A More Employee-Friendly Standard for Pretext Claims After *Ash v. Tyson*

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I. Introduction

A recent Gallup Poll reported that fifteen percent of American workers claim their employers discriminated against them during a one-year period spanning from 2004 to 2005.[1] The most frequent type of discrimination occurred in promotion decisions, which comprised thirty-three percent of the total reported incidents.[2] Employment discrimination cases are also the largest single category of federal civil cases, comprising nearly ten percent of the total federal civil docket.[3] Congress enacted Title VII of the Civil Rights Act in 1964 to combat employment discrimination and to make the victims of discrimination whole through compensation.[4] The Supreme Court has recognized that employment discrimination cases implicate personal and societal interests by promoting "efficient and trustworthy workmanship . . . through fair and . . . neutral employment and personnel decisions."[5] The Court has also recognized that Title VII furthers these interests by helping to eliminate the vestiges of this country's history of discrimination.[6] Under Title VII, employers are not under any obligation to make perfect decisions or to make decisions with which others agree.[7] Nor are they required to give women or minorities preferential treatment.[8] Rather, an employer is free to choose among all qualified applicants so long as it does not base its decision on unlawful discriminatory criteria.[9]

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[1] Amy Joyce, *The Bias Breakdown: Asians and Blacks Lead in Perceived Discrimination at Work*, Wash. Post, Dec. 9, 2005, at D1.

[2] *Id.* at D3. According to the Gallup Poll, pay discrimination was the next most common form of discrimination, comprising twenty-nine percent of the total reported incidents. The Poll also reported that employers are most likely to discriminate based on sex (twenty-six percent), followed by race (twenty-three percent), and age (seventeen percent). *Id.*

[3] Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. Empirical Legal Stud. 429, 429 (2004).

[4] Albemarle Paper Co. v. Moody, 422 U.S. 405, 417-18 (1975).

[5] McDonnell Douglas Corp. v. Green, 411 U.S. 792, 801 (1973).

[6] *Albemarle*, 422 U.S. at 418.

[7] Hartsel v. Keys, 87 F.3d 795, 801 (6th Cir. 1996).

[8] Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 259 (1981).

[9] *Id.*

A plaintiff may attempt to prove his employer engaged in unlawful discrimination in a promotion decision by showing that his employer's articulated reasons for not promoting the plaintiff were pretextual. The plaintiff may use a number of methods to achieve this goal, including presenting evidence that the plaintiff had superior qualifications for the position or presenting evidence of the employer's past treatment of the plaintiff, such as past instances of discrimination.[10] Plaintiffs are not limited to these methods of proof and are not required to demonstrate they were more qualified than the individuals chosen, so long as they show they met the minimum qualifications for the position at issue.[11] However, federal courts have held plaintiffs to differing standards in pretext cases founded on superior qualifications, and the Supreme Court has declined to articulate precisely what standard should govern these claims.[12]

This Note will utilize the recent United States Supreme Court case, *Ash v. Tyson Foods, Inc.*, to develop a precise standard for courts to use in dealing with pretext claims based in failure to promote cases. Part II will discuss the development of employment discrimination law in the context of failure to promote cases. Part III will outline the facts, holdings, and rationales used and rejected by the Supreme Court in *Ash*. Part IV will discuss the strengths and weaknesses of the various standards of proof that the circuit courts have required plaintiffs to satisfy. Finally, Part IV will suggest a standard for plaintiffs to prove pretext in failure to promote cases and explain why a uniform standard is so critical.

II. Historical Development of Law Regarding Failure to Promote Claims

Under Title VII of the Civil Rights Act, it is unlawful for an employer 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."[13] This statute prohibits discrimination based on any of the enumerated characteristics in any employment decision.[14] In 1973, the Supreme Court articulated a burden-shifting process that an employee plaintiff could use when lacking direct evidence of discrimination by an employer.[15] However, since that time, the Court has handed down several decisions making it more difficult for employee plaintiffs to prove their case, particularly in situations where a plaintiff alleges that his employer's articulated reasons for an adverse employment action were pretextual.[16]

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[10] Patterson v. McLean Credit Union, 491 U.S. 164, 187-88 (1989), *superseded on other grounds by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, § 101(2), 105 Stat. 1071, 1071-72 (codified at 42 U.S.C. § 1981(b) (2000)).

[11] *Id.* at 186.

[12] Ash v. Tyson Foods, Inc., 546 U.S. 454, 457-58 (2006) (per curiam).

[13] 42 U.S.C. § 2000e-2(a)(1) (2000).

[14] McDonnell Douglas Corp. v. Green, 411 U.S. 792, 796 (1973).

[15] *Id.* at 802-04.

[16] *See infra* Part II.B-C.

A. *The* McDonnell Douglas *Burden-Shifting Process*

To succeed on his claim of individual disparate treatment, a plaintiff must prove his employer acted with a discriminatory intent.[17] A plaintiff who is unable to provide direct evidence of discrimination by the employer may use the burden-shifting approach set forth by the Supreme Court in *McDonnell Douglas Corp. v. Green*.[18] Under this approach, a plaintiff may establish a prima facie case of employment discrimination in a failure to promote case by showing that he (1) was a member of a protected class; (2) was qualified and applied for a promotion; (3) was rejected for the promotion; and (4) the position remained open and the employer continued to seek applicants with the same qualifications as the plaintiff.[19] A court will only require a plaintiff to make a minimal showing at this stage in the proceedings.[20]

If the plaintiff succeeds in establishing a prima facie case, he creates a presumption of discrimination, and the burden shifts to the employer to produce a legitimate nondiscriminatory reason for its failure to promote decision.[21] If the employer succeeds in providing a nondiscriminatory reason, it rebuts the presumption of discrimination and the burden shifts once again to the plaintiff.[22]

The plaintiff must then show that a discriminatory reason at least partially motivated the employer's decision[23] or that the employer's articulated nondiscriminatory reason was pretextual.[24] Courts should then focus on whether discrimination is inferable from a combination of the plaintiff's prima facie case, the plaintiff's evidence attacking the employer's claimed reasons for the decision, any other evidence provided by the plaintiff, and any contrary evidence provided by the employer.[25] The plaintiff retains the burden of persuasion throughout the burden-shifting process.[26]

B. *The Plaintiff's Difficult Task of Proving Pretext*

Although *McDonnell Douglas* was a Title VII case involving an employer's failure to rehire,[27] courts have adapted its framework to fit different

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[17] Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977).

[18] *McDonnell Douglas*, 411 U.S. at 802-04.

[19] Petrosino v. Bell Atl., 385 F.3d 210, 226 (2d Cir. 2004); *see also McDonnell Douglas*, 411 U.S. at 802. Some courts have an additional fifth element—that the employer promoted equally or less qualified applicants not belonging to the protected group instead of the plaintiff. Eddie Kirtley, Comment, *Where's Einstein When You Need Him? Assessing the Role of Relative Qualifications in a Plaintiff's Case of Failure-to-Promote Under Title VII*, 60 U. MIAMI L. REV. 365, 368 & n.13 (2006) (citing Perryman v. Johnson Prods. Co., 698 F.2d 1138, 1142 n.7 (11th Cir. 1983)).

[20] Howley v. Town of Stratford, 217 F.3d 141, 150 (2d Cir. 2000).

[21] Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 143 (2000).

[22] Gonzalez v. City of New York, 354 F. Supp. 2d 327, 334 (S.D.N.Y. 2005).

