer that the employer's decision was motivated by" discriminatory animus), *cert. denied*, 111 S. Ct. 2828 (1991). *But see* Olivera v. Nestle Puerto Rico, Inc., 922 F.2d 43, 48 (1st Cir. 1990) (holding that a plaintiff must adduce additional evidence).

280. *See, e.g.*, Menard v. First Sec. Serv. Corp., 848 F.2d 281 (1st Cir. 1988) (affirming summary judgment for employer despite evidence that cast substantial doubt on the employer's reasons for firing the employee).

281. Malone v. Signal Processing Technologies, Inc., 826 F. Supp. 370 (D.C. Colo. 1993); Daniels v. Runyon, No. 91 Civ. 4823, 1993 WL 269621 (E.D.N.Y. July 8, 1993); Reiff v. Philadelphia Court of Common Pleas, 827 F. Supp. 319 (E.D. Pa. 1993).

282. *Malone*, 826 F. Supp. at 374-75 (holding that the employer's articulated reason for discharge was rebutted by testimony that employer had enormous volume of work and anticipated hiring 191 employees within the next five years); Daniels, 1993 WL 269621 at *7 (ruling that the employer's articulated reason for failure to promote an African-American plaintiff was rebutted by plaintiff's proof of both better creden-

interpreting the ammunition language to preclude employers' summary judgments when the plaintiff can raise an issue of fact as to the falsity of the employer's articulated nondiscriminatory reasons.

In addition, an argument can be made that under *St. Mary's, all* a plaintiff need do to defeat an employer's motion for summary judgment is establish a prima facie case. A recent California appellate decision, *Moisi v. College of the Sequoias Community College District*,[283] relied on *St. Mary's* ammunition language to reverse a lower court's grant of summary judgment for the employer. The court's reversal was not based on the creation of a fact issue as to falsity of the proffered reason. Rather, the court concluded that a plaintiff who establishes a prima facie case is entitled to a trial to determine the credibility of the employer's proffered reason.[284] The court stated that:

> [A]n employer's [action] . . . at the summary judgment stage does not remove the issue of credibility. Under the rule in *St. Mary's*, even though an employer has come forward with legitimate nondiscriminatory reasons for discrimination which have not been specifically rebutted by the plaintiff, the plaintiff is entitled to a full and fair opportunity to demonstrate, through the presentation of her own case and through cross-examination of the employer's witnesses, that the reasons proffered are not the true reasons for the challenged action but that an unlawful discriminatory reason is.
>
> *We recognize that the holding and analysis in St. Mary's, as we understand it, will preclude summary judgment in most employment discrimination cases,* at least in those where the employee has established a prima facie case and there are no legal defenses (such as failure to comply with statutory prerequisites or file within the applicable statute of limitations) available to the employer. Nonetheless, in California we have consistently reserved summary judgment for those cases in which there exists no triable issue of fact and in which the moving party can demonstrate an entitlement to judgment as a matter of law. Credibility issues may not be resolved at summary judgment but are left to the trier of fact. *If appellant has established a prima facie case under McDonnell Douglas, she is entitled to challenge the credibility of respondent's proffered reasons for terminating her and for refusing to rehire her at trial.*[285]

Thus, the court concluded that the truthfulness of the proffered nondiscriminatory reasons of the employer is an issue for the trier of

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tials than white person hired and nepotistic practices at a facility staffed and managed predominantly by whites); *Reiff*, 827 F. Supp. at 321 (stating that the desire to eliminate the least productive employees, the employer's articulated reason for discharge, was rebutted by testimony that discharged plaintiff had received excellent evaluations in her 34 years with the employer).

283. 19 Cal. App. 4th 564 (1993). The case involved the construction of the California Fair Employment and Housing Act, an act which parallels Title VII and uses the same models of proof. *Id.*

284. *Id.* at 575-76.

285. *Id.* (emphasis added) (citation omitted).

fact.[286] As the court stated, this view precludes summary judgment in most discrimination cases.[287] This view comports with *Burdine's* statement that "there may be some cases where the plaintiff's initial evidence, combined with effective cross-examination of the defendant, will suffice to discredit the defendant's explanation."[288] The analysis is also buttressed by Justice Scalia's statement that the rebuttal of the prima facie case by the defendant involves no credibility assessment of the proffered reason.[289]

However, the *Moisi* court ignores basic summary judgment rules. A plaintiff cannot withstand summary judgment unless he or she produces evidence sufficient to create an issue of fact.[290] The analysis in *Moisi* would allow a plaintiff to ignore this burden of production and proceed to trial when he or she has offered no evidence that could possibly controvert the defendant's justification.[291] The standard adopted in *Moisi* is much lower than that used for civil plaintiffs in other areas of the law. Forcing almost every defendant in a discrimination case to trial is too extreme and is an entrée for abuse of the process. The California court's view ignores summary judgment rules and gives too much strength to a plaintiff's establishment of a prima facie case, which is typically a light burden for a plaintiff. Nonetheless, this view and the more moderate view which relies on the "ammunition" language provide two interpretations of *St. Mary's* which work to preclude an employer's motion for summary judgment. In the few months since *St. Mary's* decision was issued, some courts have found these constructions persuasive in holding that the respective plaintiffs were entitled to jury trials on their claims of discrimination.

