

Winter 1995

The Refined Pretext-Plus Analysis: Employees' and Employers' Respective Burdens After Hicks

J. H. Tighe
University of Virginia

Follow this and additional works at: <https://scholarcommons.sc.edu/sclr>



Part of the [Law Commons](#)

Recommended Citation

J. Hagood Tighe, The Refined Pretext-Plus Analysis: Employees' and Employers' Respective Burdens After Hicks, 46 S. C. L. Rev. 333 (1995).

This Article is brought to you by the Law Reviews and Journals at Scholar Commons. It has been accepted for inclusion in South Carolina Law Review by an authorized editor of Scholar Commons. For more information, please contact digres@mailbox.sc.edu.

Note

The Refined Pretext-Plus Analysis: Employees' and Employers' Respective Burdens After *Hicks*

*J. Hagood Tighe**

I. INTRODUCTION	333
II. <i>McDonnell Douglas</i> MODEL OF PROOF	336
A. <i>The Prima Facie Case</i>	336
B. <i>The Legitimate, Nondiscriminatory Reason</i>	338
C. <i>Proving Pretext</i>	339
III. <i>St. Mary's Honor Center v. Hicks</i>	341
A. <i>Majority Opinion</i>	342
B. <i>The Dissent</i>	346
C. <i>The New Model of Proof:</i> <i>A Refined Pretext-Plus Test</i>	348
IV. THE FUNDAMENTAL MISUNDERSTANDING AND RATIONALE . .	352
V. CRITIQUE OF <i>McDonnell Douglas</i>	354
VI. CONGRESSIONAL RESPONSE TO <i>Hicks</i>	355
VII. SUMMARY JUDGMENT	356
VIII. APPLICATION OF <i>Hicks</i> IN THE FEDERAL COURTS	359
IX. CONCLUSION	361

I. INTRODUCTION

The United States Supreme Court in *St. Mary's Honor Center v. Hicks*¹ substantially clarified the burdens of proof in discrimination cases by adopting what is essentially a pretext-plus analysis. Although considered controversial by some commentators,² this decision still affords the plaintiff in a Title VII

* B.A. 1987, The University of Virginia; candidate for J.D., May 1995, University of South Carolina. The author wishes to thank Professor Thomas Haggard for his comments on earlier drafts.

1. 113 S. Ct. 2742 (1993).

2. See Mark A. Schuman, *The Politics of Presumption: St. Mary's Honor Center v. Hicks and the Burdens of Proof in Employment Cases*, 9 ST. JOHN'S J. LEGAL COMMENT. 67, 67 (1993)(describing *Hicks* as "one of the most controversial decisions the Court handed down in

discrimination suit the opportunity to prove discrimination by circumstantial evidence. At the same time, the Court has taken a stricter view of a plaintiff's duties, thus preventing frivolous suits while preserving the protections provided by the Civil Rights Act.³

As part of the civil rights movement, the United States Congress passed the Civil Rights Act of 1964.⁴ Title VII of the Act prohibits an employer from discriminating against an employee or potential employee on the basis of race, color, religion, sex, or national origin.⁵ In *McDonnell Douglas Corp. v. Green*⁶ the Court attempted to devise an "order and allocation of proof in a private, non-class action challenging employment discrimination."⁷ This model permits the use of circumstantial evidence to prove disparate treatment⁸ because of the perceived lack of direct evidence available to Title VII plaintiffs.⁹ Justice Powell articulated the relative burdens in his opinion for a unanimous Court as follows: "The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination The burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection" ¹⁰ The employee "must be given a full and fair opportunity to demonstrate by competent evidence that the presumptively valid reasons for his rejection were in fact a coverup [or pretext] for a racially discriminatory decision."¹¹

a largely low-key 1992-93 term.").

3. 42 U.S.C. §§ 2000e to 2000e-17 (1988 & Supp. V 1993).

4. Pub. L. No. 88-352, 78 Stat. 241.

5. 42 U.S.C. § 2000e-2(a)(1988) provides:

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

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

7. *Id.* at 800.

8. *See United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 713 n.1 (1983); *see also Griggs v. Duke Power Co.*, 401 U.S. 424, 431-32 (1971)(articulating the "disparate-impact" theory).

9. Plaintiffs in a Title VII action may prove their case by direct or circumstantial evidence. *See Aikens*, 460 U.S. at 714 n.3.

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

11. *Id.* at 805. *McDonnell Douglas* employed Green, a black male, as a mechanic and laboratory technician until *McDonnell Douglas* laid him off during a general work force

In several cases, the Court has refined the *McDonnell Douglas* model.¹² However, at least until *Hicks*, the circuits were split regarding the plaintiff's ultimate burden under the model.¹³ The courts and commentators have termed the opposing views as "pretext" and "pretext-plus."

Political and ideological views shape an individual's opinion of whether the impact of *Hicks* on Title VII cases is controversial. Before *Hicks*, one commentator concluded:

What ultimately underlies the controversy over the "pretext-plus" rule is a battle over policy, not law. The dominant judicial view in the early years of employment discrimination litigation—that illegal discrimination is presumed to be prevalent and that plaintiffs must be given ample opportunity to prove their cases—has given way in the current conservative climate to a notion that illegal discrimination is a thing of the past and that plaintiffs more frequently wield discrimination claims as a shield against all adverse employment actions.¹⁴

Rather than characterizing this controversy along ideological or political lines, it is more accurate to examine whether Title VII continues to offer adequate protection to victims of discrimination. *Hicks* assures employees ample opportunity to pursue discrimination claims while refining the order and allocation of proof to prevent the abuse of Title VII as a shield against legitimate, yet adverse, employment decisions.

This Note first examines the model of proof set out in *McDonnell Douglas* and the subsequent cases refining the burdens. Next, it reviews *Hicks*, focusing on the majority and dissenting opinions and changes in the model. After looking at the opinions, the Note takes a critical look at the *McDonnell Douglas* model, considers whether *Hicks* has any practical effect on summary judgment, and then looks at the prospect of a congressional response to the

reduction. *Id.* at 794. To protest his discharge, Green and other members of the Congress on Racial Equality participated in illegal activities, including a "stall-in" in which they stalled their cars to block the morning shift change. *Id.* at 794-95. A "lock-in" also took place, but the Court expressed uncertainty about the extent of Green's involvement. *Id.* at 795. Responding to McDonnell Douglas's subsequent advertisement for applicants in Green's trade, Green applied for re-employment. McDonnell Douglas turned Green down because of his participation in the stall-in and lock-in. Green filed a formal complaint with the Equal Employment Opportunity Commission alleging that McDonnell Douglas's refusal to re-employ him violated the Civil Rights Act of 1964 because the refusal was based on Green's race and his involvement in the civil rights movement. *Id.* at 796.

12. See *infra* section III.

13. See *infra* note 44 and accompanying text.

14. Catherine J. Lancot, *The Defendant Lies and the Plaintiff Loses: The Fallacy of the "Pretext-Plus" Rule in Employment Discrimination Cases*, 43 HASTINGS L.J. 59, 141 (1991) (concluding that the conservative trend toward a pretext-plus rule unfairly harms plaintiffs).

Court's holding. Finally, this Note will review federal court decisions applying *Hicks*.

II. McDONNELL DOUGLAS MODEL OF PROOF

Simply put, the *McDonnell Douglas* model of proof requires three things. First, the complainant must establish a prima facie case of racial discrimination.¹⁵ Second, the burden shifts to the employer to articulate a "legitimate, nondiscriminatory reason for the employee's rejection."¹⁶ Finally, the burden shifts back to the complainant to demonstrate that the employer's "stated reason for [the employee's] rejection was in fact pretext."¹⁷ In subsequent cases, the Court provided some guidance as to what is required to meet each of these burdens.

A. The Prima Facie Case

In *Furnco Construction Corp. v. Waters*¹⁸ the Court granted certiorari to address "the exact scope of the prima facie case under *McDonnell Douglas*."¹⁹ Describing the prima facie case, the Court stated that the "plaintiff carries the initial burden of showing actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were 'based on a discriminatory criterion illegal under the Act.'"²⁰ This raises a rebuttable presumption of discriminatory intent.²¹ The Court was willing to presume this because "more often

15. A complainant may establish a prima facie case for racial discrimination: by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

McDonnell Douglas, 411 U.S. at 802. The Court noted that the requirements of prima facie proof vary depending on the facts. *Id.* at 802 n.13; *see also* *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 575-76 (1978) (quoting *McDonnell Douglas* and discussing the plaintiff's "initial burden").

16. *McDonnell Douglas*, 411 U.S. at 802. The Court did not detail what was required to meet this burden. It simply determined that the employer met its burden. *Id.* at 802-03.

17. *Id.* at 804. This marks the origin of the "pretext" dispute. *See infra* note 41. In *McDonnell Douglas* the case was remanded to give the complainant an opportunity to make a showing of pretext. *Id.*

18. 438 U.S. 567 (1978).

19. *Id.* at 569.

20. *Id.* at 576 (quoting *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 358 (1977)).

21. The Court warned, "a *McDonnell Douglas* prima facie showing is not the equivalent of a factual finding of discrimination." *Id.* at 579.

than not people do not act in a totally arbitrary manner."²² The Court continued that once legitimate reasons were eliminated, "it is more likely than not the employer . . . based his decision on an impermissible consideration such as race."²³

The Court never explained the justification for this presumption. Rather, it appeared to take judicial notice based on its experience.²⁴ One commentator responded to this taking of judicial notice as follows:

The *McDonnell Douglas* presumption is based, not upon the accumulation of experience of the coincidence of one set of facts with another, but upon an ideology which posits that relationship without proof. This ideology holds that an employment decision adverse to a black, ethnic minority, or woman who possesses any possibility of performing even minimally acceptably in the job is very likely due to racism, that the state is competent to, and must, determine independently of the employer whether the applicant was qualified for the job and thus whether the employer's decision was racist or sexist. In other words, racial, sexual, ethnic, or religious groups would be evenly distributed if not for discrimination. There is no evidence, of course, to support this notion of "naturally" random distribution of people's performance or preferences; to the contrary, much evidence suggests that people usually do not behave in a random or even distribution. . . .

