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Affirming Ambiguity: Reeves v. Sanderson Plumbing Products Inc. and the Burden-Shifting Framework of Disparate Treatment Cases

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AFFIRMING AMBIGUITY: *REEVES V. SANDERSON PLUMBING PRODUCTS, INC.* AND THE BURDEN-SHIFTING FRAMEWORK OF DISPARATE TREATMENT CASES

I. INTRODUCTION

Title VII of the Civil Rights Act of 1964[1] makes it illegal for an employer to discriminate in the workplace on the basis of race, sex, color, religion, or national origin.[2] However, since the passage of the Act in 1964, lawyers, jurists, and commentators have asked: How do affected employees produce persuasive evidence of discrimination?[3] Undoubtedly, the most persuasive evidence of unlawful discrimination is direct proof of the employer's discriminatory motivation.[4] Direct evidence of discrimination, however, is difficult to produce and rarely arises in contemporary disparate treatment litigation.[5] This difficulty of

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1. 42 U.S.C. § 2000e to e-17 (1994). According to Justice White, Title VII "was designed to remedy the intentional and systematic exclusion of blacks by the employer and the unions from certain job categories." Johnson v. Transp. Agency, 480 U.S. 616, 657 (1987) (White, J., dissenting); *see also* United Steelworkers v. Weber, 443 U.S. 193, 203 (1979) ("Without a job, one cannot afford public convenience and accommodations. Income from employment may be necessary to further a man's education, or that of his children.") (quoting Sen. Humphrey, 110 CONG. REC. 6552 (1964)).

2. 42 U.S.C. §§ 2000e to 2(a) (1994).

3. *See, e.g.*, LEGISLATIVE HISTORY OF THE CIVIL RIGHTS ACT OF 1964, *Separate Minority Views of Hon. Richard H. Poff and Hon. William Cramer*, 1964 U.S.C.C.A.N. 2477; Thomas A. Cunniff, Note, *The Price of Equal Opportunity: The Efficiency of Title VII After* Hicks, 45 CASE W. RES. L. REV. 507, 523 (1995); Susan K. Grebeldinger, *How Can a Plaintiff Prove Intentional Employment Discrimination if She Cannot Explore the Relevant Circumstances: The Need for Broad Workforce and Time Parameters in Discovery*, 74 DENV. U. L. REV. 159 (1996).

4. For example, an employer saying, "I am firing you because you are black and I don't like blacks" would be extremely persuasive direct evidence. Ann C. McGinley, *¡Viva La Evolucion!: Recognizing Unconscious Motive in Title VII*, 9 CORNELL J.L. & PUB. POL'Y 415, 448 (2000); Michael Evan Gold, *Towards a Unified Theory of the Law of Employment Discrimination*, BERKELEY J. EMP. & LAB. L. 175, 181 (2001) (noting that such egregious discriminatory comments are rare).

5. *See* LaPierre v. Benson Nissan, Inc., 86 F.3d 444, 449 (5th Cir. 1996); Gates v. Georgia-Pacific Corp., 326 F. Supp. 397, 399 (D. Or. 1970); 1 LEX K. LARSON, EMPLOYMENT DISCRIMINATION § 8.01[1], at 8-7 (2d ed. 1994) (stating that "[e]mployers are, on the whole, too sophisticated to profess their prejudices on paper . . . before witnesses"); *see also* Brief of Amici Curiae Lawyers' Committee for Civil Rights Under Law et al. at 13 n.10, Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 113 (2000) (No. 99-536), *available at* http://supreme.lp.findlaw.com/supreme_court/docket/mardocket.html#99-536 (last visited

producing evidence has consequently forced prosecuting employees to prove their claims with indirect evidence of discrimination.

To assist the producers of indirect discriminatory evidence, the United States Supreme Court, in *McDonnell Douglas Corp. v. Green*[6] articulated an evidentiary framework riddled with presumptions and shifting production burdens.[7] Specifically, the *McDonnell Douglas* framework allows an aggrieved plaintiff to demonstrate discrimination by (1) establishing a prima facie case, and in most instances,[8] (2) proving the employer's proffered reasons for its behavior are false and therefore, a pretext for a discriminatory motive.[9] In the years since the *McDonnell Douglas* decision, the Supreme Court has attempted to refine and clarify the evidentiary framework. Yet, in the course of attempting to refine this framework, the Court's decisions have created additional ambiguities in the following two discrete, yet interrelated, areas: (1) the amount of evidence needed to sustain a discriminatory cause of action and (2) the application of discriminatory evidence to the federal courts' dispositional procedural devices.[10]

In *Reeves v. Sanderson Plumbing Products, Inc.*,[11] the Supreme Court again attempted to clarify and refine the ambiguities that remained from the Court's preceding jurisprudence. The Court addressed two central issues. The first issue, which concerned the significance of a plaintiff's evidence of pretext, was as follows: is credible

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June 29, 2001) [hereinafter Lawyers' Committee Brief] (collecting cases that acknowledge direct evidence of discrimination is difficult to prove).

6. 411 U.S. 792 (1973).

7. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 271 (1989) (O'Connor, J., concurring) ("[T]he entire purpose of the *McDonnell Douglas* prima facie case is to compensate for the fact that direct evidence of intentional discrimination is hard to come by."); *see infra* notes 23–42 and accompanying text.

8. Once a Title VII plaintiff establishes a prima facie case of discrimination, a rebuttable presumption is established. Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 254 (1981). If the defendant produces no evidence to rebut the presumption, the court must enter judgment for the plaintiff. *Id.* However, disposition of a case in this manner is rare.

9. Pretext is defined as "[a] false or weak reason or motive advanced to hide the actual or strong reason or motive." BLACK'S LAW DICTIONARY 1206 (7th ed. 1999). Accordingly, in disparate treatment cases, the plaintiff is trying to prove that the employer's reason is a "pretext" for discrimination. A plaintiff "can prove pretext indirectly by showing that (1) defendant's explanation had no basis in fact, (2) the explanation was not the real reason, or (3) the reason stated was insufficient to warrant the adverse employment action." HENRY H. PERRITT, JR., CIVIL RIGHTS IN THE WORKPLACE § 6.06[A], at 361 (3d ed. 2001).

10. "Dispositional procedural devices" mean a court's application of summary judgment and judgment as a matter of law under Federal Rules of Civil Procedure 56 and 50. FED. R. CIV. P. 50, 56.

11. 530 U.S. 133 (2000).

proof of pretext, by itself, enough to sustain a favorable jury decision?[12] Second, the Court sought to refine the standards for considering evidence when deciding a motion for a judgment as a matter of law.[13] Nonetheless, while it discussed the standards for pretext evidence, the *Reeves* Court ironically cultivated another split between the circuit courts of appeals. Thus, the practical effect of *Reeves* has been negligible.

This Comment compares and contrasts the evidentiary framework for disparate treatment cases[14] before and after the Court's recent decision in *Reeves*. Section II will review the Supreme Court's development of an evidentiary framework for disparate treatment cases and the resulting ambiguities. Section III will analyze the Supreme Court's unanimous decision in *Reeves v. Sanderson Plumbing Products, Inc.*, in which the Court attempted, but failed, to clarify the pre-*Reeves* ambiguities. Section IV will discuss the conflicting interpretations of *Reeves* in the lower federal courts. Section V advocates a uniform standard consistent with the policies underlying the *McDonnell Douglas* framework and summary judgment procedure. Finally, Section VI provides a summary and conclusion to the Comment.

II. THE HISTORICAL LEGAL FRAMEWORK

A. *The* McDonnell Douglas *Three-step Analysis*

Title VII of the 1964 Civil Rights Act allows the plaintiff to prove discrimination through evidence of either disparate impact or disparate treatment.[15] In a disparate impact case, the plaintiff attempts to prove that a "facially neutral" employment practice has a discriminatory effect

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12. *See id.* at 137.

13. *See id.* This refinement also applied to summary judgment proceedings. *Id.* at 150.

14. The term "disparate treatment cases" normally includes claims under Title VII of the Civil Rights Act of 1964. *See* 42 U.S.C. § 2000e to e-17 (1994); 1 MERRICK T. ROSSEIN, EMPLOYMENT DISCRIMINATION § 2.2, at 2-4 to 2-5 (1990). However, the evidentiary requirements of *Reeves* and its predecessors also extend, nearly identically, to claims under the Age Discrimination in Employment Act of 1967 (ADEA), the Rehabilitation Act of 1973, Title IX of the Education Amendments of 1972, and section 510 of the Employee Retirement Income Security Act of 1974 (ERISA). *See* 1 BARBARA LINDEMANN & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 13 & nn.24–26, 28 (3d ed. 1996); 2 ROSSEIN, *supra*, § 22.5, at 22-27, § 24.1[1], at 24-5. *Cf. Reeves*, 530 U.S. at 142 ("Because the parties do not dispute the issue, we shall assume, *arguendo*, that the *McDonnell Douglas* framework is fully applicable here.").

15. *See* LEE MODJESKA, EMPLOYMENT DISCRIMINATION LAW § 1.6, at 15 (2d ed. 1988).

on a protected class.[16] Accordingly, courts focus on the discriminatory results of an employer's action.[17]

In contrast, a disparate treatment case focuses not on the discriminatory *results*, but rather on the employer's discriminatory motivation.[18] In *International Brotherhood of Teamsters v. United States*, the Supreme Court summarized disparate treatment as follows: "The 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 . . . ."[19] Direct proof of discriminatory motive, however, is very difficult for plaintiffs to produce.[20] This difficulty extends from the subjective nature of discriminatory practices[21] and the fact that any documentation indicating discrimination is usually under the employer's control.[22]

In order to lessen the difficult burden on plaintiffs to produce direct evidence, the Supreme Court developed an evidentiary framework designed to make circumstantial evidence sufficient to sustain a disparate treatment claim.[23] The Court introduced this framework in *McDonnell Douglas*, where the plaintiff brought suit under Title VII alleging that he was not hired by the aerospace company because "of his race and persistent involvement in the civil rights movement."[24] The

16. *Id.* § 1.6, at 16; *see* Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) ("Congress [requires] the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.").

17. *See* 1 LINDEMANN & GROSSMAN, *supra* note 14, at 81; *see also Griggs*, 401 U.S. at 432 ("Congress directed the thrust of [Title VII] to the *consequences* of employment practices, not simply the motivation.").

18. MODJESKA, *supra* note 15, § 1.6, at 15.

19. 431 U.S. 324, 335 n.15 (1977).

20. *See supra* note 5 and accompanying text.

21. *See, e.g.*, United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 716 (1983) ("There will seldom be eyewitness testimony as to the employer's mental processes.") (inner quotations omitted).