[23] 42 U.S.C. § 2000e-2(m) (2000); *see, e.g.*, Dominguez-Curry v. Nev. Transp. Dep't, 424 F.3d 1027, 1031 (9th Cir. 2005); Strate v. Midwest Bankcentre, Inc., 398 F.3d 1011, 1019 (8th Cir. 2005); Roberson v. Alltel Info. Servs., 373 F.3d 647, 652 (5th Cir. 2004); Bellaver v. Quanex Corp., 200 F.3d 485, 492 (7th Cir. 2000).

[24] *McDonnell Douglas*, 411 U.S. at 798.

[25] Aka v. Wash. Hosp. Ctr., 156 F.3d 1284, 1290 (D.C. Cir. 1998) (en banc).

[26] Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981).

[27] *McDonnell Douglas*, 411 U.S. at 796.

types of disparate treatment claims, including failure to promote,[28] unlawful discharge,[29] retaliation,[30] harassment,[31] and even claims under different statutes.[32] The purpose of the prima facie case is to force employers to produce evidence of nondiscriminatory reasons for their employment decisions because direct evidence of intentional discrimination is rare and difficult for plaintiffs to obtain.[33] Indeed, laws against employment discrimination would be virtually useless if courts required plaintiffs to produce direct evidence of discrimination.[34] Often, the evidence needed by the plaintiff is proof of what occurred in the mental processes of the employer's decisionmaker, of which there will be no direct evidence.[35] Consequently, Title VII plaintiffs must usually rely on circumstantial evidence to satisfy their burden of persuasion.[36] Courts should be hesitant to resolve an employment discrimination case at the summary judgment stage because an employer's intent is typically in dispute.[37] Thus, it is more appropriate for these types of cases to be decided after the factfinder has had the opportunity to hear all the evidence and assess the credibility of each side.

However, the fact that an employer's stated reason for an employment decision was false does not always lead to the conclusion that the employer acted discriminatorily.[38] An employer may offer false reasons for its decision to cover up an embarrassing, but legal, motive or to help motivate an unsatis-

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[28] Brown v. Coach Stores, Inc., 163 F.3d 706, 710 (2d Cir. 1998) (holding that plaintiff was required to allege that she had applied for a specific position in order to establish a prima facie case for a failure to promote claim).

[29] Swierkiewicz v. Sorema N.A., 534 U.S. 506, 509 (2002) (finding that plaintiff who alleged he had been terminated due to his national origin and his age, and who detailed the events surrounding his termination and included the ages and nationalities of the individuals involved in his termination, stated a cause of action under both Title VII and the ADEA, even though his complaint failed to allege facts constituting a prima facie case).

[30] Johnson v. Univ. of Cincinnati, 215 F.3d 561, 578 (6th Cir. 2000) (applying *McDonnell Douglas* framework where the plaintiff alleged he had been fired in retaliation for defending his employer's affirmative action policy).

[31] Patterson v. McLean Credit Union, 491 U.S. 164, 185-87 (1989) (applying *McDonnell Douglas* framework where the plaintiff claimed that her employer had harassed, failed to promote, and discharged her because of her race), *superseded on other grounds by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, § 101(2), 105 Stat. 1071, 1071-72 (codified at 42 U.S.C. § 1981(b) (2000)).

[32] Courts have also applied the *McDonnell Douglas* burden-shifting framework to claims under the Age Discrimination in Employment Act, 29 U.S.C. § 623 (2000). *See, e.g.*, Byrnie v. Town of Cromwell, Bd. of Educ., 243 F.3d 93, 101 (2d Cir. 2001). It has been applied to racial discrimination claims under 42 U.S.C. § 1981 as well. *See, e.g.*, *Patterson*, 491 U.S. at 186.

[33] Price Waterhouse v. Hopkins, 490 U.S. 228, 271 (1989) (O'Connor, J., concurring), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, § 107, 105 Stat. 1071, 1075 (codified at 42 U.S.C. § 2000e-2 (2000)); Rhodes v. Guiberson Oil Tools, 75 F.3d 989, 993 (5th Cir. 1996) (en banc), *abrogated on other grounds by* Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133 (2000).

[34] Marzano v. Computer Sci. Corp., 91 F.3d 497, 507 (3d Cir. 1996).

[35] U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 716 (1983).

[36] *Rhodes*, 75 F.3d at 993.

[37] Chertkova v. Conn. Gen. Life Ins. Co., 92 F.3d 81, 87 (2d Cir. 1996).

[38] Fisher v. Vassar Coll., 114 F.3d 1332, 1337-38 (2d Cir. 1997), *abrogated on other grounds by Reeves*, 530 U.S. 133.

factory employee to improve his performance.[39] The factfinder may conclude that a reason left unarticulated by the employer was the true reason behind the employment decision, even though the plaintiff did not have an opportunity to rebut the reason due to the employer's failure to articulate it during the earlier proceedings.[40] However, because the employer is in the best position to give the true reason for its decision, a factfinder is entitled, though not required, to find that an employer's articulation of false reasons is actually a cover up for a discriminatory motive.[41] This is consistent with the general evidentiary principle that when a party is dishonest about a material fact, the factfinder may take it as affirmative evidence of the party's guilt.[42]

Because an employer defending against a claim of discrimination is facing potentially large compensatory and punitive damage payouts, some commentators have expressed concern that employers will nearly always produce a nondiscriminatory reason for their decision, even if it was not the actual motivation.[43] Furthermore, because the employer is only required to produce an explanation of a nondiscriminatory purpose behind its decision and is not required to produce evidence of the reason for its actions, the burden on employers is so light that they will almost always prevail unless they remain silent.[44] Justice Souter has criticized this effect of the current law on employers, pointing out that it allows employers who are "caught in a lie" to win by asserting a previously unarticulated nondiscriminatory reason for their decision at trial and, thus, gain a reward for their dishonesty.[45]

C. Supreme Court Precedent Regarding Pretext Claims

In 1986, the Supreme Court handed down three decisions that indicated it would hold plaintiffs to a higher standard of proof than it had previously.[46] In *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*,[47] *Anderson v. Liberty Lobby, Inc.*,[48] and *Celotex Corp. v. Catrett*,[49] the Court heightened the standard

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[39] *See* Mark S. Brodin, *The Demise of Circumstantial Proof in Employment Discrimination Litigation:* St. Mary's Honor Ctr. v. Hicks*, Pretext, and the "Personality" Excuse*, 18 BERKELEY J. EMP. & LAB. L. 183, 201 (1997).

[40] St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 508 (1993).

[41] Olsen v. Marshall & Ilsley Corp., 267 F.3d 597, 601 (7th Cir. 2001).

[42] Wright v. West, 505 U.S. 277, 296 (1992) (plurality opinion).

[43] *See* Alex Long, *The Disconnect Between At-Will Employment and Tortious Interference with Business Relations: Rethinking Tortious Interference Claims in the Employment Context*, 33 ARIZ. ST. L.J. 491, 520 (2001); Brent L. Ryman, Comment, *Lame Duck Precedent: A Comment on the Summary Judgment Framework for Disparate Treatment Cases After* Reeves v. Sanderson Plumbing Products, Inc., 71 U. CIN. L. REV. 669, 689 (2002).

[44] Stefanie Vines Efrati, Note, *Between Pretext Plus and Pretext Only: Shouldering the Effects of Pretext on Employment Discrimination After* St. Mary's Honor Center v. Hicks *and* Fisher v. Vassar College, 75 CHI.-KENT L. REV. 153, 162-63 (1999) (discussing the defendant's burden of proof in employment discrimination cases as set out in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981)).

[45] *St. Mary's*, 509 U.S. at 540 n.13, 543 (Souter, J., dissenting).

[46] Ann C. McGinley, *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 B.C. L. REV. 203, 206 (1993).

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

[48] Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).