.
 . . . The application of the presumption is a political decision intended to affect out-of-court behavior, in this case by punishing the failure to favor those in a "protected" class in employment decisions. The presumption, used this way, is a political allocation of power to the state and certain employees and away from the employer and the employee.²⁵

Regardless of whether the Court's presumption was grounded in precedent, until recently this initial burden was not the source of substantial controversy.²⁶

22. *Id.* at 577.

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

24. *See id.* Noting that the presumption created by the prima facie case is extremely weak, one commentator has suggested "[t]hat presumption lay at the heart of the liberal civil rights ideology of employment discrimination." Schuman, *supra* note 2, at 84.

25. Schuman, *supra* note 2, at 86, 93 (citing THOMAS SOWELL, CIVIL RIGHTS: RHETORIC OR REALITY (1984); Thomas Sowell, *By the Numbers*, in COMPASSION VERSUS GUILT 228-30 (1987)).

26. *See Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 254 n.7 (1981) (stating that in *McDonnell Douglas* the prima facie case was used to "denote the establishment of a legally mandatory, rebuttable presumption"). *See also id.* at 256 n.10 (noting that evidence of a prima facie case may be used to determine if the employer's reason was a pretext).

B. The Legitimate, Nondiscriminatory Reason

The first major controversy in the *McDonnell Douglas* model of proof regarded the employer's burden to prove that its actions were based on legitimate, nondiscriminatory reasons. In *Furnco* the Court articulated the employer's burden as "proving that he based his employment decision on a legitimate consideration, and not an illegitimate one such as race."²⁷ Because the Court phrased this step of the model as a burden of proof, the lower courts began to speculate as to the requirements to meet this burden. The Fifth Circuit stated, "This court requires [the] defendant to prove nondiscriminatory reasons by a preponderance of the evidence."²⁸ Additionally, the Fifth circuit required that the "defendant must prove that those he hired or promoted were somewhat *better* qualified than was [the] plaintiff."²⁹ Phrased this way the Court's test significantly increases the employer's burden.

Because the Fifth Circuit decision conflicted with interpretations of other courts of appeals³⁰ the Supreme Court clarified the employer's burden in *Texas Department of Community Affairs v. Burdine*.³¹ "[T]o satisfy this intermediate burden, the employer need only produce admissible evidence which would allow the trier of fact rationally to conclude that the employment decision had not been motivated by discriminatory animus."³² The employer's reason "must be clear and reasonably specific"³³ so that it frames "the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext."³⁴ However, the employer does not have to persuade the court that the proffered reason motivated its actions.³⁵ This confirmed that the employer's burden was one of production, not persuasion. The legitimate, nondiscriminatory reason, once produced, rebuts the presumption raised by the *prima facie* case.³⁶

27. 438 U.S. at 577.

28. *Burdine v. Texas Dep't of Community Affairs*, 608 F.2d 563, 567 (5th Cir. 1979) (citing *Turner v. Texas Instruments*, 555 F.2d 1251 (5th Cir. 1977)), *vacated*, 450 U.S. 248 (1981).

29. *Id.* (citing *East v. Romine, Inc.*, 518 F.2d 332 (5th Cir. 1975)).

30. *See, e.g.*, *Lieberman v. Gant*, 630 F.2d 60 (2d Cir. 1980); *Jackson v. United States Steel Corp.*, 624 F.2d 436 (3d Cir. 1980); *Ambush v. Montgomery County Gov't*, 620 F.2d 1048 (4th Cir. 1980); *Loeb v. Tectron, Inc.*, 600 F.2d 1003 (1st Cir. 1979). *But see* *Vaughn v. Westinghouse Elec. Corp.*, 620 F.2d 655 (8th Cir. 1980), *vacated*, 450 U.S. 972 (1981).

31. 450 U.S. at 248.

32. *Id.* at 257.

33. *Id.* at 258.

34. *Id.* at 255-56.

35. *Id.* at 254 (citing *Board of Trustees v. Sweeney*, 439 U.S. 24 (1978)). Yet, the Court pointed that the employer "retains an incentive to persuade the trier of fact that the employment decision was lawful." *Burdine*, 450 U.S. at 258.

36. *Id.* at 255.

The burden of production is considerably lighter than the burden of persuasion.³⁷ Rather than requiring an employer to prove by a preponderance of the evidence the existence of nondiscriminatory reasons for terminating the employee, the employer need only explain clearly the nondiscriminatory reasons for its actions.³⁸

C. Proving Pretext

Assuming that the employer meets its burden of production, “the *McDonnell-Burdine* presumption ‘drops from the case,’” and the burden shifts to the employee to prove pretext.³⁹ In *United States Postal Service Board of Governors v. Aikens* the majority concluded that the district court erroneously required the plaintiff “to submit direct evidence of discriminatory intent.”⁴⁰ Instead, the Court reiterated its statement in *Burdine* that a plaintiff “may succeed . . . either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer’s proffered explanation is unworthy of credence.”⁴¹ Thus, the plaintiff may prove its ultimate burden by circumstantial evidence. However, a new controversy developed over what circumstantial evidence a court would require.

Justice Rehnquist wrote that at this stage of the model “the factual inquiry proceeds to a new level of specificity.”⁴² “The ‘factual inquiry’ in a Title VII case is ‘[whether] the defendant intentionally discriminated against the plaintiff.’”⁴³ Despite this unambiguous statement, the circuit courts split as to whether this required a showing that the employer’s legitimate nondiscriminatory reason was merely pretextual or pretextual specifically for intentional discrimination.⁴⁴ The factual inquiry is whether the articulated

37. The Court noted, “The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.” *Id.* at 253 (citations omitted).

38. *Id.* at 260.

39. *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 715 (1983) (quoting *Burdine*, 450 U.S. at 255 n.10). “Of course, the plaintiff must have an adequate ‘opportunity to demonstrate that the proffered reason was not the true reason for the employment decision,’ but rather a pretext.” *Id.* at 716 n.5 (quoting *Burdine*, 450 U.S. at 256).

40. *Id.* at 717.

41. *Id.* at 716 (quoting *Burdine*, 450 U.S. at 256). This quotation, authored by Justice Powell based on his interpretation of *McDonnell Douglas*, see *Burdine*, 450 U.S. at 256 (Powell, J.), may be the source of the pretext controversy. Supporters of both views cite *Burdine* to support their respective positions.

42. *Aikens*, 460 U.S. at 715 (quoting *Burdine*, 450 U.S. at 255).

43. *Id.* (quoting *Burdine*, 450 U.S. at 253).

44. Courts and commentators labelled these views “pretext” and “pretext plus.” The courts of appeals for the Second, Third, Fifth, Sixth, Ninth, Tenth, and District of Columbia Circuits

reason was a pretext for intentional discrimination, instead of whether the employer's reason was a pretext for some legal or otherwise illegal reason.⁴⁵

The alternative views may be more clearly stated as follows. Assume that the plaintiff proves a *prima facie* case, that the defendant articulates a legitimate, nondiscriminatory reason, and that the plaintiff then has no additional evidence. At this point there are two options: either the plaintiff loses as a matter of law on summary judgment or by directed verdict, or the case goes to the jury. Under the latter option, there are several possibilities. First, the jury may believe the defendant and the defendant wins. Second, the jury disbelieves the defendant, but the defendant still wins because even though the plaintiff proved that the defendant's reason was false, he failed to prove that the real reason was intentional discrimination. This is the pretext-plus theory. Third, the jury disbelieves the defendant so it must find for the plaintiff. This is the pretext-only theory that was clearly rejected by the Supreme Court in *Hicks*.⁴⁶ Finally, the jury disbelieves the defendant and the jury can find for either the plaintiff or the defendant. *Hicks* would only allow a finding for the plaintiff in the unusual case where the plaintiff presents evidence in excess of that usually required for a *prima facie* showing that, combined with the jury's disbelief of the defendant, would allow a reasonable jury to conclude that the defendant intentionally discriminated.⁴⁷

Under the pretext theory⁴⁸ an employee proves intentional discrimination by showing that the employer's articulated reasons are false. The actual reason is unimportant. Under the pretext theory, if the employer made the decision on a legal yet embarrassing or "politically incorrect" basis the employer still loses.⁴⁹ For example, if an employer chose not to hire a prospective employee because the employer hates red-headed people, but the employer was reluctant to admit this fact and chose another legitimate, nondiscriminatory reason to rebut the presumption, the employer would lose.

Under the pretext-plus theory an employee must show that the employer's articulated reasons are false *plus* produce some additional evidence that the

had adopted the pretext-only rule. Lancot, *supra* note 14, at 71-75. The courts of appeals for the First, Fourth, Seventh, and Eleventh Circuits followed the pretext-plus rule. *Id.* at 81-86; *see also id.* at 71-75 nn.46-54, 82-86 nn.92-97 (citing cases from each circuit reflecting the split).

45. This burden is consistent with the Court's position in both *Aikens* and *Hicks*. *But see* Sherie L. Coons, *Proving Disparate Treatment After St. Mary's Honor Center v. Hicks: Is Anything Left of McDonnell Douglas?*, 19 J. CORP. L. 379, 379 (1994) (arguing that the Court's holding in *Hicks* conflicts with established precedent and is "illogical" and "inconsistent"); Emanuel Margolis, *Human Rights Commentator*, 67 CONN. B.J. 429, 433 (1993) (claiming Justice Scalia ignored precedent).

46. *See infra* part III.

47. *See infra* part III.