22. MODJESKA, *supra* note 15, § 1.7, at 17. Other logical reasons for the difficulty of producing direct evidence include the lack of contemporaneous witnesses to the harassment and co-workers who do not testify because they fear losing their own job. Interview with Lisa C. Paul, employment law attorney, Croen & Barr LLP, in Milwaukee, Wis. (Jan. 25, 2001).

23. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802–806 (1973); PERRITT, *supra* note 9, § 6.06[A], at 359–60; *see also* Jody H. O'Dell, Comment, *Between Pretext Only and Pretext Plus: Understanding* St. Mary's Honor Center v. Hicks *and its Application to Summary Judgment*, 69 NOTRE DAME L. REV. 1251, 1253 (1994) (noting that after *McDonnell Douglas*, "[the plaintiff] must rely upon indirect or circumstantial evidence to prove discrimination").

24. *McDonnell Douglas*, 411 U.S. at 796.

Court granted certiorari "[i]n order to clarify the standards governing the disposition of [the Title VII] action."[25] Ultimately, the Court's clarification developed into an "elaborate three-stage, burden-shifting framework" complete with presumptions and production burdens.[26]

The *McDonnell Douglas* evidentiary framework first requires the plaintiff to establish a prima facie case of intentional discrimination.[27] For instance, a prima facie case of intentional discrimination under the Age Discrimination in Employment Act (ADEA)[28] is established by proving the following: (1) the plaintiff is a member of the class protected by the ADEA, i.e. she is at least 40 years of age;[29] (2) the plaintiff was otherwise qualified for the position of employment;[30] (3) the plaintiff was discharged by the employer-defendant;[31] and, (4) the employer-defendant replaced the plaintiff.[32] After the plaintiff establishes this prima facie case by a preponderance of the evidence,[33] a rebuttable presumption of discrimination exists.[34]

In order to rebut the presumption created by a prima facie case, the employer must produce evidence of a "legitimate, nondiscriminatory reason" for the firing or other adverse action.[35] For example, in

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25. *Id.* at 798.

26. Kenneth R. Davis, *The Stumbling Three-Step, Burden-Shifting Approach in Employment Discrimination Cases*, 61 BROOK. L. REV. 703, 703 (1995).

27. *See* 411 U.S. at 802; *see also* MACK A. PLAYER, EMPLOYMENT DISCRIMINATION LAW 838–41 app. C (1988) (providing an example of a disparate treatment complaint).

28. I discuss a prima facie case in the context of the ADEA because that is the claim brought in *Reeves*. *See* Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 141 (2000). The elements of a prima facie case may be different under a Title VII discriminatory hiring claim, *see McDonnell Douglas*, 411 U.S. at 802, or a discriminatory firing claim, *see* Elizabeth Clack-Freeman, Comment, *Title VII and Plaintiff's Replacement: A Prima Facie Consideration?*, 50 BAYLOR L. REV. 463, 470 & n.46 (1998) (discussing the various interpretations of the fourth element of a prima facie case).

29. *See Reeves*, 530 U.S. at 142 (citing ADEA, 29 U.S.C. § 631(a)).

30. *Id.*

31. *Id.*

32. *Id.*; 2 ROSSEIN, *supra* note 14, § 22.6[1], at 22–28.

33. "Preponderance of the evidence" is defined as: "[t]he greater weight of the evidence... [where] the jury is instructed to find for the party that, on the whole, has the stronger evidence, however slight the edge may be." BLACK'S LAW DICTIONARY, *supra* note 9, at 1201.

34. Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 254 (1981) ("If the trier of fact believes the plaintiff's evidence, and if the employer is silent in the face of the presumption, the court must enter judgment for the plaintiff because no issue of fact remains in the case."). A rebuttable presumption is justified because if a prima facie case is demonstrated, then the most likely (and legitimate) reasons for terminating an employee are eliminated. *See* Gold, *supra* note 4, at 184–85.

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

McDonnell Douglas, the employer's reason for not hiring Green was that he participated in unlawful conduct against the company.[36] This supported assertion was enough to satisfy the employer's burden of proof at stage two of the framework.[37] Stage two also requires the employer's articulated reasons to be clear and specific enough to give the plaintiff a fair opportunity to respond under the final step of the analysis.[38]

Upon hearing the clear and specific articulations for the employer's conduct, the plaintiff must be given an opportunity to show that the employer's proffered reasons are false, and accordingly, pretextual.[39] In other words, the plaintiff is allowed to produce evidence that the employer's reasons for its action were merely a "coverup for a... discriminatory decision."[40] Proof of a coverup is powerful indirect evidence of discrimination because "once the employer's justification has been eliminated, discrimination may well be the most likely alternative explanation."[41] Accordingly, if the plaintiff produces compelling evidence of pretext, she has indirectly proven intentional discrimination.[42]

Although relatively easy to state, the framework established in *McDonnell Douglas* was rather skeletal. Specifically, ambiguities remained with regard to the employer's evidentiary burden in step two,[43] causing the Court to revisit the *McDonnell Douglas* framework within a decade.

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36. *Id.* at 803. Apparently, upon being laid off by McDonnell Douglas, Green participated in a traffic "stall-in" and "lock-in" to protest "his discharge and the general hiring practices of [McDonnell Douglas]." *Id.* at 794–95.

37. *Id.* at 806. Additional reasons given by employers include "lesser comparative qualifications, inability to get along with supervisors or fellow employees, misconduct, [and] business exigencies such as the need to eliminate jobs." 1 LINDEMANN & GROSSMAN, *supra* note 14, at 21–22 & nn.75–78 (footnotes omitted).

38. *See Burdine,* 450 U.S. at 255–56. For an example of an explanation that does not meet this standard, see Robbins v. White-Wilson Med. Clinic, Inc., 660 F.2d 1064, 1067 (5th Cir. 1981) (finding the employer's rejection of the applicant based on her "yucky" attitude legally unsatisfactory).

39. *See McDonnell Douglas,* 411 U.S. at 804. Pretext evidence may include evidence that employees in a non-protected class were retained after committing similar acts for which the plaintiff was allegedly fired. *Id.*; *see also infra* notes 148–51 on the plaintiff's evidence of pretext in *Reeves.*

40. *McDonnell Douglas,* 411 U.S. at 805.

41. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 147 (2000).

42. *See McDonnell Douglas,* 411 U.S. at 807 ("[Green] must be afforded a fair opportunity to demonstrate that [his employer's] assigned reason for refusing to re-employ was a *pretext or discriminatory* in its application.") (emphasis added).

43. *See infra* notes 45–47 and accompanying text.

B. *United States Supreme Court "Refinement" of the* McDonnell Douglas *Framework*

1. *Texas Department of Community Affairs v. Burdine*

As mentioned previously, to rebut the plaintiff's prima facie case of discrimination, the second step of the *McDonnell Douglas* framework requires an employer to proffer a nondiscriminatory reason for its action.[44] However, in construing this portion, the Court of Appeals for the Fifth Circuit required an employer to prove its nondiscriminatory reason by a preponderance of the evidence.[45] This interpretation effectively shifted the burden of persuasion to the employer after the plaintiff articulated a prima facie case.[46] In order to clarify the employer's evidentiary burden under step two of the *McDonnell Douglas* framework, the Supreme Court heard *Texas Department of Community Affairs v. Burdine.*[47]

In *Burdine,* the Supreme Court rejected the Fifth Circuit's imposition of the burden of persuasion on the defendant. Specifically, the Court noted that the ultimate burden of persuasion "remains at all times with the plaintiff."[48] The only burden that falls on the employer under step two is a burden of production.[49] Once the defendant produces admissible evidence on the reasons for the adverse action, the presumption raised by the prima facie case is rebutted.[50]

After the Court clarified the defendant's burden under step two of the *McDonnell Douglas* framework, it proceeded to expound on the utility of pretext evidence. The Court stated, in relevant part:

> [The pretext] burden now merges with the ultimate burden of persuading the court that she has been the victim of intentional discrimination. She may succeed in this either directly by

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44. *See supra* notes 35–37 and accompanying text.

45. *See, e.g.,* Burdine v. Tex. Dep't of Cmty. Affairs, 608 F.2d 563, 567 (5th Cir. 1979); Turner v. Tex. Instruments, Inc., 555 F.2d 1251, 1255 (5th Cir. 1977).

46. *See* Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 256–57 (1981) ("It is plain that the Court of Appeals required much more: it placed on the defendant the burden of persuading the court that it had convincing, objective reasons for preferring the chosen applicant above the plaintiff.").

47. *Id.* at 252 & n.4.

48. *Id.* at 253.

49. *Id.* at 254. This "burden of production" is satisfied when the employer's proffered reason "raises a genuine issue of fact as to whether it discriminated against the plaintiff." *Id.* at 254–55.

50. *Id.* at 255.

> 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.[51]

This excerpt, although rather straightforward and consistent with the *McDonnell Douglas* holding,[52] created additional ambiguity on the power of believable pretext evidence.[53] Accordingly, while *Burdine* apparently clarified the appropriate burden on the employer under step two of the framework, it provided additional confusion on the significance of pretext evidence.

The Supreme Court's brief discussion of pretext in *Burdine* spawned a debate in the lower federal courts.[54] The circuit courts of appeals split between two primary theories regarding the impact of pretext.[55] The first theory was known as the "permissive pretext-only" standard.[56] Under this standard, if a plaintiff proved the defendant's reasons for its action were pretextual, then "the trier of fact [was] permitted, but [was] not compelled, to render judgment for the plaintiff."[57] Essentially, the proof of pretext was a *factor* to consider when making the overall determination of whether intentional discrimination exists, but the court was not compelled to enter judgment for the plaintiff.[58] In contrast, other circuits interpreted *Burdine* to support the "pretext-only" standard, which highly regarded believable pretext evidence. In those circuits, when a plaintiff proved pretext beyond a preponderance of the

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51. *Id.* at 256.

52. *Compare id. with* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 807 (stating persuasive evidence of pretext may be enough to warrant a judgment for the plaintiff).

53. *See infra* notes 54–59 and accompanying text.

54. Leland Ware, *Inferring Intent From Proof of Pretext: Resolving the Summary Judgment Confusion in Employment Discrimination Cases Alleging Disparate Treatment*, 4 EMPLOYEE RTS. & EMP. POL'Y J. 37, 52 (2000); JOEL WILLIAM FRIEDMAN & GEORGE M. STRICKER, JR., THE LAW OF EMPLOYMENT DISCRIMINATION 96 (4th ed. 1997) (conceding that "*Burdine's* language left some doubt concerning how plaintiff's ultimate burden could be satisfied when the plaintiff sought to discredit the employer's reasons. Should the plaintiff win, as a matter of law, on a showing that the employer's reason was untrue?") (inner quotations omitted).

55. *See infra* notes 58–59.

56. *See* Davis, *supra* note 26, at 715.