[49] Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

employee plaintiffs would have to satisfy in order to avoid summary judgment in favor of the defendant employer, thus indicating a trend towards a more defendant-friendly standard.[50] Lower courts began to grant summary judgment in favor of defendants more often in cases where plaintiffs had claims that appeared weak or potentially unsuccessful, even when there were still questions of fact regarding the employer's motive that should have been resolved at trial.[51] The Supreme Court's 1989 decision in *Patterson v. McLean Credit Union*[52] compounded the problems employee plaintiffs faced. There, the Court announced that plaintiffs alleging racial discrimination by their employer could not seek damages under 42 U.S.C. § 1981,[53] a statute under which many Title VII plaintiffs alleging racial discrimination sue as well.

In response to these cases, Congress passed the Civil Rights Act of 1991, which clarified that civil rights plaintiffs have a right to demand a jury trial and explicitly stated that employment discrimination plaintiffs could sue for compensatory and punitive damage awards.[54] Congress passed the Act "to provide adequate protection to victims of discrimination."[55] Commentators hailed the new Act, believing it manifested Congress's intent to make litigation easier for employment discrimination plaintiffs because the practical effects of the Act were to increase financial awards for plaintiffs, make litigation cost control more difficult for employers, and make employment discrimination trials more difficult for employers to win.[56]

The Supreme Court has not required evidence of relative qualifications for a plaintiff to establish a prima facie case of discriminatory failure to promote.[57] Because employers make promotion decisions using many criteria and an employee may not know which criteria were most important to the employer, it is difficult for plaintiffs to show they are more qualified than the individual chosen.[58] Employer explanations for hiring or promotion decisions that are based on subjective considerations deserve closer scrutiny than decisions based on objective considerations because the individual selected for hire or promotion will usually be superior to the plaintiff in at least one subjective criterion.[59]

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[50] McGinley, *supra* note 46, at 207.

[51] *Id.* at 208.

[52] Patterson v. McLean Credit Union, 491 U.S. 164 (1989), *superseded on other grounds by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, § 101(2), 105 Stat. 1071, 1071-72 (codified at 42 U.S.C. § 1981(b) (2000)).

[53] *Id.* at 188-89.

[54] Civil Rights Act of 1991, Pub. L. No. 102-166, § 102, 105 Stat. 1071, 1072-73 (codified at 42 U.S.C. § 1981a (2000)); *see also* Tracy L. Bach, Note, *Gender Stereotyping in Employment Discrimination: Finding a Balance of Evidence and Causation Under Title VII*, 77 MINN. L. REV. 1251, 1267 n.75 (1993) (discussing the various effects of the Civil Rights Act of 1991 on the Civil Rights Act of 1964 and 42 U.S.C. § 1981).

[55] Landgraf v. USI Film Prods., 511 U.S. 244, 250 (1994).

[56] Thomas J. Piskorski & Michael A. Warner, *The Civil Rights Act of 1991: Overview and Analysis*, 8 LAB. LAW. 9, 17 (1992).

[57] Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 257 (1981).

[58] Anne Lawton, *The Meritocracy Myth and the Illusion of Equal Employment Opportunity*, 85 MINN. L. REV. 587, 645 (2000).

[59] Aka v. Wash. Hosp. Ctr., 156 F.3d 1284, 1298-99 (D.C. Cir. 1998) (en banc) (holding that summary judgment to employer was error where employer claimed that plaintiff was not chosen for a position because he failed to display enthusiasm for the job but was signifi-

This allows employers to simply point to this criterion and claim they chose someone else over the plaintiff because that person was superior in one particular area, even though that area may not have been that important to the employer.[60]

Accordingly, a plaintiff is not required to prove he was better qualified than the individual actually chosen for the promotion in order to prevail.[61] Rather, a plaintiff may prove that an employer's reasons for hiring another individual instead of the plaintiff were pretextual by presenting evidence of the employer's previous treatment of the plaintiff, company policy and practice, statistical data regarding minority employment, procedural abnormalities that indicate manipulation of hiring criteria, or the employer's use of subjective criteria in the hiring decision.[62] It is not easy for a plaintiff to prove that his employer's stated legitimate nondiscriminatory reasons are false.[63] The employer will presumably tailor the reasons it gives to fit the circumstances of the particular case, and the employer's legal counsel will vigorously defend those reasons.[64] Even when discrimination by the employer has occurred, the employer will often combine it with bad management or generally poor treatment of employees that although unwise, is not illegal.[65]

Thus, it follows that when a plaintiff successfully discredits her employer's proffered reason for its failure to promote decision, this is deserving of considerable weight.[66] Such a showing does not compel judgment for the plaintiff,[67] although at least one commentator believes that it should always defeat a directed verdict against the plaintiff and generally should produce a verdict for the plaintiff.[68] In situations where an employer has an established record of equal opportunity employment, the discriminatory inference arising

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cantly more qualified than the individual chosen for the position); *see also* Fischbach v. D.C. Dep't of Corr., 86 F.3d 1180, 1183 (D.C. Cir. 1996) (holding that an interviewing panel's claim that it preferred one applicant's answers to another applicant's answers was insufficient to indicate that it was a pretext for racial discrimination).

[60] Kirtley, *supra* note 19, at 387.

[61] Patterson v. McLean Credit Union, 491 U.S. 164, 187-88 (1989), *superseded on other grounds by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, § 101(2), 105 Stat. 1071, 1071-72 (codified at 42 U.S.C. § 1981(b) (2000)).

[62] Jaramillo v. Colo. Judicial Dep't, 427 F.3d 1303, 1308 (10th Cir. 2005) (per curiam).

[63] Henry L. Chambers, Jr., *Discrimination, Plain and Simple*, 36 TULSA L.J. 557, 573 (2001).

[64] *Id.*

[65] *See, e.g.*, EEOC v. Flasher Co., 986 F.2d 1312, 1319 (10th Cir. 1992) (opining that Title VII does not prohibit unexplained differences in treatment of employees even if those decisions are inconsistent or irrational); DeLuca v. Allied Domecq Quick Serv. Rests., No. 03-CV-5142, 2006 U.S. Dist. LEXIS 39261, at *27 (E.D.N.Y. June 13, 2006) (stating that an employer may subject an employee to an adverse employment action "for a good reason, a bad reason, a reason based on erroneous facts, or for no reason at all, as long as its action is not for a discriminatory reason"); Pennington v. City of Huntsville, 93 F. Supp. 2d 1201, 1214-15 (N.D. Ala. 2000) (finding that imposing conditions on an African American candidate's promotion while failing to subject Caucasian candidates to the same conditions was unwise, but not sufficient to support a Title VII claim against the employer because the additional conditions were related to the candidate's job performance).

[66] St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 511 (1993).

[67] *Id.*

[68] Chambers, *supra* note 63, at 573.

from the discrediting of the employer's stated explanation may not always be strong enough to lead a reasonable factfinder to conclude discrimination has occurred.[69]

Some courts may use their power to assign the burdens of production and persuasion to the parties in ways that favor a particular, desired outcome when they do not agree with the substantive theory of liability chosen by the plaintiff in the case.[70] This may result in a just outcome in a particular case, but more often, the effect is confusing language regarding the standard of proof and strained logic in judicial opinions.[71] With courts holding employment discrimination plaintiffs to so many different standards in pretext cases, the question arose of what the proper standard was. In *Ash v. Tyson*, the Supreme Court addressed this question but did not answer it.