48. This theory is also referred to as "pretext-only."

49. *See St. Mary's Honor Ctr. v. Hicks*, 113 S. Ct. 2742, 2758 (1993) (Souter, J., dissenting).

employer's concealed reason was intentional discrimination.⁵⁰ In the above hypothetical, the employee may prove that the employer's reason for refusing to hire the employee was false. However, absent evidence that the employer's reason constituted intentional discrimination, the employee's action will fail. Confusion over the plus evidence comes primarily from a misconception that direct evidence of intentional discrimination is required. However, courts using this theory allow circumstantial evidence. This circumstantial evidence must be evidence of discriminatory intent, rather than an inference of discriminatory intent based on unsupported allegations.⁵¹

III. ST. MARY'S HONOR CENTER V. HICKS⁵²

Hicks sued St. Mary's Honor Center, after St. Mary's fired him. Hicks alleged intentional racial discrimination in violation of Section 703(a) (1) of Title VII of the Civil Rights Act of 1964.⁵³ Hicks brought the suit in the United States District Court for the Eastern District of Missouri, which found for St. Mary's.⁵⁴ The United States Court of Appeals for the Eighth Circuit reversed and remanded.⁵⁵ The Supreme Court granted certiorari "to determine whether, in a suit against an employer alleging intentional racial discrimination in violation of . . . Title VII . . . , the trier of fact's rejection of the employer's asserted reasons for its actions mandates a finding for [Hicks]."⁵⁶

St. Mary's Honor Center employed Hicks, a black male, as a correctional officer beginning in 1978. A review of St. Mary's administration resulted in extensive supervisory changes. Hicks retained his position, but his immediate

50. Pretext-plus courts often cite in support "their concern for the ability of employers to exercise business judgment." Melissa A. Essary, *The Dismantling of McDonnell Douglas v. Green: The High Court Muddies the Evidentiary Waters in Circumstantial Discrimination Cases*, 21 PEPP. L. REV. 385, 405 (1994) (footnote omitted).

51. To avoid summary judgment, the nonmovant "may not rest upon the mere allegations or denials of [the nonmovant's] pleading, but . . . must set forth specific facts showing there is a genuine issue for trial." FED. R. CIV. P. 56(e); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *see also infra* part VII.

52. 113 S. Ct. 2742 (1993).

53. *Id.* at 2746. Section 703(a)(1) provides in relevant part: "It shall be an unlawful employment practice for an employer—(1) . . . to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race" 42 U.S.C. § 2000e-2(a)(1) (1988).

54. *Hicks v. St. Mary's Honor Ctr.*, 756 F. Supp. 1244 (E.D. Mo. 1991), *rev'd*, 970 F.2d 487 (8th Cir. 1992), *rev'd*, 113 S. Ct. 2742 (1993).

55. *Hicks v. St. Mary's Honor Ctr.*, 970 F.2d 487 (8th Cir. 1992), *rev'd*, 113 S. Ct. 2742 (1993).

56. 113 S. Ct. at 2746.

supervisor and superintendent were replaced. Although Hicks maintained a satisfactory employment record before the supervisory changes were made, after the changes Hicks “became the subject of repeated, and increasingly severe, disciplinary actions.”⁵⁷ Hicks was demoted, then discharged for threatening his immediate supervisor.⁵⁸

A. Majority Opinion

Justice Scalia’s majority opinion applied the *McDonnell Douglas* allocation of burdens of production and proof.⁵⁹ St. Mary’s did not challenge the district court’s finding that Hicks satisfied the “minimal requirements” of the prima facie case.⁶⁰ This showing effectively “create[d] a presumption that the employer unlawfully discriminated against the employee.”⁶¹ The majority pointed out that although this presumption shifts the burden of production to the defendant, the burden of persuasion remains with the plaintiff.⁶²

To rebut this presumption, the burden shifted to St. Mary’s to produce evidence that the employer took its adverse employment action “‘for a legitimate, nondiscriminatory reason.’”⁶³ St. Mary’s introduced “evidence of two legitimate, nondiscriminatory reasons for [its] actions: the severity and the accumulation of rules violations” by Hicks.⁶⁴ Hicks did not challenge the finding that St. Mary’s sustained its burden of production.⁶⁵ Therefore, the presumption raised by the prima facie showing “drop[ped] from the case.”⁶⁶

Following the *McDonnell Douglas* model, the burden then shifted back to Hicks. He had “‘the full and fair opportunity to demonstrate,’ through presentation of his own case and through cross-examination of the defendant’s witnesses, ‘that the proffered reason was not the true reason for the employment decision’ and that race was.”⁶⁷ The district court found that Hicks was

57. *Id.*

58. *Id.*

59. Chief Justice Rehnquist and Justices O’Connor, Kennedy, and Thomas joined Justice Scalia. Justice Souter authored the dissenting opinion in which Justices White, Blackmun, and Stevens joined. *Id.* at 2745.

60. *Id.* at 2747. Hicks demonstrated the *McDonnell Douglas* prima facie case “by proving (1) that he is black, (2) that he was qualified for the position of shift commander, (3) that he was demoted from that position and ultimately discharged, and (4) that the position remained open and was ultimately filled by a white man.” *Hicks*, 113 S. Ct. at 2747 (citations omitted).

61. *Id.* (quoting *Burdine*, 450 U.S. at 254).

62. *Id.* (quoting *Burdine*, at 253).

63. *Id.* (quoting *Burdine*, at 254).

64. *Id.*

65. *Hicks*, 113 S. Ct. at 2747.

66. *Burdine*, 450 U.S. at 255 n.10.

67. *Hicks*, 113 S. Ct. at 2747 (quoting *Burdine*, 450 U.S. at 256).

the only St. Mary's supervisor disciplined for his subordinates' rules violations, that St. Mary's either disregarded or treated more leniently similar and more serious violations Hicks's coworkers committed, and that Hicks's immediate supervisor manufactured the heated confrontation resulting in Hicks's discharge.⁶⁸ Based on these findings, the district court found that St. Mary's asserted reasons for Hicks's demotion and discharge were not the real reasons. However, the court concluded that Hicks failed to prove "by direct evidence or inference that his unfair treatment was motivated by his race."⁶⁹

The court of appeals set this decision aside on the ground that Hicks proved St. Mary's proffered reasons were pretextual. Upon such a showing, the court held that Hicks was entitled to judgment as a matter of law.⁷⁰ The court held that the record "compel[s] a conclusion that [Hicks] is entitled to judgment as a matter of law."⁷¹

The Supreme Court rejected the Court of Appeals' holding, saying that it "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.'"⁷² On the contrary, the Court held that the fact finder's rejection of the employer's reasons "will *permit* the trier of fact to infer the ultimate fact of discrimination"⁷³ without requiring "additional proof of discrimination."⁷⁴

This statement, read outside the context of the entire opinion, appears to endorse the pretext-only theory. However, the Court attempted to alleviate any confusion by including a footnote that stated that this holding is not inconsistent with other statements made in the opinion.⁷⁵ One of these other

68. *Id.* at 2748.

69. *Id.* at 1252. The district court based this finding, in part, on the fact that two blacks sat on the disciplinary review board recommending the discipline, that Hicks's black subordinates who actually committed the violations were not disciplined, and that "the number of black employees at St. Mary's remained constant." *Id.*

70. *Hicks v. St. Mary's Honor Ctr.*, 970 F.2d 487, 492 (8th Cir. 1992), *rev'd*, 113 S. Ct. 2742 (1993). The Court reasoned:

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

Id.

71. *Id.* at 493.

72. *Hicks*, 113 S. Ct. 2748-49 (1993) (citations omitted).

73. *Id.* at 2749 (footnote omitted).

74. *Id.* (quoting *Hicks*, 970 F.2d at 493).

75. *See id.* at 2749 n.4. The footnote states:

Contrary to the dissent's confusion-producing analysis, there is nothing whatever inconsistent between this statement and our later statements that (1) the plaintiff must show "*both* that the reason was false, *and* that discrimination was the real reason,"

statements requires the plaintiff to show that the proffered reason was false and that the real reason was discrimination.⁷⁶ Another says that “it is not enough . . . to *disbelieve* the employer.”⁷⁷ Both of these statements support the pretext-plus theory.

Rather than elaborate on how these statements should be reconciled into a test for the lower courts to apply,⁷⁸ Justice Scalia “begrudgingly”⁷⁹ utilized the balance of the opinion to counter the dissent’s attacks.⁸⁰ The dissent’s criticism focused on the fact that the majority threw out “a framework carefully crafted in precedents as old as 20 years.”⁸¹

Justice Scalia began his rebuttal of the dissent by discussing *Burdine*.⁸² *Burdine* states that after the employer meets its burden, “the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.”⁸³ Scalia argued that “[t]he dissent takes this to mean that if the plaintiff proves the asserted reason to be *false*, the plaintiff wins.”⁸⁴ But Scalia felt that “a reason cannot be proved to be ‘a pretext for discrimination’ unless it is shown *both* that the reason was false, *and* that discrimination was the real reason.”⁸⁵ This appears to be a debate regarding the pretext-only and pretext-plus theories.

The majority concluded this debate by saying, “[W]hatever doubt *Burdine* might have created was eliminated by *Aikens*. There we said, in language that

and (2) “it is not enough . . . to *disbelieve* the employer.” Even though (as we say here) rejection of the defendant’s proffered reasons is enough at law to *sustain* a finding of discrimination, *there must be a finding of discrimination*.

Id. (alteration in original) (citations omitted).

76. *Id.* at 2752.

77. *Id.* at 2754.

78. This issue is addressed *infra* part IV.

79. *See Hicks*, 113 S. Ct. at 2751. The Court said:

it is to [the dissent’s reliance on dicta in this Court’s opinions] that we now turn—begrudgingly, since we think it is generally undesirable, where the holdings of the Court are not at issue, to dissect the sentences of the United States Reports as thought they were the United States Code.