57. *Id.*

58. *See, e.g.*, Samuels v. Raytheon Corp., 934 F.2d 388, 392 (1st Cir. 1991) (holding proof of pretext does not automatically entitle the plaintiff to judgment); Benzies v. Ill. Dep't of Mental Health & Developmental Disabilities, 810 F.2d 146, 148 (7th Cir. 1987) (stating that proof of pretext "is strong evidence of discriminatory intent, but it does not compel such an inference as a matter of law").

evidence, the court was *required* to rule for the plaintiff.[59]

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

In hopes of resolving the split between the permissive pretext and pretext-only circuits, the Supreme Court granted certiorari to *St. Mary's Honor Center v. Hicks*.[60] The United States Court of Appeals for the Eighth Circuit applied the pretext-only standard to Melvin Hicks's Title VII claim.[61] Accordingly, once Hicks proved that all the defendant's reasons for its adverse action were pretextual, the Eighth Circuit granted his motion for a judgment as a matter of law.[62] The Supreme Court, reversing, held that proof of pretext does not *compel* judgment for a plaintiff because the ultimate burden of persuasion always remains with the plaintiff.[63]

The Court reached this conclusion by carefully analyzing the *McDonnell Douglas* framework. Specifically, the *Hicks* Court noted that after the defendant met its burden of producing a legitimate, non discriminatory reason for its adverse action, "the *McDonnell Douglas* framework—with its presumptions and burdens—is no longer relevant."[64] In other words, upon reaching step three of the framework, the trier of fact is working *tabula rasa*. Accordingly, the Court argued that the plaintiff's proof of pretext does nothing to compel the factfinder because all of the presumptions are eliminated;[65] all that is left is the ultimate burden of persuasion on the plaintiff to prove intentional

59. *See, e.g.*, Caban-Wheeler v. Elsea, 904 F.2d 1549, 1554 (11th Cir. 1990) (holding that if the plaintiff proves pretext, then they have satisfied the "ultimate burden" of proving intentional discrimination); Tye v. Bd. of Educ. of Polaris Joint Vocational Sch. Dist., 811 F.2d 315, 319–20 (6th Cir. 1987) (same); Bibbs v. Block, 778 F.2d 1318, 1321 (8th Cir. 1985) ("If the plaintiff shows the defendant's proffered reason to be a pretext for race, the case is over."). *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. 57, 71–81 (1991) (discussing the pretext-only standard).

60. 509 U.S. 502, 512 (1993) ("[The courts of appeals'] divergent views concerning the nature of the supposedly stable law in this Court are precisely what prompted us to take this case . . . .") (inner quotations omitted) (collecting conflicting cases).

61. *See* Hicks v. St. Mary's Honor Ctr., 970 F.2d 487, 492 (8th Cir. 1992).

62. *See id.* ("Once [Hicks] proved all of [St. Mary's] proffered reasons for the adverse employment actions to be pretextual, [Hicks] was entitled to judgment as a matter of law.").

63. *See Hicks*, 509 U.S. at 511 ("[The Court of Appeals' decision] disregards the fundamental principle of Rule 301 that a presumption does not shift the burden of proof, and ignores our repeated admonition that the Title VII plaintiff at all times bears the ultimate burden of persuasion.") (inner quotations omitted).

64. *Id.* at 510.

65. *Id.* at 510–11.

discrimination.[66]

However, *Hicks* does not completely dismiss the significance of pretextual evidence in the overall determination of intentional discrimination. Specifically, in permissive pretext language, the Court stated:

> [t]he 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. Thus, rejection of the defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination, and . . . no additional proof of discrimination is *required.*[67]

This language was a clear endorsement of the permissive pretext standard because proof of pretext will allow the factfinder to rule for the plaintiff.[68]

Upon dismissing the pretext-only standard, the majority proceeded to further "clarify" its position. However, when the majority attempted to harmonize its holding with *Burdine*, it created more ambiguities and, in fact, opened the door to yet another interpretation of the *McDonnell Douglas* framework: the pretext-plus standard.[69] Specifically, the Court, while it construed the discussion of pretext in *Burdine*,[70] stated, "[A] reason cannot be proved to be a pretext *for discrimination* unless it is

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66. *See id.* at 514 ("We have no authority to impose liability upon an employer . . . unless . . . [the] factfinder determines . . . *that the employer has unlawfully discriminated.*").

67. *Id.* at 511 (footnote omitted) (inner quotations omitted); *see also* Davis, *supra* note 26, at 719 (arguing that the *Hicks* majority "adopted the permissive pretext[] approach").

68. *See* Ware, *supra* note 54, at 53.

69. Admittedly, the pretext-plus standard did exist before *Hicks*. *See, e.g.*, Gailbraith v. N. Telecom, Inc., 944 F.2d 275, 283 (6th Cir. 1991) ("[W]e are faced with a situation in which proving that an employer's proffered reason for discharging an employee is a pretext does not establish that it is pretext for racial discrimination."); Clark v. Huntsville Bd. of Educ., 717 F.2d 525, 529 (11th Cir. 1983) (holding that "[a] finding that the defendant did not truly rely on its proffered reason, without a further finding that the defendant relied instead on race, will not suffice to establish Title VII liability"). However, the pretext-plus standard was generally considered to be at odds with *Burdine*, and probably without true authority. *See* Davis, *supra* note 26, at 714. In addition, many of the post-*Hicks* pretext-plus cases relied primarily on *Hicks* for their application of pretext-plus. *See, e.g.*, Bodenheimer v. PPG Indus., Inc., 5 F.3d 955, 957 (5th Cir. 1993) ("The Court in *St. Mary's* put the issue to bed. To prevail ultimately, the plaintiff must prove . . . that the employer's reasons were not the true reason for the employment decision *and* that unlawful discrimination was.").

70. The *Hicks* majority is construing *Burdine's* explanation that a plaintiff should have the opportunity to prove that the employer's proffered reasons "were a pretext for discrimination." Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981).

shown *both* that the reason was false, *and* that discrimination was the real reason."[71] Moreover, the Court added that, "the ultimate question [is] discrimination *vel non*."[72] The majority summarized its construction of *Burdine* when it said that "[i]t is not enough . . . to *dis*believe the employer; the factfinder must *believe* the plaintiff's explanation of intentional discrimination."[73]

Thus, at the end of the majority's opinion in *Hicks*, the Court had provided the following guidance to the lower courts by stating: (1) pretext, by itself, may be enough to demonstrate intentional discrimination;[74] and (2) pretext is not enough by itself, rather proof of intentional discrimination is required.[75] What was left, the dissent puts mildly, are "conflicting signals about the scope of [the majority's] holding in this case."[76]

The primary purpose of reviewing *Hicks* is not to analyze the correctness or incorrectness of the majority's decision.[77] Rather, the purpose of discussing the opinion is to show the ambiguity created by the majority's decision. Admittedly, *Hicks* did clarify that the pretext-only standard was contrary to law.[78] However, by bifurcating the opinion into two discrete holdings, the Court provided little guidance to the lower courts on what standard they should apply in subsequent cases.[79] The Court seemingly endorsed the following two contrary standards: (1) the permissive pretext standard, and (2) the pretext-plus standard.[80] Thus, while one issue was resolved, the resolution created

71. *Hicks*, 509 U.S. at 515 (inner quotations omitted).

72. *Id.* at 518 (alteration in original).

73. *Id.* at 519.

74. *See id.* at 511.

75. *See id.* at 519.

76. *Id.* at 535 (Souter, J., dissenting).

77. If more analysis on the intricacies of *Hicks* is sought, several other student comments do an excellent job of critiquing the decision. *See, e.g.*, O'Dell, *supra* note 23; Clack-Freeman, *supra* note 28.

78. *See Hicks*, 509 U.S. at 511.

79. *See* Clack-Freeman, *supra* note 28, at 485 ("Although the Court intended to clarify what was required from the plaintiff once the burden has shifted back to the plaintiff, [*Hicks*] . . . created additional ambiguities for the lower courts."); LINDEMANN & GROSSMAN, *supra* note 14, at 24 ("[*Hicks*] at best contains internal tensions; at worst, portions of the majority opinion simply say inconsistent things."); *see also* Rhodes v. Guiberson Oil Tools, 39 F.3d 537, 541 (5th Cir. 1995) ("[T]he opinion in *St. Mary's* is not easy to analyze . . . .").

80. *See* O'Dell, *supra* note 23, at 1267 ("[T]he majority's opinion can arguably be read to support two alternate positions."); *see also* Clack-Freeman, *supra* note 28, at 485 ("[T]he [*Hicks*] Court seem[ed] to adopt the [pretext]-plus view . . . .").

further ambiguity.

C. *The Road to* Reeves*: A Split as to Which Standard to Employ*

While the *Hicks* decision was confusing on many different levels, the greatest conflict came on the issue of summary judgment—how much evidence must a plaintiff provide to survive an adverse ruling?[81] From the permissive pretext language in *Hicks*,[82] the majority of circuits held that any factual dispute on the issue of pretext would negate the imposition of summary judgment.[83] Alternatively, other courts interpreted *Hicks* to require not only a genuine issue of fact on pretext, but also additional evidence of discrimination to survive summary judgment.[84]

1. Circuits Interpreting *Hicks* to Advocate the Permissive Pretext Standard

A majority of the circuit courts of appeals interpreted the Supreme Court's decision in *Hicks* to call for the application of the permissive pretext standard.[85] Under a permissive pretext standard, once the

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81. *See* Ware, *supra* note 54, at 61 ("Hicks has caused a considerable amount of confusion in summary judgment decisions."); EMPLOYMENT DISCRIMINATION LAW 28 (Philip J. Pfeiffer ed., 3d ed. Supp. 2000).

82. *See supra* note 67 and accompanying text.

83. *See* Ware, *supra* note 54, at 61 (stating that a majority of courts interpreting *Hicks* held that "[P]roof of pretext compels the denial of a defendant's summary judgment motion"); FRIEDMAN & STRICKER, *supra* note 54, at 118.

84. *See* Ware, *supra* note 54, at 64–65 (citing Hidalgo v. Overseas Candado Ins. Agencies, Inc., 120 F.3d 328, 337 (1st Cir. 1997)); FRIEDMAN & STRICKER, *supra* note 54, at 118. The Lawyers' Committee for Civil Rights Under Law, among others, believed this additional evidence requirement required the plaintiff to produce direct evidence of discrimination, and therefore contravenes the teachings of *McDonnell Douglas*. *See* Lawyers' Committee Brief, *supra* note 5, at 14 & n.11.