If a plaintiff withstands an employer's motion for summary judgment and proceeds to trial on the merits before a jury, the impact of *St. Mary's* should be negligible. At trial, if a plaintiff proves that an employer's proffered reason for its actions is false, most jurors will logically infer that the proffered reason is a cover-up for discrimination. Otherwise, the employer would simply have told the true reason for the action. As Justice Souter noted in his dissent, "'[C]ommon experience'

286. *Id.* at 576.

287. *Id.*

288. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 255 n.10 (1983).

289. St. Mary's Honor Ctr. v. Hicks, 113 S. Ct. 2742, 2748 (1993).

290. *See* Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

291. *See* Bolton v. Scrivener, Inc., 836 F. Supp. 783 (W.D. Okla. 1993) (criticizing *Moisi*).

tells us that it is 'more likely than not' that the employer who lies is simply trying to cover up the illegality alleged by the plaintiff."[292] Thus, the majority's assertion that proof of falsity of the employer's explanation does not *compel* judgment for the plaintiff normally should not cause a difference in the outcome of most jury trials.

Thus, while the majority in *St. Mary's* may have wished to see an increase in summary judgments to reduce the case backlog of most federal courts, the decision *should not* result in a flood of employer summary judgment victories. Under the majority's explicit language and unique view of the pretext-plus model, most circumstantial cases still must be tried by a jury. These disputes are factually-intensive and simply do not lend themselves to summary disposition. As one Fifth Circuit case stated, "[D]eterminations regarding motivation and intent depend on complicated inferences from the evidence and are therefore peculiarly within the province of the factfinder."[293]

While not a panacea, alternative dispute resolution mechanisms such as mediation may help to provide needed relief for the overloaded federal courts. In addition, many employers are now requiring their employees to agree to submit any employment disputes, including claims of discrimination, to binding arbitration. In an emerging line of cases, several lower courts have held that an employer may elect to require their employees to enter into very specific arbitration agreements, committing the employees to arbitrate employment-related disputes, including discrimination claims.[294] In addition, other types of dispute resolution techniques may be utilized in discrimination cases, including mediation, moderated settlement conferences, mini-trials, and summary jury trials. In summary, the solution to the backlog in the federal courts cannot and should not be the knee-jerk granting of employers' summary judgment motions. Such a short-sighted "solution" would result in the wholesale decimation of circumstantial discrimination cases and lead to further discriminatory abuse in the workplace.

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292. *St. Mary's*, 113 S. Ct. at 2763 (Souter, J., dissenting) (quoting Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978)).

293. Thornbrough v. Columbus & G.R.R., 760 F.2d 633, 641 (5th Cir. 1975).

294. *See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991) (ruling that ADEA claims can be subjected to compulsory arbitration); Scott v. Farm Family Life Ins. Co., 827 F. Supp. 76 (D. Mass. 1993) (applying *Gilmer* retroactively and holding that plaintiff must arbitrate sex discrimination charge). Whether as a matter of policy these arbitration agreements should bind discrimination claimants to an arbitral forum, thus depriving them of the right to a jury, is beyond the scope of this Article.

V. PROPOSED LEGISLATION TO OVERRIDE *ST. MARY'S*

A little more than one month after *St. Mary's* was decided, legislation to override the decision was introduced in Congress. The proposed legislation, entitled the "Employment Discrimination Evidentiary Amendment Act of 1993,"[295] is a partisan bill, currently co-sponsored by 26 Democrats and no Republicans. It reads as follows:

> Section 706 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5) is amended by adding at the end the following:
>
> "(l)(1) An unlawful employment practice based on disparate treatment is established if—
>
> "(A) the complaining party proves by a preponderance of the evidence a prima facie case that the respondent engaged in such practice; and
>
> "(B) either—
>
> "(i) the respondent fails to produce any evidence to rebut such case; or
>
> "(ii)(I) the respondent articulates, and produces evidence of, one or more legitimate, nondiscriminatory reasons for the conduct alleged to be the unlawful employment practice; and
>
> "(II) the complaining party demonstrates that each of such reasons is not true, but a pretext for discrimination that is the unlawful employment practice.
>
> "(2) Paragraph (1) shall not be construed to specify the only mean by which an unlawful employment practice based on disparate treatment may be established."[296]

The proposed legislation obviously seeks to return the *McDonnell Douglas* model to the pretext-only form. The intent of the legislation is to equate proof of pretext with proof of discrimination and thus compel judgment for the plaintiff. However, the wording of the legislation is problematic and may not accomplish its apparent goal. Section (1)(B)(ii)(II) quoted above states that a plaintiff will prevail by proving that the employer's proffered reasons are "not true *but a pretext for discrimination that is the unlawful employment practice.*" The italicized portion of the language should be omitted from the legislation to unambiguously override *St. Mary's*; otherwise, some courts likely will conclude that additional evidence beyond proof of falsity is still mandated by the legislation.[297]

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295. H.R. 2787, 103d Cong., 1st Sess. (1993).