Id. (Scalia, J.).

80. “We mean to answer the dissent’s accusations in detail, by examining our cases, but at the outset it is worth noting the utter implausibility that we would ever have held what the dissent says we held.” *Id.* at 2750.

81. *Id.* at 2764 (Souter, J., dissenting).

82. *Id.* at 2751-54. The majority agreed with dissent on the meaning of one quote from *Burdine*, but disagreed on its relevance. *See id.* 2751-52.

83. *Texas Dep’t of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *See Hicks*, 113 S. Ct. at 2751-52).

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

85. *Id.*

cannot reasonably be mistaken, that ‘the ultimate question [is] discrimination *vel non*.’”⁸⁶ Scalia quoted *Aikens* as defining the ultimate factual issue as “‘whether the defendant intentionally discriminated against the plaintiff.’”⁸⁷ The majority determined that its interpretation of the excerpts from *Burdine* were more consistent with precedent and eliminated internal inconsistencies created by the dissent’s interpretation.⁸⁸ Applying *Burdine* and *Aikens*, the majority closed this discussion by saying, “It is not enough, in other words, to *disbelieve* the employer; the factfinder must *believe* the plaintiff’s explanation of intentional discrimination.”⁸⁹

Responding to the dissent’s and employee’s prediction of dire consequences arising from the Court’s decision, the Court engaged in an unnecessary discussion of fibbery.⁹⁰ The Court offered dicta that it would be “absurd” to conclude disbelieved testimony becomes perjury.⁹¹ There is always a risk that either party may lie. But as the Court pointed out, the rules of procedure provide adequate remedies.⁹² An adverse judgment under Title VII is not one of them.⁹³

The majority then addressed the dissent’s attack on procedural issues. The crux of the dissent’s argument was that by allowing for the possibility that an employer may lie and still prevail the plaintiff must refute all potential legitimate reasons that one could infer from the record.⁹⁴ The majority concluded that it “makes no sense to contemplate ‘the employer who is caught in a lie but succeeds in *injecting* into the trial an *unarticulated* reason for its actions.’”⁹⁵

Next, the majority considered the employee’s contention that the employer should be forced to stand by its articulated reasons and suffer Title VII damages if the plaintiff disproves them.

86. *Id.* at 2753 (quoting *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 714 (1983)) (alteration in original). The phrase “*vel non*” means “[o]r not.” BLACK’S LAW DICTIONARY 1555 (6th ed. 1990).

87. *Hicks*, 113 S. Ct. at 2753 (quoting *Aikens*, 460 U.S. at 715).

88. *See id.* at 2751-52.

89. *Id.* at 2754.

90. *See id.* at 2754-55. The concern regarding the risk of an employer lying to improve his position in the *McDonnell Douglas* order proof is not new. *See generally* Lanctot, *supra* note 14, at 59.

91. 113 S. Ct. at 2754.

92. The Court cited Federal Rules of Civil Procedure Rules 11 and 56(g) and 18 U.S.C. § 1621. *Id.* at 2755.

93. *See id.* at 2755.

94. *See id.* at 2755-56; *id.* at 2761-64 (Souter, J., dissenting). “Under the scheme announced today, any conceivable explanation for the employer’s actions that might be suggested by the evidence, however unrelated to the employer’s articulated reasons, must be addressed by a plaintiff who does not wish to risk losing.” *Hicks*, 113 S. Ct. at 2763 (Souter, J., dissenting).

95. *Id.* at 2755 (quoting *id.* at 2764 n.13) (Souter, J., dissenting).

The employer should bear, [the employee] contends, “the responsibility for its choices and the risk that plaintiff will disprove any pretextual reasons *and therefore prevail*.” It is the “therefore” that is problematic. Title VII does not award damages against employers who cannot prove a nondiscriminatory reason for adverse employment action, but only against employers who are proven to have taken adverse employment action by reason of (in the context of the present case) race.⁹⁶

Again, the majority appears to be advancing a pretext-plus argument.

B. *The Dissent*

Justice Souter authored an uncharacteristically angry dissent.⁹⁷ The thrust of the dissent is that the majority abandoned the framework the Court established in *McDonnell Douglas* and ignored precedent reaffirming and refining its application.⁹⁸ Justice Souter interpreted the majority holding as follows:

Ignoring language to the contrary in both *McDonnell Douglas* and *Burdine*, the Court holds that, once a Title VII plaintiff succeeds in showing at trial that the defendant has come forward with pretextual reasons for its actions in response to a *prima facie* showing of discrimination, the fact finder still may proceed to roam the record, searching for some nondiscriminatory explanation that the defendant has not raised and that the plaintiff has had no fair opportunity to disprove.⁹⁹

The majority denied that this was its holding.¹⁰⁰

The dissent then analyzed the initial step in the *McDonnell Douglas* model.¹⁰¹ It took the position that a “*prima facie* case is indeed a proven case.”¹⁰²

Although, in other contexts, a *prima facie* case only requires production of enough evidence to raise an issue for the trier of fact, here it means that the plaintiff has actually established the elements of the *prima facie* case

96. 113 S. Ct. at 2756 (citing Brief of Respondent at 30).

97. Justices White, Blackmun and Stevens joined Justice Souter in his dissenting opinion. *Id.* at 2756.

98. *See id.* at 2756-57 (Souter, J., dissenting).

99. *Id.* at 2757 (Souter, J., dissenting).

100. “We mean to answer the dissent’s accusations in detail, by examining our cases, but at the outset it is worth noting the utter implausibility that we would ever have held what the dissent says we held.” *Id.* at 2750.

101. *See Hicks*, 113 S. Ct. at 2757-58 (Souter, J., dissenting).

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

to the satisfaction of the factfinder by a preponderance of the evidence.¹⁰³

This statement itself is consistent with the precedent, but the dissent applied it in a conclusive rather than presumptive fashion.¹⁰⁴

The dissent then criticized the majority regarding the employer's burden. The dissent read the majority opinion as allowing the employer to offer a legitimate nondiscriminatory reason and, if disproved, to rely on *unarticulated* reasons in the record.¹⁰⁵ The majority emphatically denied this reading.¹⁰⁶ The dissent supported this claim by pointing to the dual functions of the employer burden. The first is to rebut the presumption raised by the *prima facie* showing.¹⁰⁷ The second, which the dissent asserted the majority neglected, is "to frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext."¹⁰⁸ The dissent seems to have concluded that by not compelling judgment for the plaintiff upon a showing of mere pretext, the majority allowed the employer to rely on admissible evidence in the record other than the reasons *articulated*.¹⁰⁹ The dissent decided that this was "unfair to plaintiffs, unworkable in

103. *Id.* (Souter, J., dissenting) (citing Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 254 n.7 (1981)). The dissent relied on a footnote in *Burdine* to suggest that the *prima facie* case is conclusive, rather than presumptive. The dissent's reading of the footnote and citation to Wigmore appears to use the correct words, but incorporate a definition other than that adopted by the *Burdine* Court. Compare *Hicks*, 113 S. Ct. at 2758 (Souter, J., dissenting) with *Burdine*, 450 U.S. at 254 n.7.

104. Does this suggest a shift from the weight given a *prima facie* case by the majority or has the dissent misread the application of the *prima facie* case? The dissent thought that it would be "unfair and utterly impractical to saddle the victims of discrimination with the burden of either producing direct evidence of discriminatory intent or eliminating the entire universe of possible nondiscriminatory reasons for a personnel decision." *Hicks*, 113 S. Ct. at 2758 (Souter, J., dissenting). The majority did not suggest a possible universe. It suggested that the employee must discount facts in record that support the inference that the employer did not discriminate (e.g., if the employee were terminated by a supervisor of the same race). This may be accomplished by either direct or circumstantial evidence. After all, proving that an employer intentionally discriminated is essentially the burden of proof.

105. See *id.* at 2759-64 (Souter, J., dissenting).

106. See *supra* notes 94-96 and accompanying text.

107. See *Hicks*, 113 S. Ct. at 2759 (Souter, J., dissenting).

108. *Id.* (Souter, J., dissenting) (quoting Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 255-56 (1981)).

109. See *id.* at 2761 n.10, 2763 (Souter, J., dissenting). This conclusion arises from the majority's statement that "the 'new level of specificity' may also (as we believe) refer to the fact that the inquiry now turns from the few generalized factors that establish a *prima facie* case to the specific proofs and rebuttals of discriminatory motivation the parties have introduced." *Id.* at 2752. This defines the point in the model where, although the fact finder doubts the proffered reasons, it looks to the plaintiff, with its burden of proof, for evidence of intentional discrimination. Naturally, the employer responds.

practice, and inexplicable in forgiving employers who present false evidence in court.”¹¹⁰

The dissent devoted its final pages to general criticism of the majority for ignoring precedent and creating a “‘pretext-plus’ approach”¹¹¹ that would chill Title VII litigation and increase expenses and delays.¹¹² It suggested that the majority’s model rewards a company for lying about the reason for the adverse employment decision.¹¹³ Potential plaintiffs would be forced to anticipate all potential side issues and participate in “more extensive and wide-ranging ‘discovery.’”¹¹⁴ These increased litigation requirements would “promote longer trials and more pre-trial discovery, threatening increased expense and delay in Title VII litigation for plaintiffs and defendants, and increased burdens on the judiciary.”¹¹⁵

Most importantly, the dissent pointed to what is likely to be the dividing issue: the assumption underlying the *McDonnell Douglas* framework.¹¹⁶ “Contrary to the assumption underlying the *McDonnell Douglas* framework, that employers will have ‘some reason’ for their hiring and firing decisions, the majority assumes that some employers will be unable to discover the reason for their own personnel actions.”¹¹⁷ The basis for the dissenting opinion lies in this division. The dissenters were unwilling to question this underlying assumption and the possibility that it must be altered to prevent abuse of Title VII by those it was designed to protect.