85. *See* Sheridan v. E.I. DuPont de Nemours and Co., 100 F.3d 1061, 1066–67 (3d Cir. 1996) (en banc) ("[W]e have understood *Hicks* to hold that the elements of [a] prima facie case and disbelief of the defendant's proffered reasons are the threshold findings, beyond which the jury is permitted, but not required, to draw an inference . . . [of] intentional discrimination."); Kline v. Tenn. Valley Auth., 128 F.3d 337, 347 (6th Cir. 1997) ("[P]receding case-law of this circuit has interpreted the *Hicks* decision as creating a permissive inference of discrimination following a rejection of the reasons offered by the defendant."); Anderson v. Baxter Healthcare Corp., 13 F.3d 1120, 1124 (7th Cir. 1994); Shaw v. HCA Health Servs. of Midwest, Inc., 79 F.3d 99, 100 (8th Cir. 1996) (sustaining a jury verdict for plaintiff where a prima facie case and jury's finding of pretext existed) (citing St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 510–11 (1993)); Durham v. Xerox Corp. 18 F.3d 836, 839–40 (10th Cir. 1994) ("Although a prima facie case combined with disproof of the employer's explanations does not prove intentional discrimination as a matter of law, it may permit the factfinder to infer intentional discrimination . . . .") (citing *Hicks*, 509 U.S. at 511); Combs v. Plantation Patterns,

plaintiff introduces evidence of a prima facie case and believable evidence[86] that the employer's articulated reasons are false, then the jury is *permitted* to find for the plaintiff and the plaintiff should survive summary judgment.[87] For example, in *Washington v. Garrett*, the Court of Appeals for the Ninth Circuit, relying on *Hicks*, stated that "[i]f a plaintiff succeeds in raising a genuine factual issue regarding the authenticity of the employer's stated motive, summary judgment is inappropriate."[88] Accordingly, that court rejected the defendant's motion for summary judgment on Washington's racial discrimination claim because "a genuine issue of fact" existed regarding the veracity of the employer's explanation.[89] This approach, however, has not been accepted by a minority of the United States Courts of Appeals.

2. Circuits Interpreting *Hicks* to Advocate the Pretext-Plus Standard

Justice Souter's dissent in *Hicks* warned that the majority's advocacy for a pretext-plus standard "would result in summary judgment for the employer in . . . many cases where the plaintiff has no evidence beyond [a prima facie case] and [a] show[ing] that the employer's articulated reasons are unworthy of credence."[90] This warning manifested itself in some circuits where plaintiffs, in order to survive summary judgment or judgment as a matter of law, were required to prove not only a prima facie case and pretext, but additional evidence of discriminatory intent.[91]

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106 F.3d 1519, 1529 (11th Cir. 1997) ("[W]e understand the *Hicks* Court to have been unanimous that disbelief of the defendant's proffered reasons, together with the prima facie case, is sufficient circumstantial evidence to support a finding of discrimination."); Barbour v. Merrill, 48 F.3d 1270, 1277 (D.C. Cir. 1995) ("According to *Hicks*, a plaintiff need only establish a prima facie case and introduce evidence [of pretext] . . . at that point, the factfinder . . . may infer discrimination."), *cert. granted in part*, 516 U.S. 1086 (1996), *and cert. dismissed*, 516 U.S. 1155 (1996).

86. Hereinafter, when I discuss "believable" evidence of pretext, I mean evidence that would *allow* a rational factfinder to conclude that the employer's explanation for its adverse action was false—it does not have to be uncontroverted.

87. *See Hicks*, 509 U.S. at 511; *see also, e.g.*, Washington v. Garrett, 10 F.3d 1421, 1433 (9th Cir. 1994) ("If a plaintiff succeeds in raising a genuine factual issue regarding the authenticity of the employer's stated motive, summary judgment is inappropriate, because it is for the trier of fact to decide which story is to be believed."); *Sheridan*, 100 F.3d at 1067 ("[A] plaintiff may survive summary judgment . . . if the plaintiff produced sufficient evidence to raise a genuine issue of fact as to whether the employer's proffered reasons were not its true reasons for the challenged employment action.").

88. *Washington*, 10 F.3d at 1433.

89. *Id.* at 1434.

90. *See Hicks*, 509 U.S. at 535–36 (Souter, J., dissenting).

91. *See infra* notes 92–98. *See generally* Lanctot, *supra* note 59, at 81–91 (discussing the implications of the pretext-plus standard).

The Courts of Appeals for the First,[92] Second,[93] Fourth,[94] and Fifth Circuits[95] applied the pretext-plus standard to their disparate treatment cases. For example, additional evidence of discriminatory intent was required by the United States Court of Appeals for the Fifth Circuit.[96] That court, in *Bodenheimer v. PPG Industries, Inc.*, articulated its preferable standard: "To prevail ultimately, the plaintiff must prove . . . that the employer's reasons were not the true reason for the employment decision *and* that unlawful discrimination was."[97] In addition, to survive summary judgment, the Fifth Circuit demanded that: (1) a fact issue exist "as to whether each of the employer's stated reasons was what actually motivated the employer" *and* (2) other evidence appears to "create[] a reasonable inference that [discrimination] was a determinative factor in the actions of which plaintiff complains."[98]

Thus, the pre-*Reeves* climate is ambiguously clear: with two conflicting standards established by the Supreme Court within one majority decision,[99] the courts of appeals were free to choose the evidentiary standard they found most appropriate. Some courts applied the permissive pretext standard; other courts applied the pretext-plus standard. Accordingly, the split in the circuit courts was well established, and it was simply a matter of time before the high court again addressed the line of jurisprudence that originated in *McDonnell Douglas*.

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92. *See, e.g.*, Woods v. Friction Materials, Inc., 30 F.3d 255, 260 (1st Cir. 1994) ("To [defeat summary judgment], the claimant must prove *both* that the employer's articulated reason is false, and that discrimination was the actual reason for its employment action.") (citing *Hicks*, 509 U.S. at 512 n.4); Smith v. Stratus Computer, Inc., 40 F.3d 11, 16 (1st Cir. 1994).

93. *See, e.g.*, Fisher v. Vassar Coll., 114 F.3d 1332 (2d Cir. 1997) (en banc).

94. *See, e.g.*, Theard v. Glaxo, Inc., 47 F.3d 676 (4th Cir. 1995).

95. *See infra* notes 96–98 and accompanying text.

96. *See* Davis, *supra* note 26, at 733; Ware, *supra* note 54, at 65.

97. 5 F.3d 955, 957 (5th Cir. 1993) (citation omitted); *see also* Scales v. Slater, 181 F.3d 703, 709 (5th Cir. 1999) ("To show pretext, a plaintiff must provide evidence showing that the asserted reason was false *and* that discrimination was the actual motivation.") (emphasis added) (citing *Hicks*, 509 U.S. at 515); Nichols v. Lewis Grocer, 138 F.3d 563, 566 (5th Cir. 1998).

98. Rhodes v. Guiberson Oil Tools, 75 F.3d 989, 994 (5th Cir. 1996) (en banc).

99. *See supra* note 80 and accompanying text.

III. ATTEMPTED CLARITY: *REEVES V. SANDERSON PLUMBING PRODUCTS, INC.*

The Supreme Court's latest attempt to clarify the *McDonnell Douglas* evidentiary framework[100] took place in *Reeves v. Sanderson Plumbing Products, Inc.*[101] However, consistent with the trend of the Supreme Court's preceding opinions, *Reeves's* attempted clarification resulted in continuing ambiguity.

A. Facts of Reeves

Sanderson Plumbing Products employed Roger Reeves, age fifty-seven, in its toilet manufacturing facility for forty years.[102] Reeves worked in the "Hinge Room" department where he was a supervisor for the company's "regular line."[103] As a supervisor, Reeves was responsible for recording the attendance and hours of his workers, and reviewing the weekly report of hours worked by each of the employees he supervised.[104] In the summer of 1995, Reeves's supervisor, Russell Caldwell, informed the director of manufacturing, Powe Chestnut, that employees in the Hinge Room were frequently absent, tardy, or leaving early.[105] A subsequent audit of the Hinge Room's timesheets detailed "numerous timekeeping errors and misrepresentations on the part of . . . Reeves."[106] Consequently, in October 1995 Sanderson Plumbing fired Reeves.[107] Less than a year later, in June 1996, Reeves filed suit in the United States District Court for the Northern District of Mississippi, alleging that he was fired because of his age[108] in violation of the ADEA.[109]

B. District Court Proceedings

In response to Reeves's suit, Sanderson Plumbing argued at trial that

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100. *See supra* notes 27–42 and accompanying text.

101. 530 U.S. 133 (2000).

102. *Id.* at 137.

103. *Id.*

104. *Id.*

105. *Id.* at 137–38.

106. Reeves v. Sanderson Plumbing Prods., Inc., 197 F.3d 688, 690 (5th Cir. 1999) (per curiam), *rev'd*, 530 U.S. 133 (2000).

107. *See Reeves*, 530 U.S. at 138.

108. *Id.*

109. 29 U.S.C. § 623(a)(1) (1994) (stating in relevant part that it is "unlawful for an employer . . . to discharge any individual . . . because of such individual's age").

it terminated Reeves because of his dereliction in regard to the attendance records and time sheets.[110] Reeves responded with evidence that he "accurately recorded the attendance and hours of the employees under his supervision, and that Chestnut [one of his superiors] . . . had demonstrated age-based animus[111] in his dealings with [Reeves]."[112] The case proceeded to a jury which decided in favor of Reeves and awarded him $70,000.[113] The district court added $28,490.80 to the jury's award to compensate Reeves for two years of lost income.[114] Contemporaneously, the district court denied Sanderson Plumbing's post-verdict motions for judgment as a matter of law, or in the alternative, a new trial.[115]

C. The United States Court of Appeals for the Fifth Circuit Reverses

Sanderson Plumbing timely appealed the district court's denial of the company's post-verdict relief.[116] The Fifth Circuit, in a *per curiam* decision, reversed and rendered judgment for Sanderson Plumbing.[117] Even though the court applied a highly deferential standard,[118] it held that Reeves had not introduced a sufficient amount of evidence to sustain a finding of unlawful discrimination.[119] Nonetheless, the court of appeals conceded that Reeves "very well may" have offered sufficient evidence to prove that Sanderson Plumbing's explanation for Reeves's firing was pretextual.[120] This proof of pretext, however, was "not dispositive" on the ultimate issue of intentional discrimination.[121]

In addition, the court of appeals dismissed Reeves's additional evidence of discriminatory animus. In particular, the court noted that Chestnut's derogatory comments were "not made in the direct context of Reeves's termination."[122] Accordingly, "[b]ecause Reeves failed to

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110. *Reeves*, 530 U.S. at 138.

111. The "age-based animus" took the form of derogatory age-based comments directed at Reeves, *id.* at 151, and unequal treatment compared to younger employees, *id.* at 151–52.

112. *Id.* at 138 (footnote added).

113. *Reeves*, 197 F.3d at 691.

114. *Reeves*, 530 U.S. at 139.

115. *Id.*

116. *See Reeves*, 197 F.3d at 691.