III. *ASH V. TYSON*

In *Ash v. Tyson*, two male African American superintendents at a poultry plant applied for promotions to shift manager positions.[72] Their employer, Tyson Foods, promoted two Caucasian males for the positions instead.[73] The two African American men sued Tyson, claiming they were better qualified for the positions than the Caucasian men who received the promotions were and alleging racial discrimination under Title VII of the Civil Rights Act and 42 U.S.C. § 1981.[74]

The plaintiffs claimed that Tyson's reasons for not promoting them were pretextual for eight reasons. First, the company's answers as to why it did not promote the plaintiffs changed over time.[75] Second, management used qualifications not required by company policy to keep the plaintiffs from receiving the promotions.[76] Third, the company only checked references for African American applicants.[77] Fourth, the company lied about a college degree requirement for the positions.[78] Fifth, the company offered the promotion to a Caucasian man before interviewing the second plaintiff.[79] Sixth, the company's management handpicked a Caucasian man for the shift manager position after telling the plaintiffs that Tyson would hold the position open before making a promo-

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[69] Aka v. Wash. Hosp. Ctr., 156 F.3d 1284, 1291 (D.C. Cir. 1998) (en banc) (citing an example given in *St. Mary's*, 509 U.S. at 513, of a situation where a hiring officer and forty percent of the workforce are members of the plaintiff's minority group but that group makes up only ten percent of the labor market, and opining that in such a situation, any inference resulting from the plaintiff's discrediting of the employer's stated reasons for its decision will be weak).

[70] Robert Belton, *Burdens of Pleading and Proof in Discrimination Cases: Toward a Theory of Procedural Justice*, 34 VAND. L. REV. 1205, 1209-10 (1981).

[71] *Id.* at 1210.

[72] Ash v. Tyson Foods, Inc., 546 U.S. 454, 455 (2006) (per curiam).

[73] *Id.*

[74] *Id.*

[75] Ash v. Tyson Foods, Inc., 129 F. App'x 529, 531 (11th Cir. 2005) (per curiam).

[76] *Id.*

[77] *Id.*

[78] *Id.*

[79] *Id.*

tion decision.[80] Seventh, there was no proof that the plant was losing money while the plaintiffs were superintendents there, despite the company's claims to the contrary.[81] The final reason was that management made the decision in an atmosphere where they treated African Americans differently.[82] This unequal treatment included exhibiting a cold demeanor towards the plaintiffs and referring to them as "boys."[83]

The United States District Court for the Northern District of Alabama held a jury trial on the matter.[84] At trial, the plaintiffs presented evidence of a Tyson job summary that listed three to five years experience among the requirements for the shift manager position.[85] One of the Caucasian men promoted to shift manager instead of the plaintiffs had worked for Tyson for less than two years.[86] The plaintiffs also introduced evidence of Tyson's personnel policy, which stated that employees within the department should receive promotions created by vacancies whenever possible.[87] Both plaintiffs applied for promotions within their department, but one of the Caucasian men promoted did not even work in the same complex of the plant.[88] The plaintiffs also presented evidence of another Tyson personnel policy, which stated that promotion was one of the rights and benefits that came with established seniority within the company.[89] One plaintiff had worked at the Tyson plant for thirteen years and the other for fifteen years, while the Caucasian man who got the promotion had worked at the plant for less than two years.[90] Tyson moved for judgment as a matter of law at the close of the plaintiff's evidence, which the district court denied.[91]

Tyson then offered evidence that the man responsible for making the promotion decisions was unaware of the company's promotion policies and, alternatively, that the policies were merely suggestions, so their strict enforcement was not required.[92] Tyson also offered evidence that one of the main criteria for promotion was the applicant's employment somewhere other than at that particular plant, claiming that management was looking for a new perspective because the plant was losing money and in danger of closing.[93] The plaintiffs claimed that these criteria were pretextual and that Tyson articulated these reasons to avoid liability.[94] The plaintiffs offered evidence that the plant was not

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[80] *Id.*
[81] *Id.*
[82] *Id.*
[83] *Id.* The Supreme Court held that the use of the word "boy" in reference to the plaintiffs could be evidence of the employer's discriminatory intent. Ash v. Tyson Foods, Inc., 546 U.S. 454, 456 (2006) (per curiam).
[84] *Ash*, 546 U.S. at 455.
[85] Petition for Writ of Certiorari, *Ash*, 546 U.S. 454 (No. 05-379), 2005 WL 2341981, at *5.
[86] *Id.*
[87] *Id.*
[88] *Id.*
[89] *Id.*
[90] *Id.*
[91] Ash v. Tyson Foods, Inc., 546 U.S. 454, 455 (2006) (per curiam).
[92] Petition for Writ of Certiorari, *supra* note 85, at *6.
[93] *Id.*
[94] *Id.* at *6-7.

losing money and that one of the Caucasian men Tyson promoted came from a plant Tyson had in fact closed for lack of profits.[95]

The judge instructed the jury that it could not find Tyson liable for making "stupid" promotion decisions and that it could only find Tyson liable if the decisions were racially discriminatory.[96] A racially mixed jury found Tyson engaged in discrimination against both plaintiffs and awarded each of them $250,000 in compensatory damages and $1,500,000 in punitive damages.[97] However, after the jury returned the verdict, the District Court granted Tyson's renewed motion for judgment under Federal Rule of Civil Procedure 50(b).[98]

The United States Court of Appeals for the Eleventh Circuit affirmed in part and reversed in part.[99] The court of appeals affirmed as to one plaintiff, finding that he failed to present sufficient evidence to show pretext and thus could not show unlawful discrimination by Tyson under the *McDonnell Douglas* burden-shifting framework.[100] The Eleventh Circuit reversed as to the second plaintiff, however, finding he presented sufficient evidence that Tyson's reasons for not promoting him were pretextual.[101] The evidence consisted of statements that Tyson did not promote him because he had no college degree, he lacked experience outside of that particular plant, and the plant where he was currently a superintendent was suffering financial losses.[102] The second plaintiff, however, presented evidence that a Tyson official interviewed him after Tyson had already hired a Caucasian man for the position, thus showing that Tyson's stated reasons were pretextual because they had already hired someone else.[103] The court stated that an employer would only be entitled to judgment as a matter of law where the employee presented a weak issue of fact regarding whether the employer's stated reason was false and there was "abundant and uncontroverted independent evidence" that discrimination had not occurred.[104] The court further articulated its standard by stating that "[p]retext can be established through comparing qualifications only when 'the disparity in qualifications is so apparent as virtually to jump off the page and slap you in the face.'"[105]

On appeal, the United States Supreme Court reversed in part, finding that the plaintiffs' evidence of superior qualifications could show that Tyson's articulated reasons for its failure to promote decision were pretextual as to both

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[95] *Id.*
[96] *Id.* at *7.
[97] *Id.* at *3.
[98] Ash v. Tyson Foods, Inc., 546 U.S. 454, 455 (2006) (per curiam).
[99] *Id.*
[100] *Id.*
[101] *Id.*
[102] Ash v. Tyson Foods, Inc., 129 F. App'x 529, 534 (11th Cir. 2005) (per curiam).
[103] *Id.*
[104] *Id.* at 532.
[105] *Id.* at 533. This standard came from a prior case, *Cooper v. Southern Co.*, 390 F.3d 695, 732 (11th Cir. 2004). The Fifth Circuit has sometimes used this standard as well. *See* Deines v. Tex. Dep't of Protective & Regulatory Servs., 164 F.3d 277, 280-82 (5th Cir. 1999); EEOC v. La. Office of Cmty. Servs., 47 F.3d 1438, 1445 (5th Cir. 1995); Odom v. Frank, 3 F.3d 839, 847 (5th Cir. 1993). The First and Tenth Circuits have also used it on occasion. *See* Jaramillo v. Colo. Judicial Dep't, 427 F.3d 1303, 1309 (10th Cir. 2005) (per curiam); Lehman v. Prudential Ins. Co. of Am., 74 F.3d 323, 329 (1st Cir. 1996).