C. *The New Model of Proof: A Refined Pretext-Plus Test*

The majority in *Hicks* adopted the pretext-plus test for application in the final stage of the *McDonnell Douglas* model of proof. The majority failed to term its holding as pretext-plus, but the language employed in the majority opinion is unmistakable.¹¹⁸

First, the majority rejected the holding by the court of appeals that rejection of the employer’s asserted reasons for its actions compels summary

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

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

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

113. *See id.* at 2763 n.11, (Souter, J., dissenting); *see also supra* note 94 and accompanying text.

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

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

116. *Id.* at 2764 (Souter, J., dissenting).

117. *Id.* (Souter, J., dissenting) (citing *Furnco Constr. Corp. v. Waters*, 438 U.S. 567 (1978)) (citation omitted).

118. *But cf.* Norma G. Whitis, Note, *St. Mary’s Honor Center v. Hicks: The Title VII Shifting Burden Stays Put*, 25 LOY. U. CHI. L.J. 269 (1994) (suggesting that *Hicks* rejected pretext-plus and pretext-only rules and adopted a hybrid test).

judgment for the plaintiff.¹¹⁹ The majority's statement that "a reason cannot be proved to be a 'pretext for discrimination' unless it is shown *both* that the reason was false, *and* that discrimination was the real reason"¹²⁰ furthers this proposition.

McDonnell Douglas does not say . . . that all the plaintiff need do is disprove the employer's asserted reason. In fact, it says just the opposite: [O]n the retrial respondent must be given a full and fair opportunity to demonstrate by competent evidence that the presumptively valid reasons for his rejection *were in fact a coverup for a racially discriminatory decision*.¹²¹

119. See *Hicks*, 113 S. Ct. at 2748-49. This suggests that in a jury trial the plaintiff must do more than persuade the jury not to believe the employer's proffered reason. The American Bar Association Section on Litigation recently promulgated model jury instructions reflecting this position:

Defenses to Indirect Evidence of Discrimination

In this case, the plaintiff must prove by a preponderance of the evidence that [his/her] [membership in a protected class] was a motivating factor in the defendant's decision [to discharge/not to hire/etc.] [him/her]. The plaintiff's [membership in a protected class] was a motivating factor if you find that it played a role in the defendant's decision, even though other factors may have also played roles in that decision.

You must consider any legitimate, nondiscriminatory reason or explanation stated by the defendant for its decision. If you find that the defendant has stated a valid reason, then you must decide in favor of the defendant unless the plaintiff proves by a preponderance of the evidence that the stated reason was not the true reason but is only a pretext or excuse for discriminating against plaintiff because of [his/her] [membership in a protected class].

The plaintiff can attempt to prove pretext directly by persuading you by a preponderance of the evidence that [his/her] [membership on a protected class] was more likely the reason for the defendant's decision than the reason stated by the defendant.

The defendant can also attempt to prove that the defendant's stated reason for its decision [to discharge/not to hire/etc.] is a pretext by persuading you that it is just not believable. However, it is not enough for the plaintiff simply to prove that the defendant's stated reason for its decision was not the true reason. The reason for this is that the plaintiff always must prove by a preponderance of the evidence that [he/she] was [discharge/not hired/etc.] because of [his/her] [membership in a protected class]. Therefore, even if you decide that the defendant did not truly rely on the stated reason for its decision [to discharge/not to hire/etc.], you cannot decide in favor of the plaintiff without further evidence that the defendant relied on the plaintiff's [membership in a protected class].

AMERICAN BAR ASSOCIATION, SECTION ON LITIGATION, EMPLOYMENT AND LABOR RELATIONS COMMITTEE, MODEL JURY INSTRUCTIONS 1.02[3][a] (1994).

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

121. *Id.* at 2753 (alteration in original) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 805 (1973)).

Thus, mere pretext is insufficient; a showing of racial discrimination is required.

The Court clearly distinguished pretext from “pretext for discrimination,” noting that “‘pretext’ means . . . ‘pretext for the sort of discrimination prohibited by [Title VII].’”¹²² “It is not enough, in other words, to *disbelieve* the employer; the factfinder must *believe* the plaintiff’s explanation of intentional discrimination.”¹²³ It is impossible to manipulate these statements to suggest that mere pretext is sufficient to compel judgment for an employee. Moreover, “the ultimate question [is] discrimination *vel non*,”¹²⁴ not pretext *vel non*.

The majority’s adoption of a pretext-plus requirement would be uncontroverted, except in one part of the majority’s opinion the Court said:

The factfinder’s disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the *prima facie* case, suffice to show intentional discrimination. Thus, rejection of the defendant’s proffered reasons, will *permit* the trier of fact to infer the ultimate fact of intentional discrimination, and the Court of Appeals was correct when it noted that, upon such rejection, “[n]o additional proof of discrimination is *required*.”¹²⁵

It is tempting to borrow from the majority’s reasoning that *Burdine*’s “dictum contradicts or renders inexplicable numerous other statements.”¹²⁶ Presumably, however, the Court would not repeat a mistake that would lead to erroneous interpretations of its holding. Therefore, the Court must have intended a reading compatible with its pretext-plus comments.

To understand the Court’s intention, one must look to its initial discussion of the *prima facie* case. The Court stated, “Petitioners do not challenge the District Court’s finding that respondent satisfied the *minimal* requirements of such a *prima facie* case.”¹²⁷ The use of the word “minimal” suggests that the Court perceives different degrees of the *prima facie* case. For example, a plaintiff presenting a *prima facie* case of racial discrimination may make only

122. *Id.* at 2752 n.6 (alteration in original) (quoting *McDonnell Douglas*, 411 U.S. at 804). The dissent called this “a halfhearted attempt to rewrite these passages from *McDonnell Douglas*.” *Id.* at 2759 n.5 (Souter, J. dissenting).

123. *Id.* at 2754. This clarifies what a jury must find but, other than requiring more than a showing of mere pretext, the Court does not articulate what evidence will support this finding.

124. *Hicks*, 113 S. Ct. at 2753 (alteration in original).

125. *Id.* at 2749 (alteration in original) (footnote omitted) (quoting *Hicks v. St. Mary’s Honor Ctr.*, 970 F.2d 487, 493 (8th Cir. 1992), *rev’d*, 113 S. Ct. 2742 (1993)).

126. *Id.* at 2752.

127. *Id.* at 2747 (emphasis added).

a minimal showing that (1) the plaintiff was within the protected class; (2) the plaintiff was qualified for the position at issue; (3) the plaintiff suffered adverse employment action; and (4) the position remained open and the employer continued to seek applicants with similar qualifications.¹²⁸ As in *Hicks*, the plaintiff need prove only a few facts to meet this initial burden.¹²⁹ The Court's opinion leaves open the possibility that the employee may prove additional facts, either through the use of direct or indirect evidence, in excess of those required to make the *prima facie* showing.¹³⁰ However, once the employer proffers a legitimate nondiscriminatory reason for its employment action, the presumption raised by the *prima facie* showing "drops from the case."¹³¹ The controversial language in *Hicks*¹³² allows an employee to present and prove enough facts in the *prima facie* showing that, in addition to disproving the employer's asserted reason as pretextual, might reasonably create an inference that the employer intentionally discriminated.

The Ninth Circuit Court of Appeals recently applied this reasoning. In *Wallis v. J.R. Simplot Co.*¹³³ the court affirmed the district court's grant of summary judgment on Title VII and ADEA charges for an employer because, although the plaintiff established a *prima facie* case, the plaintiff did not offer in the *prima facie* case and rebuttal evidence to refute the employer's stated reason that would permit a rational trier of fact to find that the employer intentionally discriminated.¹³⁴

[I]n deciding whether an issue of fact has been created about the credibility of the employer's nondiscriminatory reasons, the district court must look at the evidence supporting the *prima facie* case, as well as the other evidence offered by the plaintiff to rebut the employer's offered reasons. And, in those cases where the *prima facie* case consists of no more than the minimum necessary to create a presumption of discrimination under *McDonnell Douglas*, plaintiff has failed to raise a triable issue of fact.¹³⁵

128. See *Hicks*, 113 S. Ct. at 2747; *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

129. See *Hicks v. St. Mary's Honor Ctr.*, 756 F. Supp. 1244, 1249-50 (E.D. Mo. 1991), *rev'd*, 970 F.2d 487 (8th Cir. 1992), *rev'd*, 113 S. Ct. 2742 (1993).

130. See *Wallis v. J.R. Simplot Co.*, 26 F.3d 885, 889 (9th Cir. 1994) ("In offering a *prima facie* case, of course, a plaintiff may present evidence going far beyond the minimum requirements.").

131. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 255 & n.10 (1981). "In saying that the presumption drops from the case, we do not imply that the trier of fact no longer may consider evidence previously introduced by the plaintiff to establish the *prima facie* case." *Id.* at 255 n.10.

132. See *supra* text accompanying note 125.

133. 26 F.3d 885 (9th Cir. 1994).

134. *Id.* at 892.

135. *Id.* at 890 (discussing *Sischo-Nownejad v. Merced Community College Dist.*, 934 F.2d

Had the employee presented additional evidence in its *prima facie* showing, the employee might have survived the summary judgment motion by proving an inference of intentional discrimination based on the additional evidence presented and the evidence rebutting the employer's proffered reasons.

IV. THE FUNDAMENTAL MISUNDERSTANDING AND RATIONALE

Some criticize the majority opinion of *Hicks*, claiming that its holding effectively destroys an employee's ability to prove a claim of intentional discrimination because the plus analysis requires the employee to present direct evidence.¹³⁶ This criticism represents a fundamental misunderstanding of the purpose of the *McDonnell Douglas* model of proof and the *Hicks* holding.