117. *Id.* at 694.

118. *Id.* at 691 ("[The district court] should be reversed only if there is no legally sufficient evidentiary basis for a reasonable jury to find that Sanderson discharged Reeves because of his age.") (quoting FED. R. CIV. P. 50(a)(1)) (inner quotations omitted).

119. *Id.* at 694.

120. *Id.* at 693.

121. *Id.*

122. *Id.*

offer evidence sufficient to prove *both* that [Sanderson Plumbing's] reason [was] untrue *and* that age [was] what really triggered Reeves's discharge,"[123] the Fifth Circuit vacated the jury's decision.[124]

D. The Supreme Court's Analysis and Decision

1. The Majority

Upon receiving the Fifth Circuit's adverse ruling, Reeves petitioned the Supreme Court for certiorari.[125] The Court granted certiorari to resolve a split among the circuit courts of appeals regarding standards on the sufficiency of pretext evidence.[126] In its decision, the Court addressed the following two interrelated issues: First, is a prima facie case, coupled with believable proof of pretext, adequate to sustain a jury's finding of intentional discrimination?[127] Second, what standard should a court employ when reviewing evidence under a motion for judgment as a matter of law?[128]

On the first issue, Justice O'Connor noted that the Fifth Circuit's pretext-plus standard had "misconceived the evidentiary burden borne by [disparate treatment] plaintiffs."[129] The plaintiff's evidentiary burden was clarified by the Court when it affirmatively endorsed the permissive pretext standard: "[A] plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated."[130] The Court's endorsement of the permissive standard was based on the probative value of pretext evidence: believable pretext evidence, in many circumstances, would permit the trier of fact to infer discriminatory intent.[131] Thus, courts that required

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123. *Id.* at 692. Compare this pretext-plus language with the earlier Fifth Circuit holdings. *See supra* notes 96–98 and accompanying text.

124. *Id.* at 694.

125. *See* Reeves v. Sanderson Plumbing Prods., Inc., 528 U.S. 985 (1999) (granting certiorari).

126. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 140 (2000).

127. *Id.*

128. *See id.* at 149.

129. *Id.* at 146.

130. *Id.* at 148; *see also* Louis B. Kushner, et al., *When Employment Discrimination Cases go to the Jury*, 15 LAW. J. 2, 13 (2000) ("[T]he *[Reeves]* Court laid [the permissive pretext-only or pretext-plus] argument to rest by ruling that pretext-plus evidence is not necessary.").

131. *Reeves*, 530 U.S. at 147 ("[The inference of discrimination] is consistent with the general principle of evidence law that the factfinder is entitled to consider a party's

proof beyond a prima facie case and pretext ignored the value of pretext evidence and unfairly burdened plaintiffs in disparate treatment cases.[132] To relieve this burden, the Supreme Court effectively clarified that lower courts were *generally* precluded from requiring additional evidence beyond a prima facie case and believable pretext evidence to sustain a finding of discrimination.[133]

The Court's "clarification" was, however, not without qualification. Significantly, the opinion added that proof of pretext may not "*always* be adequate to sustain a jury's finding of liability."[134] In some instances, the Court argued, believable evidence of pretext may not create a jury question on whether intentional discrimination occurred.[135] In carving out this exception, the majority retreated from its earlier advocacy on the significance of pretext evidence.[136] In particular, proof that the employer lied about its reasons for termination does not necessarily mean that discrimination is the "most likely alternative explanation."[137]

This exception, considered alongside the Court's general endorsement of the permissive standard, created ambiguity in the ultimate holding of the court—when will believable pretext evidence be

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dishonesty about a material fact as affirmative evidence of guilt.") (inner quotations omitted). Reeves's Brief submitted to the Court noted that this conclusion is a "hornbook principal." *See* Petitioner's Brief at 27, Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133 (2000) (No. 99-536), *available at* http://supreme.lp.findlaw/supreme-court/briefs/99-536/99-536mol/brief/brief01.html (last visited June 29, 2001).

132. *Cf.* Anne Lawton, *The Meritocracy Myth and the Illusion of Equal Employment Opportunity*, 85 MINN. L. REV. 587, 653–54 (2000) ("The pretext-plus approach essentially transformed the circumstantial evidence case into one requiring direct evidence of discrimination.") (footnote omitted). The difficulty of producing direct evidence of discrimination is well documented. *See supra* notes 5, 21–22 and accompanying text.

133. *See Reeves*, 530 U.S. at 148; *see also* Lawton, *supra* note 132, at 655 (noting that the *Reeves* court rejected the pretext-plus standard); Kushner, *supra* note 130, at 13.

134. *Reeves*, 530 U.S. at 148.

135. *Id.* Two examples are included in the majority opinion. The employer would be entitled to judgment as a matter of law if: (1) the record revealed an alternate, nondiscriminatory reason for the employer's decision, or (2) the plaintiff created a weak issue of fact on pretext and there was "abundant and uncontroverted independent evidence that no discrimination had occurred." *Id.*

136. *See supra* note 131 and accompanying text. By creating this qualification, the Court concedes that persuasive proof of pretext may still not be enough to infer discrimination. Yet, the basis for the Court's rejection of the pretext-plus standard is the idea that once the employer's proffered reason is shown to be false, "discrimination may well be the most likely alternative explanation." *Reeves,* 530 U.S. at 147. Thus, *Reeves* contains an internal conflict on the power of pretext evidence.

137. *Reeves*, 530 U.S. at 147. *But see* Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978) (stating that a showing of pretext "more likely that not" demonstrated that the actual motivation was "impermissible").

enough to survive pretrial disposition? By neglecting to answer this question,[138] *Reeves* simply affirms the split that existed between the circuits after *Hicks*: proof of pretext, along with a prima facie case, *may or may not* be enough to survive summary judgment. To determine if summary judgment is appropriate, *Reeves* invited courts to weigh the validity and impact of admissible pretext evidence themselves, particularly in summary judgment proceedings.[139]

By inviting lower courts to weigh the significance of pretext evidence, *Reeves* encouraged what it expressly proscribed in the second part of the opinion. In the second portion of the opinion, the Court clarified the standard a court should apply when deciding a motion for judgment as a matter of law.[140] This clarification also applied to a court's decision on a summary judgment motion, since "the standard for granting summary judgment mirrors the standard for judgment as a matter of law."[141]

Initially, a court should "review all of the evidence in the record."[142] Importantly, this standard affirmed that courts should consider *both* the prima facie case and evidence of pretext when considering a dispositive motion like summary judgment.[143] While reviewing all of the evidence, the court should "draw all reasonable inferences in favor of the nonmoving party."[144] In erring toward the nonmovant, courts should not be so quick to dismiss the power of derogatory comments, even when

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138. *See* Tracy E. Higgins & Laura A. Rosenbury, *Discrimination and Inequality Emerging Issues Agency, Equality, and Antidiscrimination Law*, 85 CORNELL L. REV. 1194, 1212 (2000) ("*Reeves* appears to leave substantial latitude for lower courts to express their skepticism toward allegations of discriminatory intent."). The Court briefly answered the converse of this question. *See supra* note 135 for two examples of when pretext evidence will *not* be enough to defeat judgment as a matter of law.

139. *Reeves*, 530 U.S. at 148 (noting that summary judgment is contingent on whether a "*weak* issue of fact" exists on the issue of pretext) (emphasis added); Kim Askew, Reeves v. Sanderson Plumbing Products, Inc. (*Is Pretext-Plus Really Gone?*), *in* EMERGING ISSUES IN EMPLOYMENT LAW AND LITIGATION 465 (ALI-ABA ed. 2000); *infra* notes 258–61 and accompanying text. *But see* Ware, *supra* note 54, at 63 ("If *Reeves* is properly interpreted by lower courts it should resolve some of the confusion that has surrounded the plaintiff's evidentiary burden at the summary judgment phase . . . .") (emphasis added). "If," however, proves to be the key word in Ware's conclusion.

140. *Reeves*, 530 U.S. at 149–51.

141. *Id.* at 150 (inner quotations omitted).

142. *Id.*

143. *Id.* at 152 ("[T]he [court of appeals] disregarded critical evidence favorable to petitioner—namely, the evidence supporting petitioner's prima facie case and undermining respondent's nondiscriminatory explanation.").

144. *Id.* at 150.

they are "not made in the direct context" of the adverse action.[145] Moreover, *Reeves* cautioned that a reviewing court should avoid weighing evidence and making credibility determinations.[146] In addition, a reviewing court should disregard all of the moving party's evidence that is contradicted, impeached, or produced by interested witnesses.[147]

After it discussed the standards for pretext and review of a motion for judgment as a matter of law, the Court analyzed the facts of Reeves's claim. On the issue of pretext, the Court noted that Reeves made a "substantial showing" that Sanderson Plumbing's proffered explanation for the firing was false.[148] In response to Sanderson's contention that Reeves had failed to maintain accurate attendance records, Reeves offered evidence that his recording was proper.[149] Moreover, Reeves presented evidence that showed there had never been any earlier complaints about his record keeping, and that the company had not reacted so harshly in similar situations of questionable accuracy.[150] Therefore, the Supreme Court concluded that Reeves had produced a sufficient level of pretext evidence for a reasonable juror to infer intentional discrimination.[151]

In addition to evidence of pretext, Reeves produced a significant amount of other discriminatory evidence. According to the refined standards for deciding a motion for judgment as a matter of law, the court of appeals should have construed Powe Chestnut's (Reeves's supervisor) age-based comments in a more favorable light.[152] Those comments, coupled with Reeves's prima facie case of age discrimination, comprised a solid foundation of "age-based animus."[153] Accordingly, the Supreme Court reversed the Fifth Circuit's judgment and upheld the district court's decision to submit the case to a jury.

2. Justice Ginsburg's Concurrence

Justice Ginsburg's concurring opinion focused on the majority's

145. *Id.* at 152.

146. *Id.* at 150–51 ("'Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge.'") (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986)).

147. *See id.* at 151.

148. *Id.* at 144.

149. *Id.* at 144–45.

150. *Id.* at 145.

151. *Id.* at 153–54.

152. *Id.* at 152–153.

153. *Id.* at 153.

imprecise exception to the general permissive pretext standard.[154] Justice Ginsburg echoed the majority's advocacy for this general permissive standard: "[T]he ultimate question of liability ordinarily should not be taken from the jury once the plaintiff has introduced [a prima facie case and believable evidence of pretext]."[155] However, the concurrence conceded that additional evidence beyond these two categories might be required to sustain a finding of intentional discrimination.[156] This additional evidence requirement, Ginsburg predicted, would probably be "uncommon."[157] Nonetheless, Justice Ginsburg sought a more precise explanation of situations where additional evidence would be required.[158]

Justice Ginsburg's concern about the majority's confusing exception to the permissive pretext rule foreshadowed the ambiguous legacy of *Reeves*. And, like Justice Souter's prediction in *Hicks* regarding the future of summary judgment under a pretext-plus regime,[159] Justice Ginsburg's concerns quickly materialized.