plaintiffs.[106] The Court held that the Eleventh Circuit's "slap you in the face" pretext standard was "unhelpful and imprecise."[107] The Court then listed several other standards used by different federal courts.[108] This included another decision by the Eleventh Circuit, which stated that qualification disparities "must be of such weight and significance that no reasonable person, in the exercise of impartial judgment, could have chosen the candidate selected over the plaintiff."[109] The Court also cited the Ninth Circuit, which held that qualifications evidence by itself may show pretext when the plaintiff's qualifications are "clearly superior" to those of the individual chosen for the promotion.[110] The Court then cited the District of Columbia Circuit, which held that a factfinder might infer pretext if a "reasonable employer would have found the plaintiff to be significantly better qualified for the job."[111]

In addition, the Court cited some of its own previous decisions to show that evidence of superior qualifications alone may be enough to show pretext in some situations.[112] In a 1989 decision, the Court indicated a plaintiff could seek to demonstrate his employer's claim to have promoted a more qualified individual was pretextual by demonstrating that the plaintiff was in fact more qualified than the individual chosen.[113] In a more recent decision from 2000, the Court held that an employee's prima facie case, together with adequate evidence to find the employer's claimed justification is untrue, may allow the factfinder to conclude that the employer engaged in discrimination.[114]

Ultimately, the Court in *Ash* declined to give a precise definition of what standard courts should follow in pretext cases based on superior qualifications.[115] The Court failed to explain why the case did not merit a statement of what the proper standard should be, nor did it explain why the standard used by the Eleventh Circuit led to imprecise results, thus leading to further confusion, rather than clarifying the state of the law.

IV. ANALYSIS OF THE *ASH* STANDARD AND A PROPOSED NEW STANDARD

Because the Supreme Court declined to define what standard courts should use in pretext cases based on superior qualifications, a question remains as to what the correct standard should be. The Court was correct in overruling the *Ash* standard because it had numerous flaws, many of which were not noted by the Court. Many of the standards used by other federal courts share the same or

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[106] *Ash*, 546 U.S. at 456.
[107] *Id.* at 457.
[108] *Id.* at 457-58.
[109] *Id.* at 457 (quoting *Cooper*, 390 F.3d at 732).
[110] *Id.* at 457-58 (quoting Raad v. Fairbanks N. Star Borough Sch. Dist., 323 F.3d 1185, 1194 (9th Cir. 2003)).
[111] *Id.* at 458 (quoting Aka v. Wash. Hosp. Ctr., 156 F.3d 1284, 1294 (D.C. Cir. 1998) (en banc)).
[112] *Id.* at 457.
[113] *Id.* (citing Patterson v. McLean Credit Union, 491 U.S. 164, 187-88 (1989), *superseded on other grounds by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, § 101(2), 105 Stat. 1071, 1071-72 (codified at 42 U.S.C. § 1981(b) (2000))).
[114] *Id.* (citing Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 148 (2000)).
[115] *Id.* at 458.

similar flaws. Thus, a new standard is needed that eliminates the problems inherent in many of the current standards and ensures employee plaintiffs the opportunity to litigate their claims on a level playing field with their employer.

A. Criticisms of the Ash v. Tyson *Standard*

The Supreme Court criticized the Eleventh Circuit's standard in *Ash* as being "unhelpful and imprecise."[116] This is an accurate criticism because the standard is so subjective. Standards based on metaphors, such as a slap in the face, may be more memorable than other standards, but they offer little real guidance to the factfinder and carry with them the added problem that each factfinder will understand a metaphor differently, thus increasing the chances of discrepancies among courts applying the same standard. Indeed, Judge Cardozo stated that metaphors must "be narrowly watched, for starting out as devices to liberate thought, they end often by enslaving it."[117] The Court further criticized the Eleventh Circuit's standard, opining that some other standard would ensure more uniform results among the different courts.[118] However, since *Ash*, district courts have been widely inconsistent with their rulings,[119] perhaps because the Court declined to articulate a precise standard for trial courts to apply, leaving them to choose from among those standards not explicitly rejected by the Court or to fashion new ones.[120]

Another flaw with the Eleventh Circuit's standard, not noted by the Supreme Court, is that it is close to impossible for most plaintiffs to achieve, thus disposing of many potentially meritorious cases prematurely. This standard seems closer to the beyond a reasonable doubt standard used in criminal trials than to the preponderance of the evidence standard properly used in civil cases. Courts define preponderance of the evidence as

> [t]he greater weight of the evidence . . . that, though not sufficient to free the mind wholly from reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue . . . . [T]he jury is instructed to find for the party that, on the whole, has the stronger evidence, *however slight the edge may be*.[121]

While civil cases involve very important personal rights, the judicial system's concern that it might mistakenly hold a defendant liable is not as great as the corresponding concern in a criminal case. Courts should reflect this policy judgment by utilizing a lower burden of proof in civil cases.[122] In civil disputes, the plaintiff and defendant should share the risk of an incorrect decision in a "roughly equal fashion."[123] Judges have interpreted this standard to mean

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[116] *Id*. at 457.
[117] Berkey v. Third Ave. Ry. Co., 155 N.E. 58, 61 (N.Y. 1926).
[118] *Ash*, 546 U.S. at 458.
[119] *See infra* Part IV.B.
[120] Debra S. Katz & Lisa J. Banks, *Victories for Workers*, NAT'L L.J., Aug. 2, 2006, at 10, 10.
[121] BLACK'S LAW DICTIONARY 1220 (8th ed. 2004) (emphasis added).
[122] *See In re* Winship, 397 U.S. 358, 371-72 (1970) (Harlan, J., concurring) (discussing the policy reasons behind requiring a higher burden of proof in criminal cases than in civil cases).
[123] Santosky v. Kramer, 455 U.S. 745, 755 (1982); Addington v. Texas, 441 U.S. 418, 423 (1979).

the factfinder need only conclude the plaintiff's claim is more than fifty percent likely to return a verdict for the plaintiff.[124]

A reasonable doubt, on the other hand, is "[t]he doubt that prevents one from being firmly convinced of a defendant's guilt"[125] and which leaves the mind of the judge or jury in a condition where they feel "an abiding conviction, to a moral certainty, of the truth of the charge."[126] Some states have defined reasonable doubt in their criminal trial jury instructions as "not mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt," but rather "an *actual and substantial doubt* reasonably arising from the evidence, from the facts or circumstances shown by the evidence, or from the lack of evidence on the part of the State, as distinguished from a doubt arising from mere possibility, from bare imagination, or from fanciful conjecture."[127] Other criminal courts have instructed juries that if "you are not firmly convinced of [the] defendant's guilt, you must give [the] defendant the benefit of the doubt and find him not guilty."[128] Judges have concluded that proof beyond a reasonable doubt means that the factfinder must find a material disputed fact to be at least ninety to ninety-five percent likely.[129]

An analysis of the standard used in *Ash*, as well as those used in many other pretext cases, shows that these standards are much closer to the criminal beyond a reasonable doubt standard than they are to the appropriate preponderance of the evidence standard. Courts should not require plaintiffs to meet such a high evidentiary burden in a civil matter. A standard that directs the factfinder that the evidence must slap them in the face requires a much greater quantum of proof than that appropriate for civil cases. Indeed, when applying the "slap you in the face" standard, the Eleventh Circuit has never found a plaintiff's evidence sufficient to meet that burden.[130] The Eleventh Circuit has

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[124] C.M.A. McCauliff, *Burdens of Proof: Degrees of Belief, Quanta of Evidence, or Constitutional Guarantees?*, 35 VAND. L. REV. 1293, 1303 (1982); R. J. Simon, *Judges' Translations of Burdens of Proof into Statements of Probability*, 13 TRIAL LAW. GUIDE 103, 103-14 (1969); Elisabeth Stoffelmayr & Shari Seidman Diamond, *The Conflict Between Precision and Flexibility in Explaining "Beyond a Reasonable Doubt,"* 6 PSYCHOL. PUB. POL'Y & L. 769, 774 (2000) (citing United States v. Fatico, 458 F. Supp. 388, 403 (E.D.N.Y. 1978), *aff'd*, 603 F.2d 1053 (2d Cir. 1979)).