The court created the *McDonnell Douglas* model of proof because direct evidence of intentional discrimination rarely exists.¹³⁷ The model of proof provides plaintiffs with an opportunity to prove their case by circumstantial evidence. The pretext-plus analysis is consistent with that objective because the "plus" requirement can be satisfied by using circumstantial evidence.¹³⁸ The *McDonnell Douglas* model never required direct evidence of intentional discrimination, and it does not now. Rather than direct evidence of the "plus" factor, *Hicks* requires production of any evidence indicating that it was more likely than not that the employer discriminated on the basis of race or some other proscribed consideration.

The majority held that proof of pretext does not compel judgment for the plaintiff and refined the *McDonnell Douglas* model of proof to employ a pretext-plus test. However, the Court failed to articulate a clear rationale for its decision. Instead, it spent a large portion of the opinion defending its position from the dissent's attacks. Other than relying on precedent, the majority offers little indication of its applied rationale.

Commentators typically identify the pretext-plus position with a politically conservative position.¹³⁹ Justice Scalia, a Reagan appointee, usually expresses a conservative viewpoint, and his opinion in *Hicks* typifies that ideology. *Hicks* is consistent with opinions Scalia wrote while sitting on the Court of Appeals for the District of Columbia Circuit.¹⁴⁰

The majority opinion, however, appears to express more than a simple conservative position. The majority disagrees with the dissent's basic

1104 (9th Cir. 1991).

136. See generally Essary, *supra* note 50, at 387-94.

137. "There will seldom be 'eyewitness' testimony as to the employer's mental processes." United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 716 (1983).

138. But see Lancot, *supra* note 14, at 141.

139. See, e.g., *id.* at 70.

140. See *id.* (citing Carter v. Duncan-Higgins, Ltd., 727 F.2d 1225 (D.C. Cir 1984) (Scalia, J., dissenting)).

assumption that employers act with intentional discrimination. This may reflect a change in the Court's approach to Title VII cases.¹⁴¹ However, the Court more likely determined that it needed to curb abuses of Title VII litigation by those persons Title VII was designed to protect. Because the Court created the *McDonnell Douglas* model, it had jurisdiction to modify its application in order to best enforce the statute.¹⁴²

There have been articles and books in recent years suggesting that employment discrimination laws are ill-equipped to correct the problems faced by minorities.¹⁴³ One of the most controversial is FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS.¹⁴⁴ In this book, Richard Epstein advocates repeal of Title VII. Epstein argues that the present consensus about anti-discrimination principle

focuses too heavily on historic injustices, for which there is no adequate remedy, and too little on the economic and social consequences that are generated by the anti-discrimination laws, especially as they have been shaped and are extended within the American political system. The future and present are being slighted in favor of the past.¹⁴⁵

Epstein's book could be characterized as a "*Modest Proposal*"¹⁴⁶ to encourage supporters of the anti-discriminatory measures to re-evaluate their methods. In the case of Title VII discrimination, the Court apparently has determined that the pretext-only theory allows persons whom the statute is designed to protect to use—or abuse—it to deter employers from taking any

141. See *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981).

142. Furthermore, if Congress disagrees with the Court, it has authority to reverse the Court's position through legislation. See *infra* part VI.

143. See generally THOMAS SOWELL, *CIVIL RIGHTS: RHETORIC OR REALITY* (1984); WALTER E. WILLIAMS, *THE STATE AGAINST BLACKS* (1982); John J. Donohue III, *Is Title VII Efficient?* 134 U. PA. L. REV. 1411 (1986).

144. RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* (1992).

145. *Id.* at 2. The author neither agrees with Epstein nor suggests that the Supreme Court has followed Epstein's direction. Before accepting either Epstein's or Sowell's assertions, one should carefully consider all of the available evidence. For example, the United States Office of Personnel Management recently released the results of a study conducted by labor sociologist Hilary Silver of Brown University. The study, reported to allow for differences in age, education, job performance and other factors, found that blacks in the federal work force are fired at nearly twice the rate of whites. See *Has Subtle Racism Replaced Overt Bias in the Workplace?*, MIAMI HERALD, October 20, 1994, at A1.

146. Jonathan Swift wrote the essay *A Modest Proposal for Preventing the Children of Poor People in Ireland From Being a Burden to Their Parents or Country* in 1729 in response to worsening conditions in Ireland resulting from the potato famine. In this classic satire, Swift proposes in great detail how the overpopulation problem could be solved by having 100,000 one-year old children slaughtered and served as food.

adverse employment action out of fear of being sued.¹⁴⁷ The Court has concluded that the pretext-plus version of the model of proof is the most effective means of protecting victims while preventing abuse. If the consensus is that Title VII does not prevent more subtle forms of discrimination, Congress is the appropriate forum for improvements.¹⁴⁸

V. CRITIQUE OF *MCDONNELL DOUGLAS* ~

Even in its refined form after *Hicks* there still is some question regarding the basic assumptions upon which the *McDonnell Douglas* analysis is based. For example, the presumption of intentional discrimination raised by the prima facie case appears to be based on nothing more than judicial notice.¹⁴⁹

[W]e are willing to presume this largely because we know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons [I]t is more likely than not the employer, who we generally assume acts only with *some* reason, based his decision on an impermissible consideration such as race.¹⁵⁰

Although it may be reasonable to assume that employers act with some reason, this presumption is reasonable only if one also can assume that employees who suffer an adverse employment action will not bring unsubstantiated Title VII actions. If the latter assumption cannot be made, then the former assumption is unwarranted. “The *McDonnell Douglas* presumption is based, not upon the accumulation of experience of the coincidence of one set of facts with another, but upon an ideology which posits that relationship without proof.”¹⁵¹ “*Hicks* threatens the liberal ideology that ‘evil’ prejudices are so deeply enmeshed that, even where they are not proven, they must be presumed.”¹⁵²

Another criticism is that the *McDonnell Douglas* model does not function on a “color-blind” basis.¹⁵³ The statutory language¹⁵⁴ of Title VII protects “any individual,” not just minorities. Furthermore, the Court has stated that Title VII protection is not limited to members of historically or socially disfavored groups.¹⁵⁵ However, the Court did not clarify whether the prima facie case in the *McDonnell Douglas* model must be altered in reverse

147. Excessive damage awards only make this type of abuse more appealing to disgruntled employees. See *Lane v. Hughes Aircraft Co.*, No. BC 075519 consolidated with BC 08355 (Cal. App. Dep’t Super. Ct. 10/24/94) (awarding \$89.6 million on race bias claims).

148. See *infra* section VI.

149. See *supra* note 24 and accompanying text.

150. *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978).

151. Schuman, *supra* note 2, at 86; see also *supra* note 25 and accompanying text.

152. Schuman, *supra* note 2, at 94.

153. See EPSTEIN, *supra* note 144, at 176-78.

154. See *supra* note 5.

155. See *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 280 (1976).

discrimination cases,¹⁵⁶ since it is designed for use by members of protected classes.¹⁵⁷

Several circuit courts have modified the *McDonnell Douglas* model in reverse discrimination cases, holding that the plaintiff raises an inference of racial discrimination only when he satisfies the *McDonnell Douglas* prima facie test *and* presents evidence of background circumstances to support the suspicion that the defendant discriminates against whites.¹⁵⁸ On the other hand, several circuits have held that establishing a prima facie case entitles a reverse discrimination plaintiff to an inference of discrimination.¹⁵⁹

Decisions applying either version in reverse discrimination cases are highly suspect. In *Pilditch v. Board of Education*¹⁶⁰ the court stated: "The notion that all black decision-makers are driven by [discrimination against whites] rests on just the type of stereotype the civil rights laws were designed to prevent from infecting personnel decisions; it would be painfully ironic if those same laws were here used to perpetuate such stereotypes."¹⁶¹ Presumably, the goal of civil rights laws also includes preventing perpetuating the stereotype that whites discriminate against blacks. However, it does not seem possible to square these goals when applying the *McDonnell Douglas* model in reverse discrimination cases, because it is not a color-blind test.

VI. CONGRESSIONAL RESPONSE TO *HICKS*

As the *Hicks* dissent noted:

It is not as though Congress is unaware of our decisions concerning Title VII, and recent experience indicates that Congress is ready to act if we adopt interpretations of this statutory scheme it finds to be mistaken. Congress has taken no action to indicate that we were mistaken in *McDonnell Douglas* and *Burdine*.¹⁶²

156. See *Notari v. Denver Water Dep't*, 971 F.2d 585, 588 (10th Cir. 1992).

157. Indeed, *McDonnell Douglas* "is silent on the question of whether disparate treatment claims could be raised by whites, and if so whether they would be governed by the same sort of rules. But its silence on that critical question speaks volumes." EPSTEIN, *supra* note 144, at 177.

158. See *Harding v. Gray*, 9 F.3d 150, 151 (D.C. Cir. 1993); *Notari* 971 F.2d at 588-89; *Donaghy v. City of Omaha*, 933 F.2d 1448, 1458 (8th Cir. 1991), *cert. denied*, 112 S. Ct. 938 (1992); *Murray v. Thistledown Racing Club, Inc.*, 770 F.2d 63, 67-68 (6th Cir. 1985).

159. See *Pilditch v. Board of Educ.*, 3 F.3d 1113, 1116-17 (7th Cir. 1993), *cert. denied*, 114 S. Ct. 1065 (1994); *Wilson v. Bailey*, 934 F.2d 301, 304 (11th Cir. 1991); *Young v. City of Houston*, 906 F.2d 177, 180 (5th Cir. 1990). See also *McGrath v. Baltimore County Community Colleges*, 1994 WL 118024 (4th Cir. 1994) (unpublished opinion) (holding that plaintiff established a prima facie case of retaliation).

160. 3 F.3d 1113 (7th Cir. 1993), *cert. denied*, 114 S. Ct. 1065 (1994).

161. *Id.* at 1119.