296. *Id.*

297. See *supra* notes 83-84 and accompanying text for a discussion of the distinction some courts make between proving "pretext" and "pretext for discrimination," the latter requiring evidence beyond proof of falsity of the employer's articulated reason. Hence, reference to "pretext for discrimination" in the proposed legislation gives

These same courts—ones which may be predisposed to ignore *St. Mary's* ammunition language—may also conclude that proof of falsity of the proffered reason (much less a fact issue as to falsity) does not raise a genuine issue of material fact as to discrimination at the summary judgment stage. Hence, it is critical that the legislation be revised to omit the ambiguous language. simply putting a period after the word "true" in section (1)(B)(ii)(II) would easily solve the ambiguity and clearly enunciate the pure pretext-only view.

Assuming the offending language is deleted, another crucial issue is not addressed by the legislation: What type of evidence will create a fact issue as to falsity of the proffered reason? As discussed earlier, *McDonnell Douglas* itself listed several types of pretext evidence, including evidence that similarly situated employees (not of plaintiff's protected classification) were treated differently than the plaintiff, evidence of prior treatment of the plaintiff, or statistical evidence revealing disparities relating to the protected classification of the plaintiff.[298] The Court later clarified that pretext evidence is not limited to certain types but may take a variety of forms.[299] Unfortunately, and perhaps predictably, as this Article has pointed out, courts vary widely in their interpretation of the probative value of pretext evidence at the summary judgment stage. In application, this means that whether an individual plaintiff can withstand an employer's summary judgment motion and obtain a jury trial depends largely on the proclivities of a given trial judge. Of course, the issue of whether legislation can address this seemingly intractable issue is debatable. A non-exhaustive listing of the types of evidence from which a jury could infer falsity might be useful to trial judges. However, such a listing would be imprecise as evidence varies so widely from case to case.

One major omission from the legislation in its current form is its failure to address the issue of retroactivity, that is, whether it applies to pending claims or cases. The failure of the Civil Rights Act of 1991 to address this same issue was a serious omission and resulted in a legislative punt back to the courts to resolve the issue. However, the omission was perhaps the result of a political compromise. The issue has finally worked its way up to the Supreme Court, and the decision will presumably clarify the guidelines for determining the retroactivity of legislation when the legislation is silent.[300] Therefore, in order to avoid the quagmire surrounding the issue of whether the Civil Rights Act of 1991 is

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these courts an opportunity to construe the legislation in a pretext-plus fashion.

298. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804-05 (1973).

299. Patterson v. McLean Credit Union, 491 U.S. 164, 187 (1989).

300. *See supra* note 18.

retroactive, the proposed legislation overriding *St. Mary's* should be amended to address the retroactivity issue explicitly.

In summary, Congress should take a careful look at the cases emerging post-*St. Mary's* to determine whether the impact of *St. Mary's* truly merits this pro-plaintiff legislation. If lower courts consistently utilize the "ammunition" language provided by the majority in overruling employers' motions for summary judgment, the effects of properly drafted legislation would be negligible. On the other hand, if lower courts utilize *St. Mary's* to authorize the routine granting of employer summary judgments, revised legislation should be advanced so as to allow factfinders the opportunity to decide whether discrimination has occurred.

VI. CONCLUSION

An inherent tension pervades discrimination law: the need for equal opportunity in the workplace versus the need for business to exercise legitimate business judgment without the coercive fear of discrimination lawsuits. As a whole, the Supreme Court and Congress have taken different philosophical approaches to issues surrounding discrimination cases, approaches which often affect the outcome of similar cases.

St. Mary's Honor Center v. Hicks, in its majority and dissenting opinions, reflects the evidentiary difficulties involved in circumstantially proving that an employer intended to discriminate. But while the majority opinion indubitably precluded the compelling of judgment for a plaintiff who proves an employer's articulated reason false, it arguably should have little further effect on the ability of employees to pursue their claims before a jury. The decision, via the explicit language of the majority, should not result in a landslide of employer summary judgments. On the contrary, via the Court's language and the inherent nature of circumstantial cases, most cases must be resolved by juries.

Before enacting overriding legislation, pro-civil rights leaders should carefully examine the impact of *St. Mary's* by studying lower courts' interpretations of the Court's decision. Piecemeal legislation should be enacted only in response to decisions which truly constrict the ability of plaintiffs to pursue discrimination cases.