[125] BLACK'S LAW DICTIONARY, *supra* note 121, at 1293.

[126] *Id.* at 1294 (citing Commonwealth v. Webster, 59 Mass. (5 Cush.) 295, 320 (1850)).

[127] Victor v. Nebraska, 511 U.S. 1, 8, 18 (1994) (upholding these instructions in a Nebraska case). Courts have used instructions that closely mirror this one in other jurisdictions as well. *See, e.g.*, Tillman v. Cook, 215 F.3d 1116, 1125 (10th Cir. 2000); Ramirez v. Hatcher, 136 F.3d 1209, 1212 (9th Cir. 1998); Wilson v. State, 967 P.2d 98, 101 (Alaska Ct. App. 1998).

[128] State v. Medina, 685 A.2d 1242, 1252 (N.J. 1996); *see also Victor*, 511 U.S. at 27 (Ginsburg, J., concurring) (stating that jurors in criminal cases should be instructed that the prosecution must prove its case by something more than a preponderance of the evidence but not to an absolute certainty); United States v. Hessman, 493 F.3d 977, 983 (8th Cir. 2007) (upholding jury instruction that "if, after a full and fair consideration of all the evidence or lack of evidence produced by the State you are not firmly convinced of the defendant's guilt, then you have a reasonable doubt and you should find the defendant not guilty").

[129] Stoffelmayr & Diamond, *supra* note 124, at 774.

[130] Petition for Writ of Certiorari, *supra* note 85, at *8; *see, e.g.*, Goodman v. Ga. Sw., 147 F. App'x 888, 892-93 (11th Cir. 2005) (per curiam); Stuart v. Jefferson County Dep't of

used this standard to grant summary judgment for defendants[131] and to overturn jury verdicts for plaintiffs.[132] At least thirty-four district court decisions within the Eleventh Circuit have applied this standard, and not once has the plaintiff been able to meet this stringent burden.[133]

B. Standards Used by Other Courts

Commentators have opined that the federal courts' failure to articulate a coherent framework for assigning the burdens of proof in employment discrimination cases is a major problem in enforcing employment discrimination laws.[134] This disparity among the federal courts is especially striking in the area of pretext claims. The different circuits have required plaintiffs in these cases to meet standards with varying degrees of difficulty. In *Ash*, the Supreme Court mentioned several standards used by different federal courts but declined to adopt any of them.[135] Thus, one can infer that the Court did not consider any of these standards proper. This subsection will discuss the standards noted by the Court in *Ash* and the strengths and weaknesses of each, as well as several other standards not mentioned by the Court.

The alternative Eleventh Circuit standard that looks at qualification disparities from the perspective of a "reasonable person, in the exercise of impartial judgment"[136] is facially superior to the one used in *Ash*. It is more akin to the preponderance of the evidence standard properly used in civil trials. In many civil cases, courts evaluate the parties' conduct against that of a reasonable person. This standard is more realistic for a plaintiff to satisfy and, although not exact, is more precise than the standard criticized by the Supreme Court. However, the Eleventh Circuit has applied it harshly to find that comparative qualifications, the employer's use of subjective criteria, and the plaintiff's belief that his qualifications were superior are not enough for a factfinder to

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Human Res., 152 F. App'x 798, 802 (11th Cir. 2005) (per curiam); Templeton v. Bessemer Water Serv., 154 F. App'x 759, 764 (11th Cir. 2005) (per curiam); Cooper v. S. Co., 390 F.3d 695, 732 (11th Cir. 2004); Wilson v. B/E Aerospace, Inc., 376 F.3d 1079, 1090 (11th Cir. 2004); Hall v. Ala. Ass'n of Sch. Bds., 326 F.3d 1157, 1167-69 (11th Cir. 2003) (per curiam); Walker v. Prudential Prop. & Cas. Ins. Co., 286 F.3d 1270, 1277-78 (11th Cir. 2002); Cofield v. Goldkist, Inc., 267 F.3d 1264, 1268-69 (11th Cir. 2001) (per curiam); Denney v. City of Albany, 247 F.3d 1172, 1187-88 (11th Cir. 2001); Alexander v. Fulton County, 207 F.3d 1303, 1340, 1342 (11th Cir. 2000); Lee v. GTE Fla., Inc., 226 F.3d 1249, 1254-55 (11th Cir. 2000) (per curiam).

[131] *E.g.*, *Cofield*, 267 F.3d at 1269.

[132] *E.g.*, Ash v. Tyson Foods, Inc., 129 F. App'x 529, 536 (11th Cir. 2005) (per curiam); *Lee*, 226 F.3d at 1256.

[133] Petition for Writ of Certiorari, *supra* note 85, at *11-12.

[134] *See* Belton, *supra* note 70, at 1206-07; Thomas R. Lee, *Pleading and Proof: The Economics of Legal Burdens*, 1997 BYU L. REV. 1, 3; John M. Monahan, Note, Cabrera v. Jakabovitz – *A Common-Sense Proposal for Formulating Jury Instructions Regarding Shifting Burdens of Proof in Disparate Treatment Discrimination Cases*, 5 GEO. MASON U. CIV. RTS. L.J. 55, 57 (1994); *see also* Kellyann Everly, Comment, *A Reasonable Burden: The Need for a Uniform Burden of Proof Scheme in Reasonable Accommodation Claims*, 29 U. DAYTON L. REV. 37, 38 (2003) (stating that a coherent burden of proof framework is needed in disability discrimination claims in the reasonable accommodation context).

[135] Ash v. Tyson Foods, Inc., 546 U.S. 454, 457-58 (2006) (per curiam).

[136] *Id.* at 457 (citing Cooper v. S. Co., 390 F.3d 695, 732 (11th Cir. 2004)).

find pretext.[137] Prior to *Ash*, the Eleventh Circuit spoke of this standard as though it was the same as the *Ash* standard,[138] thus making it puzzling that the court would continue to apply it after the Supreme Court expressed its disapproval of the *Ash* standard. However, the Eleventh Circuit has used this standard since the Supreme Court's decision in *Ash*[139] and ultimately applied it to *Ash* on remand.[140] The Eleventh Circuit again concluded that the first plaintiff did not introduce sufficient evidence of pretext to support a verdict in his favor and further ruled that Tyson was entitled to a new trial as to the second plaintiff because he did not present enough evidence to support the damages awarded by the jury.[141]

The Ninth Circuit standard, that qualifications evidence by itself may show pretext where the plaintiff's qualifications are "clearly superior" to those of the individual selected,[142] has many of the same problems as the *Ash* standard. The phrase "clearly superior" is just as vague as the one rejected by the Supreme Court in *Ash*. What is "clearly superior" to one person may appear only slightly superior to another person, or even equal. This standard contains no reference to how a reasonable or impartial person should view the evidence and could result in courts denying close but potentially meritorious cases a chance to go before the factfinder. However, this standard is slightly more plaintiff-friendly than the one applied in *Ash*, and unlike the standard used by the Fifth and Eleventh Circuits, the Ninth Circuit has used it to overturn grants of summary judgment to employers.[143] In the Ninth Circuit, evidence that the plaintiff and the person actually promoted were equally qualified can be sufficient to withstand a defense motion for summary judgment.[144]

The D.C. Circuit articulated yet another standard cited in *Ash*: A factfinder may infer pretext if "a reasonable employer would have found the plaintiff to be significantly better qualified for the job."[145] The main strength of this standard is that it looks at the facts from the perspective of a reasonable employer, rather than a reasonable person. Because the employment decision affects the employer more than those people unaffiliated with the company, this

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[137] Ash v. Tyson Foods, Inc., 190 F. App'x 924, 927 (11th Cir. 2006) (per curiam).