162. *St. Mary's Honor Ctr. v. Hicks*, 113 S. Ct. 2742, 2765-66 (1993) (Souter, J. dissenting)

In the eighteen months since *Hicks* was decided, Congress has taken no action indicating that the majority was mistaken. However, two bills have been introduced that would compel a finding of intentional discrimination upon a showing of mere pretext.¹⁶³

VII. SUMMARY JUDGMENT¹⁶⁴

Hicks certainly will affect pretrial dispositive motions. However, it is unclear whether this benefits employers, employees, or neither.¹⁶⁵ If the employee fails to present a prima facie case, then the employer is entitled to summary judgment.¹⁶⁶ If the employee makes a prima facie showing and the employer fails to offer a legitimate nondiscriminatory reason for the adverse employment action, the employee is entitled to summary judgment.¹⁶⁷ It is at this point that the summary judgment issue becomes more complicated because *Hicks* failed to explain what evidence is required to survive an employer's motion for summary judgment.

When reviewing the standards for summary judgment in discrimination cases, one court offered the following:

[T]he Second Circuit has also expressed an unwillingness to allow "the mere incantation of intent or state of mind . . . [to] operate as a talisman to defeat an otherwise valid [summary judgment] motion." Such an approach . . . would render the summary judgment rule sterile in discrimination cases, where intent is inevitably at issue. In fact, the Second Circuit has flatly stated that "the salutary purposes of summary judgment—avoiding protracted, expensive and harassing trials—apply no less to discrimination cases than to commercial or other areas of litigation." Therefore the courts of this Circuit will not shrink from granting a motion for summary judgment where the non-movant's proof "amounts to no more than speculation and conjecture."¹⁶⁸

(citing Civil Rights Act of 1991, 102 Pub. L. No. 102-166, 105 Stat. 1071).

163. See H.R. 2867, 103rd Cong., 1st Sess. (1993); H.R. 2787, 103rd Cong., 1st Sess. (1993).

164. See generally FED. R. CIV. P. 56.

165. See *Lancot*, *supra* note 14, at 66 (explaining that under the pretext-plus rule, a plaintiff would be unable to survive summary judgment without negating the defendant's proffered reason and affirmatively demonstrating that the real reason was discrimination); *Whitis*, *supra* note 118, at 282 (suggesting that it will be more difficult for defendants to win summary judgment); see also Richard L. Alfred & Michael D. Ricciuti, *Burden of Production and Proof in Employment Discrimination Cases: An Endangered Future for Summary Judgment Motions?* 38 B.B.J. Jan.-Feb. 1994, at 7 (concluding that *Hicks* will make it more difficult for either party to win pretrial dispositive motions).

166. See *Harlston v. McDonnell Douglas Corp.*, 37 F.3d 379, 383 (8th Cir. 1994).

167. Cf. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-03 (1973).

168. *Cianfrano v. Babbitt*, 851 F. Supp. 41, 44-45 (N.D.N.Y. 1994) (alteration in original)

Most of the circuits have addressed the issue of what a plaintiff must do to withstand summary judgment after an employer has proffered legitimate, nondiscriminatory reasons for the adverse employment action. Several circuits have held that an employee must do more than offer evidence that the employer's proffered reasons are a pretext.¹⁶⁹ The First Circuit absolutely

(quoting *Meiri v. Dacon*, 759 F.2d 989, 998 (2d cir.), *cert. denied*, 474 U.S. 829 (1985); *Resource Developers v. Statue of Liberty - Ellis Island Found.*, 926 F.2d 134, 141 (2d Cir. 1991)). In *Cianfrano*, the court held that the plaintiff's evidence of discrimination was, at best, "merely colorable" and granted the defendant's motion for summary judgment. *Id.* at 49-50 (quoting *Anderson*, 477 U.S. at 249).

169. *Goldman v. First Nat'l Bank*, 985 F.2d 1113, 1117 (1st Cir. 1993) (quoting *Connell v. Bank of Boston*, 924 F.2d 1169, 1172 n.3 (1st Cir.), *cert. denied*, 501 U.S. 1218 (1991)); *see also Woods v. Friction Materials*, 30 F.3d 255, 260 (1st Cir. 1994); *McLee v. Chrysler Corp.*, 38 F.3d 67 (2d Cir. 1994) (removing an employment discrimination case by writ of mandamus from a district judge who refused to follow the circuit's pretext-plus rule at the summary judgment stage); *Woroski v. Nashua Corp.*, 31 F.3d 105, 108 (2d Cir. 1994); *LeBlanc v. Great American Ins. Co.*, 6 F.3d 836, 842-43 (1st Cir. 1993) ("In this circuit, we have always required not only 'minimally sufficient evidence of pretext,' but evidence that overall reasonably supports a finding of discriminatory animus." (quoting *Goldman*, 985 F.2d at 1117), *cert. denied*, 114 S. Ct. 1398 (1994)).

The Fourth Circuit appears to adopt the pretext-plus analysis. *See Lofton v. Marsh*, 1994 WL 318787 (4th Cir. July 1, 1994) (unpublished opinion) (holding that the district court correctly observed that in a Title VII case the plaintiff must do more than disprove the defendant's articulated reasons, he must establish that the articulated reasons were a pretext for prohibited discrimination); *Sabry v. Gilbert Sec. Serv., Inc.*, 1994 WL 328278 n.6 (4th Cir. July 11, 1994) (unpublished opinion) (stating that even if the defendant's articulated reasons were shown to be pretextual, judgment for the defendant would be proper because the plaintiff did not carry the ultimate burden of proving that he was terminated on the basis of race or national origin). *See also Bailey v. South Carolina Dep't of Social Serv.*, 851 F. Supp. 219, 221 n.3 (D.S.C. 1993) (interpreting *Hicks* as having "changed the focus of the final prong of the 'shifting burdens' analysis at the summary judgment stage from whether the defendant's proffered reason is pretextual to simply whether the plaintiff can show evidence sufficient for the factfinder to conclude that the defendant's adverse employment decision was wrongfully based on an impermissible factor such as race or gender." (citing *LeBlanc v. Great Am. Ins. Co.*, 6 F.3d 836 (1st [sic] Cir. 1993)).

The Fifth Circuit requires "some proof that age motivated the employer's action, otherwise the law has been converted from one preventing discrimination because of age to one ensuring dismissals only for just cause to all people over 40." *Moore v. Eli Lilly & Co.*, 990 F.2d 812, 816 (5th Cir.) (quoting *Blenkowski v. American Airlines*, 851 F.2d 1503, 1508 n.6 (5th Cir. 1988)), *cert. denied*, 114 S. Ct. 467 (1993). *See also Bodenheimer v. PPG Indus., Inc.*, 5 F.3d 955, 957 (5th Cir. 1993) (holding that plaintiff must prove that "the proffered reasons are not just pretexts, but pretexts for age discrimination"); *Armstrong v. City of Dallas*, 997 F.2d 62, 66-67 (5th Cir. 1993) (concluding that the evidence did not support a finding of pretext on a motion for summary judgment in a racial discrimination case).

The Tenth Circuit has been cited to follow the First, Second and Fifth Circuit. *See Waldron v. SL Industries*, 849 F. Supp. 996, 1004 n.11 (D.N.J. 1994). However, the language of the court is unclear. *See Durham v. Xerox Corp.*, 18 F.3d 836 (10th Cir.) (finding that the plaintiff offered neither direct evidence of intentional discrimination nor sufficient indirect evidence in a reverse discrimination action under § 1981), *cert. denied*, 115 S. Ct. 80 (1994).

rejected the argument that “once evidence of pretext is offered, that evidence along with the prima facie case will at all times shield the plaintiff from adverse summary judgments.”¹⁷⁰ The EEOC advanced this argument in its amicus curiae brief based on the following language in *Hicks*: “The factfinder’s disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination.”¹⁷¹ The court rejected this interpretation of *Hicks*, saying that “the Supreme Court envisioned that some cases exist where a prima facie case and the disbelief of a pretext *could* provide a strong enough inference of actual discrimination to permit the fact-finder to find for the plaintiff.”¹⁷² The court did not “think that the Supreme Court meant to say that such a finding would *always* be permissible.”¹⁷³

On the other hand, plaintiffs in other circuits have successfully argued that once they have “pointed to some evidence discrediting the defendant’s proffered reasons, to survive summary judgment the plaintiff need not also come forward with additional evidence of discrimination beyond his or her prima facie case.”¹⁷⁴ These courts hold that the plaintiff avoids summary

170. *Woods*, 30 F.3d at 260 n.3.

171. *St. Mary’s Honor Ctr. v. Hicks*, 113 S. Ct. 2742, 2749 (1993).

172. *Woods*, 30 F.3d at 260 n.3.

173. *Id.* (emphasis added). In support of its conclusion, the court offered the following hypothetical:

[S]uppose an employee made out a truly barebones prima facie case of age discrimination, and the employer responded that the employee lacked the necessary skills for the job. Suppose also that unrefuted evidence showed that the response was a pretext, because the employer had fired the employee to conceal the employer’s own acts of embezzlement. In such an instance, there would be a prima facie case at the outset and a disbelieved pretext, but we think it plain that no reasonable jury could find age discrimination on such a record.

Id.

174. *Fuentes v. Perskie*, 32 F.3d 759 (3d Cir. 1994) (citing *Anderson v. Baxter Healthcare Corp.*, 13 F.3d 1120 (7th Cir. 1994) (affirming summary judgment for the employer because the employee failed to cast substantial doubt on the employer’s proffered reasons or provide evidence from which a fact finder could reasonably conclude that the employer discriminated on the basis of national origin); *cf. Waldron v. SL Industries, Inc.*, 849 F. Supp. 996, 1004 n.11 (D.N.J. 1994) (citing cases that conclude most of the decisions in the Third Circuit support a pretext-plus analysis).