IV. THE CONFLICTING INTERPRETATIONS OF *REEVES* IN THE LOWER FEDERAL COURTS

By neglecting to clarify how much evidence is required to defeat an employer's motion for summary judgment, *Reeves* has had a negligible impact on the pre-*Reeves* circuit split. Two interpretations continue to exist on the impact of believable pretext evidence. Courts subscribing to the first interpretation have applied *Reeves* and held that a jury issue existed when a prima facie case and credible evidence of pretext were presented. This interpretation is the general holding of *Reeves*.[160] On the other hand, other courts have held that a prima facie case and believable evidence of pretext *did not* create a jury issue of discrimination.[161] This interpretation finds its basis in the exception to the general *Reeves* holding.[162] These two interpretations are detailed in

154. *See supra* notes 134–35, 137 and accompanying text.

155. *Reeves*, 530 U S. at 155.

156. *Id.* at 154.

157. *Id*

158. *Id.*

159. *See supra* note 90 and accompanying text.

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

161. *See infra* Part IV.B.

162. *See Reeves*, 530 U.S at 148 ("[T]here will be instances where . . . sufficient evidence [exists] to reject the defendant's explanation, [yet] no rational factfinder could conclude that

the following cases.

A. Courts Holding That a Prima Facie Case and Believable Evidence of Pretext Create a Jury Issue

Most commentators and courts of appeals have interpreted *Reeves* to hold that a prima facie case and credible evidence of pretext demonstrates an issue of fact for the jury to resolve.[163] In other words, if conflicting evidence exists regarding the veracity of an employer's reasons for its adverse action, a genuine issue arises as to the existence of discrimination.[164] This conclusion relies on the probative value of pretext evidence—if an employer's reason is proven false, then discrimination is the "most likely alternative explanation."[165] The following courts, in light of *Reeves*, have denied summary judgment to the employer upon introduction of a prima facie case and admissible evidence of pretext.

In *Ross v. Campbell Soup Co.*, the Court of Appeals for the Sixth Circuit concluded that believable evidence of pretext, by itself, was enough to create an issue of fact for the jury.[166] Dale Ross was employed by Campbell Soup as a sales merchandiser for the frozen foods division.[167] While employed at Campbell, Ross injured his back five times by bending or lifting on the job.[168] In October 1994 Ross was terminated by Campbell.[169] In response, Ross filed suit claiming that Campbell had discriminated against him based on his back disability, in

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the action was discriminatory.").

163. *See* Ware, *supra* note 54, at 63 (interpreting *Reeves* to hold that "[w]hen [believable pretext evidence] is identified at the summary judgment phase, the case should proceed to trial"); McGinley, *supra* note 4, at 462 ("In *Reeves*, the unanimous Court made it clear that only under unusual circumstances will it tolerate grants of summary judgment where the plaintiff presents . . . evidence of a prima facie case and that the defendant's explanation is pretextual."); Stephen S. Rappoport, *Employment Discrimination—Procedure:* Reeves *Clarifies Aspects of Proving Job Bias But Poses Questions for Summary Judgment*, 69 U.S.L.W. 2099, 2099 (2000) ("The presence of such [pretext] evidence almost certainly bars the grant of summary judgment . . . ."). For cases supporting this interpretation, *see infra* notes 166–191 and accompanying text.

164. *See* Ware, *supra* note 54, at 72 ("When the plaintiff has evidence which shows that the employer's proffered justification is false there is, by definition, a 'genuine issue' since the factfinder is permitted to infer discriminatory motive solely from the proof of pretext.").

165. *See Reeves*, 530 U.S. at 147.

166. *See* 237 F.3d 701, 709 (6th Cir. 2001).

167. *Id.* at 702.

168. *Id.*

169. *Id.* at 705.

violation of the Americans with Disabilities Act.[170] The district court granted Campbell's motion for summary judgment on numerous grounds.[171] Ross appealed, and the Sixth Circuit reversed the grant of summary judgment.[172]

The Sixth Circuit began its analysis by deciding whether Ross had introduced a prima facie case of disability discrimination.[173] One component of this prima facie case was dependent on "the employer's state of mind and how it thought Ross's back condition affected his performance as an employee."[174] To make these determinations, the court reviewed Campbell's proffered reasons for terminating Ross and any evidence of pretext.[175] Upon a review of the record, the court of appeals noted that Ross had produced some believable evidence of pretext.[176] Accordingly, because of the inferential power of this evidence,[177] the court concluded that there was a "genuine issue of material fact as to the company's state of mind during the events that led to his firing."[178] Consequently, to defeat the employer's motion for summary judgment, the Sixth Circuit required only believable evidence of pretext.

Another circuit abiding by this permissive standard is the Ninth Circuit Court of Appeals. In *Chuang v. University of California-Davis*, the court of appeals reversed the district court's approval of summary judgment in favor of the University.[179] Dr. Chuang was an assistant professor of pharmacology at the University's School of Medicine.[180] During his service to the University, Dr. Chuang believed that he was being discriminated against based on his race (Asian) and national origin (Chinese).[181] This prompted Chuang to file a Title VII claim against the University alleging that it had (1) failed to "provide

170. *Id.* at 705–06 (citing ADA, 42 U.S.C. §§ 12101–12213 (2000)).

171. *Id.* at 705.

172. *Id.* at 710.

173. *Id.* at 708.

174. *Id.*

175. *Id.* at 708.

176. *Id.* at 709.

177. The probative power of pretext is the basis for the court's denial of summary judgment. Specifically, the court noted that the dispute as to the veracity of Campbell's explanation "provides evidence as to the company's discriminatory intent in firing Ross." *Id.* at 708.

178. *Id.* at 709.

179. 225 F.3d 1115, 1130 (9th Cir. 2000).

180. *Id.* at 1120.

181. *Id.* at 1119.

[Chuang] with a promised tenure position[;]" (2) forced Chuang to relocate his laboratory during an ongoing research program; and (3) neglected Chuang's complaints "regarding the misappropriation of some of his research funds."[182]

The Ninth Circuit began its analysis by noting that "[a]s a general matter, the plaintiff in an employment discrimination action need produce very little evidence in order to overcome an employer's motion for summary judgment."[183] Accordingly, the court found that Dr. Chuang had asserted a prima facie case on two of his three independent assertions.[184] The University responded with "legitimate, nondiscriminatory reasons for its [adverse] actions.[185] In response, the court moved to an analysis of Dr. Chuang's evidence of pretext.[186]

In considering pretext evidence, the Ninth Circuit adopted the general holding of *Reeves*: "[A] disparate treatment plaintiff can survive summary judgment" by producing a prima facie case and evidence that the employer's explanation is false.[187] In this case, the court applied Chuang's prima facie evidence to rebut the University's explanation for its action.[188] In drawing all reasonable inferences toward Chuang,[189] the court decided that Chuang had produced sufficient evidence to create a fact issue on pretext.[190] Consequently, summary judgment was misapplied in the district court.[191]

In addition to the Ninth and Sixth Circuits, other courts have denied summary judgment when believable pretext evidence is introduced.[192] In

182. *Id.*

183. *Id.* at 1124.

184. *Id.* at 1124–26. The court determined that there was no prima facie evidence on the claim of misappropriating research funds. *Id.* at 1126.

185. *Id.* at 1126.

186. *Id.* at 1127.

187. *Id.* (citing Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133 (2000)).

188. *Id.*

189. *See id.* (noting that Chuang is the only full-time faculty member in the department without tenure and also the only member that is non-Caucasian).

190. *Id.*

191. *Id.* at 1130.

192. *See, e.g.*, EEOC v. Sears Roebuck & Co., 243 F.3d 846, 854 (4th Cir. 2001) ("[A] prima facie case and evidence of pretext raises a sufficient inference of discrimination to entitle a plaintiff to survive a motion for summary judgment."); Toth v. Gates Rubber Co., No. 99-1017, 2000 U.S. App. LEXIS 14374, at *25 (10th Cir. June 21, 2000) (finding contradictory evidence on the issue of pretext was enough to defeat summary judgment); Munoz v. Oceanside Resorts, Inc., 223 F.3d 1340, 1345–46 (11th Cir. 2000) (ruling that indirect evidence of pretext was enough to infer intentional discrimination and overcome the defendant's judgment as a matter of law); Hinson v. Clinch County, Ga. Bd. of Educ., 231

doing so, these courts refused to weigh the evidence and drew all reasonable inferences in favor of the nonmovant.[193] Thus, courts that deny summary judgment upon admission of a prima facie case and believable evidence of pretext have not contradicted the evidentiary standards articulated in *Reeves*.[194] This contradiction, however, is not easily avoided in the remaining circuit courts of appeals.

B. Courts Holding That a Prima Facie Case and Believable Evidence of Pretext Do Not Create a Jury Issue

The United States Court of Appeals for the First Circuit has refused to subscribe to the general holding of *Reeves*.[195] Instead, the First Circuit has embraced the exception to that holding and, accordingly, has carefully dissected plaintiff's evidence of pretext to ensure that it is supported by a discriminatory conclusion.[196] This plaintiff-hostile framework is well demonstrated in *Feliciano v. El Conquistador Resort & Country Club*.[197]

Feliciano de la Cruz filed a Title VII claim accusing the El Conquistador Resort of firing her based on her Puerto Rican national origin.[198] Before her firing, Feliciano[199] was the resort's credit manager for thirteen months.[200] After working at the resort for six months, El Conquistador increased Feliciano's salary by $4,000 and three days before being fired, the resort's president gave her a commendation

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F.3d 821, 831–32 (11th Cir. 2000) (reversing summary judgment for high school principal who produced believable pretext evidence); Anderson v. Consol. Rail Corp., No. 98-6043, 2000 U.S. Dist. LEXIS 11978, at *16 (E.D. Pa. Aug. 9, 2000) (precluding summary judgment against plaintiff if believable pretext evidence is produced).

193. *See, e.g., Anderson*, 2000 U.S. Dist. LEXIS 11978, at *16; Ross v. Campbell Soup Co., 237 F.3d 701, 709 (6th Cir. 2001) (reversing district court that "drew evidentiary conclusions in favor of [the movant]").

194. *See supra* notes 142–47 and accompanying text.

195. *See supra* note 130 and accompanying text.