[138] *Cooper*, 390 F.3d at 732.

[139] The Eleventh Circuit has applied this standard in multiple cases since the Supreme Court's decision in *Ash*. Higgins v. Tyson Foods, Inc., 196 F. App'x 781, 783 (11th Cir. 2006) (per curiam); *see Ash*, 190 F. App'x at 927; Brooks v. County Comm'n of Jefferson County, 446 F.3d 1160, 1163 (11th Cir. 2006); Price v. M & H Valve Co., 177 F. App'x 1, 12-13 (11th Cir. 2006) (per curiam); Roper v. City of Foley, 177 F. App'x 40, 49 (11th Cir. 2006) (per curiam); Watkins v. Huntsville, 176 F. App'x 955, 956 (11th Cir. 2006) (per curiam).

[140] *Ash*, 190 F. App'x at 927.

[141] *Id.*

[142] Ash v. Tyson Foods, Inc., 546 U.S. 454, 457-58 (2006) (per curiam) (citing Raad v. Fairbanks N. Star Borough Sch. Dist., 323 F.3d 1185, 1194 (9th Cir. 2003)). The Fifth Circuit has also used this standard occasionally. *See, e.g.*, EEOC v. La. Office of Cmty. Servs., 47 F.3d 1438, 1444 (5th Cir. 1995).

[143] *See, e.g.*, Margolis v. Tektronix, Inc., 44 F. App'x 138, 141-42 (9th Cir. 2002) (mem.); Haas v. Betz Labs., Inc., 185 F.3d 866 (9th Cir. 1999) (unpublished table decision); Godwin v. Hunt Wesson, Inc., 150 F.3d 1217, 1222 (9th Cir. 1998).

[144] *Margolis*, 44 F. App'x at 141-42.

[145] Aka v. Wash. Hosp. Ctr., 156 F.3d 1284, 1294 (D.C. Cir. 1998) (en banc).

is a more appropriate perspective for the factfinder to take. Although the reasonable employer may often have the same perspective as the reasonable person, it may differ in that an employer will have more knowledge about a particular company's needs, strengths, and areas needing improvement.

The weakness of the D.C. Circuit's approach is that it holds employees to too high a standard of proof, in that they must be "significantly better qualified" for the position. The use of the word "significantly" seems to require something more than a preponderance of the evidence but something less than beyond a reasonable doubt. "Significantly" is a vague word, so it is not clear how much evidence an employee must present. This standard falls somewhere in between the virtually impossible to achieve "slap you in the face" standard used by the Eleventh Circuit in *Ash* and the more plaintiff-friendly standard used by the Ninth Circuit.

The previous Supreme Court decisions cited in *Ash* show that the Court has required plaintiffs to meet a lesser burden than have the federal appellate courts. In *Patterson v. McLean Credit Union*,[146] the Court held that a plaintiff could seek to demonstrate pretext by showing that he or she was better qualified than the individual chosen for the job.[147] It does not require qualifications that are "clearly superior" or "so apparent as virtually to slap you in the face"—it merely requires qualifications that are "better." This is similar to the preponderance of the evidence standard and deserves more deference than it has received because the Supreme Court articulated this standard.

An alternative standard applied by the Seventh Circuit, not cited in *Ash*, is that qualification disparities between different candidates is not evidence of pretext unless the disparities are "so favorable to the plaintiff that there can be no dispute among reasonable persons of impartial judgment that the plaintiff was clearly better qualified for the position at issue."[148] However, the Seventh Circuit has applied this standard to find that even if the comparator evidence does indicate pretext, it is at best weak evidence of discrimination.[149] The Seventh Circuit has found this approach consistent with the Supreme Court's decision in *Ash* and has applied it since that decision.[150] The strength of this standard is that it specifies that the perspective to be taken is that of a reasonable person of impartial judgment.[151] In employment discrimination cases, it may be difficult to remember that the proper perspective is not that of the employer in a particular case, but that of an impartial person free from biases that the employer may or may not have. The weakness of this standard is that it requires plaintiffs to satisfy a burden of proof that is far too high. Language such as "so favorable" and "clearly better qualified" imply something closer to the standard of proof used in criminal cases than the standard used in civil cases.

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[146] Patterson v. McLean Credit Union, 491 U.S. 164 (1989), *superseded on other grounds by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, § 101(2), 105 Stat. 1071, 1071-72 (codified at 42 U.S.C. § 1981(b) (2000)).

[147] *Id.* at 187-88, *cited in Ash*, 546 U.S. at 457.

[148] Millbrook v. IBP, Inc., 280 F.3d 1169, 1179 (7th Cir. 2002).

[149] *Id.* at 1183.

[150] Mlynczak v. Bodman, 442 F.3d 1050, 1060 (7th Cir. 2006).

[151] *Id.* at 1059.

Among the most difficult standards plaintiffs have been required to meet is that used by the Fifth Circuit. The Fifth Circuit has required the losing candidate in a superior qualifications case to demonstrate that his qualifications "leap from the record and cry out to all who would listen that he was vastly—or even clearly—more qualified."[152] This standard is similar to the *Ash* standard that the Supreme Court ultimately rejected. It uses an analogy that brings a visual image to mind, but is difficult to apply because the significance of the picture it conjures up in one's mind will vary from person to person. The Fifth Circuit has used this standard to grant summary judgment[153] and directed verdicts for employers,[154] to reverse trial judge findings of discrimination as being clearly erroneous,[155] and to overturn jury findings of discrimination.[156] At least forty district court decisions in the Fifth Circuit have applied this standard since 1999, and in all but one case, the judge ruled that the plaintiff's evidence was insufficient to satisfy this standard.[157] The Sixth Circuit has rejected this standard due to its "vastly—or even clearly" language, which it could not reconcile with the Supreme Court's decision in *Texas Department of Community Affairs v. Burdine*.[158] In *Burdine*, the Supreme Court stated that evidence of qualifications "may be probative of whether the employer's reasons are pretexts for discrimination."[159] The Sixth Circuit found the "vastly—or even clearly" language to be inconsistent with the Supreme Court's statement because it would require the plaintiff to show a "huge disparity in qualifications in order to provide a genuine issue of fact with regard to pretext."[160] The Sixth Circuit opined that this directly contradicted the Court's language in *Burdine* and was thus unacceptable.[161]

The Second and Seventh Circuits have applied a more concrete standard, but one that is still nearly impossible for plaintiffs to satisfy.[162] It requires a plaintiff to show that her qualifications were so superior to those of the person selected for the position that no reasonable person using impartial judgment could have selected the person chosen over the plaintiff.[163] This is similar to the *Cooper* standard discussed by the Supreme Court in *Ash*, and shares the same strengths in that it is more concrete than some other standards and will therefore facilitate consistent results among different courts. Its weakness is that a plaintiff would have difficulty proving that no reasonable person "could" have selected the person chosen over the plaintiff. This is closer to the criminal