The Sixth, Seventh, Eighth, and Eleventh Circuits are consistent with the Third Circuit. *See Harvey v. Anheuser-Busch, Inc.*, 38 F.3d 968 (8th Cir. 1994) (affirming summary judgment for the employer because evidence of instances where white employees were allegedly disciplined less severely were not sufficiently similar to the circumstances leading to the plaintiff’s dismissal); *Howard v. BP Oil Co.*, 32 F.3d 520, 525 (11th Cir. 1994) (reversing a grant of summary judgment in a § 1981 race discrimination suit); *Manzer v. Diamond Shamrock Chems. Co.*, 29 F.3d 1078 (6th Cir. 1994) (affirming denial of a directed verdict for the employer in an age discrimination case); *Gaworski v. ITT Commercial Fin. Corp.*, 17 F.3d 1104, 1109 (8th Cir.)

judgment because he has raised a genuine issue of material fact regarding the employer's proffered reasons.¹⁷⁵

After *Hicks* it should be clear that a plaintiff must do more than demonstrate mere pretext. After the employer has proffered its legitimate nondiscriminatory reason for discharging an employee, the trial judge must consider the quantum of evidence to determine whether a fact finder could reasonably find "both that the reason was false, and that discrimination was the real reason."¹⁷⁶ Therefore, the plaintiff must offer additional evidence, direct or circumstantial, that the employer discriminated.¹⁷⁷

VIII. APPLICATION OF *HICKS* IN THE FEDERAL COURTS

Although the Court made it clear that it is "not enough . . . to disbelieve the employer,"¹⁷⁸ the circuits are split as to the quantum of evidence required for the plaintiff to prove its case. Even though a circuit court may require only a showing of mere pretext at the summary judgment level, that level of production is not sufficient for the plaintiff to meet its ultimate burden of proving intentional discrimination.

Several circuits appear to adopt the pretext-plus rule based on *Hicks*. For example, after noting that the plaintiff had demonstrated the employer's proffered reason was false and offered other evidence of her retaliatory discharge, the Second Circuit Court of Appeals stated that "had the district court stopped its analysis short of this point and reached its conclusion that [the plaintiff] was subjected to retaliatory discharge based simply on her

(affirming a judgment for the plaintiff in an age discrimination suit), *cert. denied*, 115 S. Ct. 355 (1994); *Anderson v. Baxter Healthcare Corp.*, 13 F.3d 1120, 1123-24 (7th Cir. 1994) (affirming the district court's holding that the plaintiff failed to show pretext in an age discrimination case).

The Ninth Circuit's position is unclear. *Compare* *Washington v. Garrett*, 10 F.3d 1421, 1433 (9th Cir. 1993) (finding that once a plaintiff proves a prima facie case and raises a genuine issue as to the verity of the employer's proffered reason, such an issue cannot be resolved on summary judgment) *with* *Wallis v. J.R. Simplot Co.*, 26 F.3d 885, 890 (9th Cir. 1994) (stating that when evidence of pretext is lacking, summary judgment is appropriate even though plaintiff may have established a minimal prima facie case).

175. However, "a party may not create a genuine issue of fact in response to a summary judgment motion by filing an affidavit that contradicts earlier deposition testimony." *King v. Virginia Employment Comm'n*, No. 93-1619, 1994 WL 416439 (4th Cir. Aug. 10, 1994) (per curiam) (unpublished opinion) (citations omitted); *Rohrbough v. Wyeth Lab., Inc.*, 916 F.2d 970, 976 (4th Cir. 1990); *cf. Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986) (recognizing that "the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment").

176. *St. Mary's Honor Ctr. v. Hicks*, 113 S. Ct. 2742, 2752 (1993).

177. In *Hicks* the majority held that a plaintiff can prove its case by showing that the employer's proffered reason was unworthy of credence. However, this rule applies only where the plaintiff already has introduced other evidence suggesting that the employer discriminated.

178. *Id.* at 2754.

demonstration that the defendants' excuse was false, we would have been forced to vacate the judgment and remand in light of *Hicks*.¹⁷⁹ Several other courts have adopted this approach.¹⁸⁰

The Sixth Circuit recently concluded that *Hicks* rejected both the pretext-only and pretext-plus rules.¹⁸¹ To raise an issue of fact regarding the credibility of the employer's explanation, "the plaintiff is 'required to show by a preponderance of the evidence either (1) that the proffered reasons had no basis *in fact*, (2) that the proffered reasons did not *actually* motivate his discharge, or (3) that they were *insufficient* to motivate discharge.'"¹⁸² The first requires "evidence that the proffered bases for the plaintiff's discharge never happened."¹⁸³ The third generally requires evidence that similarly situated employees outside the protected class were treated more favorably.¹⁸⁴ For the second, "the plaintiff argues that the sheer weight of the circumstantial evidence of discrimination makes it 'more likely than not' that

179. *Saulpaugh v. Monroe Community Hosp.*, 4 F.3d 134, 141 (2d Cir. 1993), *cert. denied*, 114 S. Ct. 1189 (1994).

180. *See* *Lofton v. Marsh*, 1994 WL 318787 (4th Cir. July 1, 1994) (unpublished opinion) (holding that the district court correctly observed that in a Title VII case the plaintiff must do more than disprove the defendant's articulated reasons, he must establish that the articulated reasons were a pretext for prohibited discrimination); *Sabry v. Gilbert Sec. Serv., Inc.*, 1994 WL 328278 n.6 (4th Cir. July 11, 1994) (unpublished opinion) (stating that even if the defendant's articulated reasons were shown to be pretextual, judgment for the defendant would be proper because the plaintiff did not carry the ultimate burden of proving that he was terminated on the basis of race or national origin); *Maness v. Star-Kist Foods, Inc.*, 7 F.3d 704, 707-08 (8th Cir. 1993), *cert. denied*, 114 S.Ct. 2678 (1994) (stating that after the employer rebuts the prima facie case, "discussion . . . relating to the prima facie case, non-discriminatory reasons and pretext are immaterial at this stage, we consider these arguments only insofar as they may illuminate the general question of whether retaliation or discrimination has been established." (citation omitted)); *Moham v. Steego Corp.*, 3 F.3d 873, 875 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 1307 (1994) (concluding that rejection of the employer's reason is not a finding of intentional discrimination); *Pilditch v. Board of Educ.*, 3 F.3d 1113, 1117-18 (7th Cir. 1993), *cert. denied*, 114 S. Ct. 1065 (1994) (holding that beyond proving "the reasons proffered by the employer as fake . . . [the employee] must also prove that the true reason for his firing was discriminatory." (citing *Hicks*, 113 S. Ct. at 2742)); *Card v. Hercules Inc.*, No. 92-4169, 1993 WL 351337, at *5-6 (10th Cir. Aug. 19, 1993); *EEOC v. Flasher Co.*, 986 F.2d 1312, 1319-20 (10th Cir. 1992); *Lapieere v. Benson Nissan, Inc.*, No. 92-3855, 1994 WL 149077, at *6-7 (mem.) (E.D. La. April 18, 1994); *Nelms v. Ross Stores, Inc.*, 1994 WL 241755 (M.D.N.C. 1994); *Bailey v. South Carolina Dep't of Social Services*, 851 F. Supp. 219 (D.S.C. 1993); *EEOC v. Louisiana Dep't of Social Servs.*, No. 91-4369, 1993 WL 408354, at *5-6 (E.D. La. Oct. 7, 1993); *EEOC v. MCI Int'l, Inc.*, 829 F. Supp. 1438, 1450-51 (D.N.J. 1993); *Elmore v. Capstank, Inc.*, No. 9204004, 1993 WL 290259, at *11-12 (mem.) (D. Kan. July 8, 1993); *Wright v. Office of Mental Health*, No. 92-0674, 1993 WL 267279, at *19 n.9 (S.D.N.Y. July 12, 1993).

181. *See* *Manzer v. Diamond Shamrock Chems. Co.*, 29 F.3d 1078, 1083 (6th Cir. 1994).

182. *Id.* at 1084 (quoting *McNabola v. Chicago Transit Auth.*, 10 F.3d 501, 513 (7th Cir. 1993)).

183. *Id.*

184. *Id.*

the employer's explanation is a pretext, or coverup."¹⁸⁵ To make this type of showing, the court held, "the plaintiff may not rely simply upon his prima facie evidence but must, instead, introduce additional evidence of age discrimination."¹⁸⁶ Each of these alternatives requires additional evidence that creates an inference of intentional discrimination. Therefore, although the court claims to be following *Hicks* rather than its prior pretext-plus approach, this still is essentially a pretext-plus analysis.¹⁸⁷

IX. CONCLUSION

The majority in *Hicks* adopted a pretext-plus analysis. Although the Court did not use this name, the language of the opinion supports this conclusion. "Intuitively, it makes sense that the plaintiff should have to prove that the defendant committed the action(s) upon which the complaint is based."¹⁸⁸ Although the Court attempted to resolve the dispute as to the final stage of the *McDonnell Douglas* model, liberal commentators and judges persist in twisting the words of the opinion to advocate a lighter standard of proof for plaintiffs. The *Hicks* version of pretext-plus analysis provides the best means of protecting Title VII victims while preventing the use of Title VII as a "shield"¹⁸⁹ against every adverse employment decision.

185. *Id.*

186. 29 F.3d at 1084.

187. *But see id.* at 1082-83; *Kline v. Tennessee Valley Auth.*, No. 92-5919, 1993 WL 288280, at *5 (6th Cir. July 29, 1993) (per curiam).

188. Howard E. Berkenblit, Survey, *The Burden of Proof in Title VII Disparate Treatment Actions: St. Mary's Honor Center v. Hicks*, 35 B.C. L. REV. 472, 483 (1994) (citing *St. Mary's Honor Ctr. v. Hicks*, 113 S. Ct).

189. *Supra* note 14 and accompanying text.