196. For a discussion on the exception to the general holding of *Reeves, see supra* notes 134–35, 137.

197. 218 F.3d 1 (1st Cir. 2000). It is important to note that the above rendered judgment was issued six days before *Reeves*. *Compare id. with Reeves*, 530 U.S. at 133. However, after the *Reeves* opinion was issued, Feliciano petitioned the First Circuit for a rehearing; she claimed the court's opinion was inconsistent with *Reeves*. *Feliciano*, 218 F.3d at 9. Feliciano's petition was denied because the First Circuit claimed that its June 6 opinion was wholly "consistent" with *Reeves*. *Id.* at 10. Thus, it is fair to say that the court's initial decision is an example of the First Circuit's interpretation of *Reeves*.

198. *Id.* at 4.

199. I have omitted "de la Cruz" from the plaintiff's last name to remain consistent with the First Circuit's opinion. *Id.* at 1–10.

200. *Id.* at 4.

letter.[201] Despite these offerings, Feliciano was "abruptly terminated" and replaced with a woman from the Philippines.[202] Soon after, Feliciano initiated the Title VII suit against her former employer.

In the district court, El Conquistador's motion for summary judgment was granted.[203] The district court concluded that Feliciano had failed to produce any material facts "directed toward proving an animus of discrimination on the basis of national origin."[204] Feliciano appealed and the First Circuit affirmed summary judgment for El Conquistador.[205]

Applying the *McDonnell Douglas* framework, the First Circuit found that a prima facie case of discrimination existed.[206] In response, El Conquistador offered a non discriminatory explanation: Feliciano's firing was related to her incompetence as the resort's credit manager.[207] This explanation, according to the court, was enough to satisfy El Conquistador's burden of production.[208] With that burden satisfied, the *McDonnell Douglas* framework disappeared, leaving the ultimate burden of persuasion with Feliciano.[209]

To satisfy her burden of persuasion, Feliciano offered evidence that El Conquistador's explanation for her discharge was pretextual.[210] To show that she was competent, Feliciano argued that the financial problems at the hotel were not related to her performance.[211] In addition, Feliciano argued that her salary raise and commendation letter were inconsistent with El Conquistador's allegations of incompetence.[212] El Conquistador countered that the raise and commendation letter were

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201. *Id.*

202. *Id.* at 4.

203. *Id.*

204. *Id.*

205. *Id.* at 9.

206. *Id.* at 5. For a national origin prima facie case, the First Circuit required the plaintiff to prove the following: (1) that she is in a protected class; (2) she was qualified for, and performed the job at a satisfactory level; (3) she was dismissed; and (4) after being terminated, she was replaced by someone with equivalent qualifications to perform similar work. *Id.*

207. *Id.* at 6.

208. *Id.*

209. *See* St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 510 (1993).

210. *See Feliciano*, 218 F.3d at 7.

211. *Id.* at 7. ("According to Feliciano, the hotel's financial problems were caused by an inexperienced and improperly trained hotel staff, a bug in the computer system, a failure of the finance department to obtain spec sheets for . . . timely billing, and a failure to provide backups for the banquet checks.") (inner quotations omitted).

212. *See id.*

routine and not based on Feliciano's performance.[213] Moreover, El Conquistador disputed Feliciano's excuses for the poor financial status of the resort.[214]

In its analysis, the First Circuit acknowledged that it would have to "*weigh* all the circumstantial evidence of discrimination, including the strength of the plaintiff's prima facie case and the employer's proffered reasons for its action."[215] The court began this task by evaluating Feliciano's pretext evidence and it concluded that "a reasonable trier of fact *could find* that El Conquistador did not believe that Feliciano's job performance was unsatisfactory, and hence fired her for some other reason."[216]

This finding, however, was not enough for Feliciano to survive summary judgment. The court held that this believable evidence of pretext does not "shed any light" on the true reason for Feliciano's firing.[217] Instead, Feliciano's pretext evidence only showed the "unfair[ness]" of El Conquistador's decision.[218] Thus, despite a genuine issue of fact regarding pretext, summary judgment was affirmed for El Conquistador.[219]

Other courts have also upheld the application of summary judgment when a genuine issue of fact existed regarding the truthfulness of an employer's explanation. In *Schnabel v. Abramson*, the Court of Appeals for the Second Circuit found that the plaintiff had introduced enough evidence to allow a reasonable juror to "conclude that the stated reasons for discharging the plaintiff were a pretext."[220] Nonetheless, the court refused to allow the inference of discrimination from this persuasive evidence of pretext.[221] Consequently, the Second Circuit affirmed summary judgment in favor of the employer.[222]

Other United States Courts of Appeals have adopted the *Reeves* exception as law within their circuit.[223] Interestingly, these courts have

213. *Id.*
214. *Id.*
215. *Id.* at 7 (emphasis added).
216. *Id.* at 8 (emphasis added).
217. *Id.*
218. *Id.*
219. *Id.* at 9. ("Under such circumstances, summary judgment is proper.").
220. Schnabel v. Abramson, 232 F.3d 83, 88 n.3 (2d Cir. 2000).
221. *See id.* ("[P]laintiff has not demonstrated that the asserted pretextual reasons were intended to mask age discrimination.").
222. *Id.* at 91.
223. *See* Rubinstein v. Adm'rs. of the Tulane Educ. Fund, 218 F.3d 392, 400 (5th Cir.

found that a material issue of fact existed as to the legitimacy of the employer's justification for its adverse action.[224] Nonetheless, the same courts have refused to deny the employer's summary judgment motion because there was not a jury issue on the ultimate question of discrimination.[225] However, as the following section illustrates, that logic, in addition to being faulty, contravenes well-established standards that govern evidentiary review during summary judgment.

V. THE PROBATIVE VALUE OF PRETEXT: WHY SUMMARY JUDGMENT IS IMPROPER WHEN BELIEVABLE PRETEXT EVIDENCE IS ADMITTED

The post-*Reeves* disparate treatment environment is alarmingly similar to the pre-*Reeves* uncertainty. The question that spawned *Reeves* lingers without a clear answer—how much evidence must a plaintiff introduce to survive summary judgment?[226] In attempting to answer this question, *Reeves* noted that a prima facie case, in addition to believable evidence of pretext, *may or may not* defeat summary judgment.[227] A definite answer is contingent on the weight and persuasiveness of the pretextual evidence.[228] This amorphous standard has perpetuated uncertainty in the disposition of disparate treatment

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2000) (noting that there was some evidence of pretext in addition to derogatory remarks, but not enough to survive summary judgment); James v. N.Y. Racing Ass'n, 233 F.3d 149, 157 (2d Cir. 2000) (affirming summary judgment for the employer despite prima facie evidence and additional evidence that "would allow a reasonable factfinder to conclude that [the employer's] explanation . . . is false"); Weinstock v. Columbia Univ., 224 F.3d 33, 58 (2d Cir. 2000) (Cardamorre, J., dissenting) (dissenting based on majority's failure to realize material issue of fact on pretext evidence); Massey v. Blue Cross-Blue Shield of Ill., 226 F.3d 922, 925–26 (7th Cir. 2000) (acknowledging that jury could have come up with alternate conclusion, but still affirming judgment as a matter of law for the defendant); Calvin v. Yellow Freight Sys., 218 F.3d 904, 908 (8th Cir. 2000) (Bataillon, J., dissenting) (per curiam) (arguing that material dispute as to pretext evidence should have precluded summary judgment); *see also* Marullo v. Ellerbe Becket, Inc., No. 95-CV-4561, 2001 WL 282772, at *12 (E.D.N.Y. Mar. 16, 2001) (declining to accept Magistrate's recommendation because the plaintiff failed to "demonstrate the existence of a genuine issue of material fact . . . as to *both* the falsity of the stated reason and the likelihood of discriminatory motive") (emphasis added).

224. *See, e.g., Massey*, 226 F.3d at 926 ("[T]he jury might have disbelieved everything [the employer] said . . . ."); *James*, 233 F.3d at 157 (finding issue of fact regarding veracity of employer's proffered reason).

225. *See, e.g.*, Feliciano de la Cruz v. El Conquistador Resort & Country Club, 218 F.3d 1, 8 (1st Cir. 2000) (concluding that evidence of pretext "does not shed any light" on what was the true reason for the adverse action).

226. *See supra* note 138 and accompanying text.

227. *Compare* notes 130–133 and accompanying text *with* notes 134–138 and accompanying text.

228. *See* Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 148 (2000).

claims.[229] To resolve this uncertainty, a uniform standard is required.[230] This standard should be based on the policies underlying the *McDonnell Douglas* formulation and summary judgment procedure.

The majority standard,[231] which requires *denial* of an employer's summary judgment motion when a prima facie case and believable evidence of pretext are established, promotes the policies underlying the *McDonnell Douglas* framework and summary judgment procedure. For instance, it is clear that the *McDonnell Douglas* framework relies on inferences that can be made from circumstantial evidence.[232] The most fundamental of these inferences allows a factfinder, upon a showing that an employer's explanation is false, to deduce that discrimination was the "actual reason for [the employer's] decision."[233] Courts have upheld this inference as a "reasonabl[e]" conclusion based on a "general principle of evidence law."[234]

In accordance with principles of summary judgment procedure, this reasonable inference of discrimination must be drawn in favor of the plaintiff[235] during adverse summary judgment proceedings.[236] In other words, if a plaintiff demonstrates a "genuine issue as to any material fact"[237] on the falsity of an employer's explanation, the reasonable inference from pretext creates a genuine issue of material fact as to

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229. *See* discussion *supra* Part IV.

230. *Cf. Developments in the Law—Employment Discrimination*, 109 HARV. L. REV. 1568, 1602 (1996) ("The entire area of shifting burdens is replete with confusion, and guidance is needed desperately.").

231. *See supra* Part IV.A.

232. *See supra* note 23 and accompanying text.

233. *Reeves*, 530 U.S. at 147; *see* Ware, *supra* note 54, at 71; Michael J. Hayes, *Has* Wright Line *Gone Wrong? Why Pretext can be Sufficient to Prove Discrimination Under the National Labor Relations Act*, 65 MO. L. REV. 883, 951 (2000) ("[W]hen a party raises a false motive for its actions, it is logical to infer that the party is seeking to conceal an unlawful motive."); *see also* Shattuck Denn Mining Corp. v. NLRB, 362 F.2d 466 (9th Cir. 1966) (noting that, in union-affiliated discrimination suits, "[i]f [the trier of fact] finds that the stated motive for a discharge is false, he certainly can infer that there is another motive. More than that, he can infer that the motive is one that the employer desires to conceal—an unlawful motive....").

234. *Reeves*, 530 U.S. at 147.

235. I align nonmovant with the plaintiff and movant with the defendant in this context because that is generally the posture of the parties in disparate treatment cases. *See, e.g., id.* at 139; *cf.* Ware, *supra* note 54, at 49–50 & n.111 ("Employers began to prevail on summary judgment with greater frequency.").

236. *Reeves*, 530 U.S. at 149; Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986).

237. This phrase is the standard for determining whether summary judgment is appropriate. *See* FED. R. CIV. P. 56. If a "genuine issue as to any material fact" exists, summary judgment is inappropriate. *Id.*

intentional discrimination.[238] If such a genuine issue exists, summary judgment against the plaintiff is inappropriate and the case should proceed to a jury.[239]

Despite this logical blend of discriminatory inferences and summary judgment procedure, some courts have not drawn "all reasonable inferences in favor of the nonmoving party" when considering pretextual evidence.[240] For example, in *Feliciano*, the First Circuit recognized that there was a jury question on the issue of whether the employer's justification was false.[241] Nonetheless, the court concluded that this showing of pretext "[did] not shed any light on what [the] true reason for firing [Feliciano] was."[242] From that conclusion, it is apparent that the *Feliciano* court did not recognize the reasonable inference from the evidence of pretext that discrimination was the true reason for Feliciano's firing.[243] Instead, by requiring additional evidence to establish a nexus between pretext and discrimination, the First Circuit "essentially ignore[d]" the policies underlying the *McDonnell Douglas* framework and summary judgment procedure.[244]

In contrast, courts that deny an employer's summary judgment motion when believable evidence of pretext is introduced have embraced *McDonnell Douglas's* inferences as well as summary judgment standards.[245] These courts have recognized the reasonable

238. Ware, *supra* note 54, at 72 ("When the plaintiff has evidence which shows that the employer's proffered justification is false, there is, by definition, a 'genuine issue' since the factfinder is permitted to infer a discriminatory motive solely from proof of pretext.").

239. *Id.* at 73. Empirical examples of this approach are discussed at *supra* Part IV.A.

240. Ware, *supra* note 54, at 71–72; *see, e.g.*, Malacara v. City of Madison, 224 F.3d 727, 733 (7th Cir. 2000) (Williams, J., dissenting) (noting that the majority had ignored evidence favorable to the plaintiff, including the prima facie case and pretext evidence); Falcon v. Trs. of the State Colls. in Colo., No. 99-1318, 2000 U.S. App. LEXIS 14338, at *14 (10th Cir. June 19, 2000) (refusing, in light of *Reeves*, to draw reasonable inferences in favor of Falcon on issues of derogatory remarks and pretext).

241. Feliciano de la Cruz v. El Conquistador Resort & Country Club, 218 F.3d 1, 10 (1st Cir. 2000) ("Feliciano's explanations of her job performance problems generated a triable issue of pretext.").

242. *Id.* at 8; *see also* Schnabel v. Abramson, 232 F.3d 83, 88 (2d Cir. 2000) (arguing that despite a jury issue of pretext, the plaintiff "has not demonstrated that the asserted pretextual reasons were intended to mask age discrimination").

243. *See* Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 147–48 (2000).

244. O'Dell, *supra* note 23, at 1281–82; *see also* 1 LARSON, *supra* note 5, §8.05[2], at 8-85 ("To grant summary judgment [for the defendant upon a showing of pretext] would . . . remove any chance that a jury might have had to infer discriminatory intent . . . .").

245. *See* PERRITT, *supra* note 9, § 6.06[A], at 360 ("If *McDonnell Douglas* is viewed as . . . permitting an inference of discriminatory intent to be drawn from this [pretextual] evidence, there is no reason to require the plaintiff to adduce additional evidence once the

inference that pretext evidence allows.[246] Accordingly, during summary judgment, courts subscribing to the majority standard have recognized that a genuine issue of pretext implies a genuine issue of discrimination.[247] This inferential correlation precludes summary judgment in favor of the employer.

In addition to upholding the inferential policies underlying the *McDonnell Douglas* framework, courts that apply the majority standard uphold policies underlying summary judgment procedure. Specifically, from the inception of the Federal Rules of Civil Procedure, courts have recognized the importance of having juries try issues of motive and intent.[248] For instance, in *Poller v. Columbia Broadcasting System, Inc.*, the Supreme Court warned that "summary procedures should be used sparingly in . . . litigation where motive and intent play leading roles."[249] Motive and intent are key inquiries in disparate treatment cases.[250] Accordingly, *Poller* teaches that imposition of summary judgment should be used sparingly when applying the *McDonnell Douglas* framework.

The reasoning of *Poller* is preserved by the standard advocated in this article. This standard, instead of requiring additional evidence of discrimination to survive summary judgment,[251] minimizes the burden on the plaintiff by requiring just enough evidence to create a jury issue on the veracity of the employer's explanations.[252] In contrast, courts requiring evidence beyond pretext render plaintiffs' survival of summary

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employer's explanation is shown to be pretextual.").

246. *See Reeves*, 530 U.S. at 147–48; Ware, *supra* note 54, at 72.

247. *See supra* Part IV.A.

248. *See* Ware, *supra* note 54, at 69–70; *see also* LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972, at 1720 (1972), *microformed on* CIS No. 72-S542-28 (Cong. Info. Serv.) (statement of Congressman Ervin) (advocating that juries should decide questions of fact that arise under discriminatory lawsuits).

249. 368 U.S. 464, 473 (1962). Admittedly, Judge Easterbrook of the Seventh Circuit Court of Appeals has warned that *Poller* is not applicable under contemporary summary judgment analysis. *See* Gordon v. United Airlines, Inc., 246 F.3d 878, 896–97 (7th Cir. 2001) (Easterbrook, J., dissenting). However, *Poller* has not been expressly overruled by the Supreme Court. Furthermore, juries are better equipped to determine intent issues in the workplace because they "are immersed in the workaday world; they know how offices and factories operate, and bring to their evaluations of the evidence a common sense rooted in the experience of their everyday lives." Lawyers' Committee Brief, *supra* note 5, at 27.

250. *See* Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977); MODJESKA, *supra* note 15, § 1.6, at 15.

251. *See supra* Part VI.B.

252. *See* Chuang v. Univ. of Calif.-Davis, 225 F.3d 1115, 1129 (9th Cir. 2000) (noting that the plaintiffs should bear a small burden at summary judgment; accordingly, all that was required was a genuine issue of fact on the employer's proffered reasons).

judgment more difficult.[253] This outcome is at odds with the Court's hesitancy to approve summary judgment in lawsuits where motive and intent are the key inquiries.[254]

Another policy underlying application of summary judgment recognizes a prohibition on "weigh[ing] the evidence."[255] This prohibition emanates from the idea that "weighing . . . the evidence . . . [is a] jury function[], not . . . [a function] of a judge."[256] This principle demands a standard that requires only a prima facie case and believable evidence of pretext. Specifically, once the plaintiff produces enough evidence of pretext to create a genuine issue of fact, summary judgment should invariably be denied.[257] A reviewing court does not have to determine if the plaintiff's evidence is "weak" or inconclusive in order to determine if summary judgment is appropriate.[258] Thus, the standard advocated here avoids contravening the prohibition against weighing the evidence.

Weighing the evidence during summary judgment proceedings is inevitable upon application of a standard that scrutinizes pretextual evidence to determine if the ultimate burden of proving discrimination is satisfied.[259] Under that standard, additional evidence will be required if the plaintiff merely creates a "weak" issue of pretext.[260] To determine if the evidence is weak or strong, a court will have to weigh the pretextual evidence at the summary judgment stage.

For example, in *Feliciano*, the panel justified summary judgment against the plaintiff by noting that the pretextual evidence was "thin" and unpersuasive.[261] In order to reach that conclusion, however, the court had to "*weigh* all the circumstantial evidence of discrimination,"

253. *See* O'Dell, *supra* note 23, at 1280.

254. *Poller*, 368 U.S. at 473; Ware, *supra* note 54, at 69–71 (summarizing the policy of summary judgment when issues of motive and intent are presented).

255. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 150 (2000).

256. *Id.* (quoting Anderson v. Liberty Lobby, 477 U.S. 242, 255 (1986)).

257. *See, e.g.*, Ross v. Campbell Soup Co., 237 F.3d 701, 709–10 (6th Cir. 2001) (holding that summary judgment is improper when pretextual evidence, which allows an inference of discrimination, is presented); *supra* note 192 and accompanying text.

258. This is the inquiry that *Reeves* encouraged courts to make before deciding if summary judgment or judgment as a matter of law is appropriate. *See Reeves*, 530 U.S. at 148.

259. This is the minority standard that is embraced by courts that rely on the exception in *Reeves*. *See supra* part IV.B for a survey of courts that have applied this standard.

260. *Reeves*, 530 U.S. at 148; Feliciano de la Cruz v. El Conquistador Resort & Country Club, 218 F.3d 1, 7 (1st Cir. 2000) (requiring a "weigh[ing]" of the evidence before determining of summary judgment is proper).

261. *Feliciano*, 218 F.3d at 10 (1st Cir. 2000).

including the plaintiff's pretextual evidence.[262] This activity, however, *expressly contravened* well-established principles underlying summary judgment.[263]

From the analysis above, it is clear that the standard employed by a majority of the circuit courts of appeals furthers the policies underlying the *McDonnell Douglas* framework and summary judgment procedure. These courts, by requiring only a genuine issue of fact on the employer's advanced explanation, have upheld the inferential value of pretextual evidence and avoided contravention of well-established summary judgment principles. In contrast, courts that have continued to scrutinize believable evidence of pretext failed to realize the probative value of pretext, and consequently ignored fundamental standards of summary judgment. This imprecise practice should be eradicated in disparate treatment lawsuits.

VI. CONCLUSION

The *McDonnell Douglas* framework is the primary mechanism courts employ to analyze indirect evidence of discrimination in disparate treatment cases. The framework's frequent application, however, has been compromised by pervasive uncertainties. Admittedly, the Supreme Court has attempted to clarify these uncertainties. However, the Court has generally created additional confusion by its "clarification." In its latest attempt to clarify, the Court simply left important questions unanswered and continued to recognize diametrically opposed interpretations of pretextual evidence.

In *Reeves*, the Court attempted to clarify the pretext-plus versus permissive pretext debate. In its amorphous holding, the Court created additional uncertainty as to the probative value of pretext evidence. Consequently, two interpretations of *Reeves* have developed in the lower federal courts. One of these interpretations, subscribing to an exception in *Reeves*, invites lower courts to contradict well-established principles of evidentiary review. This contradiction is avoided by the

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262. *Id.* at 7 (emphasis added).

263. *Reeves*, 530 U.S. at 150 (forbidding courts from "weigh[ing] the evidence").

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second interpretation of *Reeves* that regards pretext evidence as a powerful enough indicator of intentional discrimination to survive summary judgment.

However, the coexistence of these interpretations will probably invite another instance of Supreme Court clarification. When that opportunity arises, the Supreme Court should try to settle the post-*Reeves* debate by adopting a standard that automatically recognizes a jury issue when a prima facie case and believable evidence of pretext are produced. In reality, however, the Court is likely to perpetuate the ambiguous legacy of its *McDonnell Douglas* jurisprudence.

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