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[152] Price v. Fed. Express Corp., 283 F.3d 715, 723 (5th Cir. 2002).
[153] Cook v. Miss. Dep't of Human Servs., 108 F. App'x 852, 860-62 (5th Cir. 2004) (per curiam).
[154] Cheney v. U.S. Oncology, Inc., 34 F. App'x 962 (5th Cir. 2002) (per curiam).
[155] Odom v. Frank, 3 F.3d 839, 847 (5th Cir. 1993).
[156] Scott v. Univ. of Miss., 148 F.3d 493, 509-10 (5th Cir. 1998); EEOC v. La. Office of Cmty. Servs., 47 F.3d 1438, 1445 (5th Cir. 1995).
[157] Petition for Writ of Certiorari, *supra* note 85, at *15.
[158] Bender v. Hecht's Dep't Stores, 455 F.3d 612, 626 (6th Cir. 2006) (citing Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 259 (1981)).
[159] *Id.* at 626 (quoting *Burdine*, 450 U.S. at 259).
[160] Jenkins v. Nashville Pub. Radio, 106 F. App'x 991, 994-95 (6th Cir. 2004).
[161] *Id.*
[162] Jordan v. City of Gary, 396 F.3d 825, 834 (7th Cir. 2005); Byrnie v. Town of Cromwell, Bd. of Educ., 243 F.3d 93, 103 (2d Cir. 2001).
[163] *Jordan*, 396 F.3d at 834; *Byrnie*, 243 F.3d at 103.

standard of beyond a reasonable doubt because it implies that if there is even a mere possibility that the employer could have legitimately chosen the candidate selected over the plaintiff, the employer must win. Very few plaintiffs would be able to satisfy this overly demanding standard.

None of the standards currently in use in the federal courts adequately serve the needs of both employers and employees. Accordingly, a new standard is needed that will be fair to parties on both sides of employment discrimination disputes.

C. A New Standard

The burden of proof concept is one of the most important procedural aspects of the judicial system.[164] It assists factfinders in their application of substantive law by quantifying what level of confidence they should have in making conclusions of fact in a particular case.[165] The allocation of the burden of proof is often the dispositive factor in the outcome of the proceedings.[166]

The different standards currently used by the federal courts each have their own strengths and weaknesses. By combining parts of the different approaches mentioned in *Ash*, one can formulate a superior standard for use by the courts. The standard would be articulated as follows: A factfinder may infer pretext if a reasonable employer exercising impartial judgment would more likely than not have chosen the plaintiff over the candidate actually selected absent a discriminatory motive. This would combine the approach taken by the D.C. Circuit, the alternative Eleventh Circuit standard cited by the Supreme Court, and the Seventh Circuit standard.

This approach has the strength of viewing a situation from the perspective of the reasonable employer—a perspective that is more relevant than that of a reasonable person. Some courts have already used the reasonable employer standard in cases involving constructive discharge,[167] harassment,[168] employer intrusions on employee privacy,[169] and retaliation.[170] The factfinder should look at the facts from the perspective of a reasonable employer in the defendant's particular line of business because different types of businesses will have different legitimate priorities regarding the qualifications of employees they seek to hire and promote.[171]

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[164] Belton, *supra* note 70, at 1207.

[165] *In re* Winship, 397 U.S. 358, 370 (1970).

[166] Lavine v. Milne, 424 U.S. 577, 585 (1976).

[167] McPherson v. City of Waukegan, 379 F.3d 430, 441 (7th Cir. 2004); Tiner v. Greenberg, Traurig, P.A., 50 F. App'x 859, 860 (9th Cir. 2002) (mem.); Banks v. Ohio, 50 F.3d 10 (6th Cir. 1995) (unpublished table decision).

[168] Erickson v. Wis. Dep't of Corr., 469 F.3d 600, 605-06 (7th Cir. 2006); Kunin v. Sears Roebuck & Co., 175 F.3d 289, 294 (3d Cir. 1999); Risinger v. Ohio Bureau of Workers' Comp., 883 F.2d 475, 483 (6th Cir. 1989).

[169] Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 665 (1995).

[170] Carter v. George Wash. Univ., 387 F.3d 872, 881-82 (D.C. Cir. 2004); David v. Caterpillar, Inc., 324 F.3d 851, 861-62 (7th Cir. 2003).

[171] *See* William M. Muth, Jr., Note, *The After-Acquired Evidence Doctrine in Title VII Cases and the Challenge Presented by* Wallace v. Dunn Construction Co., 968 F.2d 1174 (11th Cir. 1992), 72 NEB. L. REV. 330, 347 (1993).

This approach would allow a factfinder to infer pretext but would not require such an inference to be drawn, as evidenced by the word *may*. This approach would take the perspective of a reasonable employer with impartial judgment, meaning a reasonable employer free from biases against members of a protected group. Although it may seem obvious that the perspective taken should be that of a person free from biases, the standard needs to be explicit in this regard because, in some industries more so than others, a typical employer may have strong biases that have historically been accepted against a protected group. For example, transportation, storage and warehousing, and manufacturing industries have a high rate of discrimination against women and minorities.[172] This might mean that a typical employer in these industries is likely to discriminate, albeit perhaps subconsciously.[173] Thus, it is important that there be a distinction between a *reasonable* employer and a *typical* employer because, unfortunately, these are not one and the same.

The evidentiary burden here would be more likely than not. This burden is lighter than any of the approaches discussed by the Supreme Court in *Ash*. This lighter burden has the advantage of keeping potentially meritorious cases before the courts that otherwise might be wrongfully dismissed if an erroneously high evidentiary burden is required. One must remember that despite the often atrocious facts that underlie an employment discrimination claim, it is still a civil matter, not criminal, and so the standard that applies in other civil cases applies in employment discrimination disputes as well.

The more likely than not burden is the one imposed on plaintiffs seeking to establish a prima facie case under the *McDonnell Douglas* framework.[174] In a more recent decision, the Supreme Court held that a plaintiff may obtain a mixed-motive jury instruction if she presents evidence that would allow a reasonable jury to find by a preponderance of the evidence that a discriminatory factor was one of the motivating factors in an employment decision.[175] This indicates that the more likely than not standard is appropriate in a wide variety of employment discrimination situations. The proposed standard is also consistent with Congress's intent. Congress has been clear whenever it has chosen to require heightened proof requirements in other contexts, and it has not chosen to include a higher burden on employee plaintiffs in the statute at this time.[176]

Because an employer's intent is nearly always in dispute in an employment discrimination case,[177] courts should not easily dismiss such cases before they reach the factfinder, and once the factfinder has made a decision, courts should give this decision its proper weight and not overturn it lightly. Employment discrimination plaintiffs already face serious challenges because direct

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[172] Alfred W. Blumrosen & Ruth G. Blumrosen, *First Statistical Report on Intentional Job Discrimination Against Women*, 25 WOMEN'S RTS. L. REP. 63, 101-06 (2003).

[173] *Id.*

[174] McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

[175] Desert Palace, Inc. v. Costa, 539 U.S. 90, 101 (2003).

[176] Kerry S. Acocella, Note, *Out with the Old and in with the New: The Second Circuit Shows It's Time for the Supreme Court to Finally Overrule* McDonnell Douglas, 11 CARDOZO WOMEN'S L.J. 125, 137-38 (2004) (citing *Desert Palace*, 539 U.S. at 99).

[177] Chertkova v. Conn. Gen. Life Ins. Co, 92 F.3d 81, 87 (2d Cir. 1996).

evidence of discrimination is difficult to obtain.[178] Indeed, the Supreme Court appears to have taken notice of this problem and over the last several years has chosen to remove the artificial legal doctrines used by the federal courts to reduce their civil rights caseloads via disposal through summary judgment.[179]

Because this proposed standard is more plaintiff-friendly than any of those the Supreme Court mentioned in *Ash*, employers would likely criticize it as more cases would proceed to trial under this standard. Placing a lesser burden on employee plaintiffs may result in employers paying more money to preserve records for litigation and give employees—particularly those in management—more anti-discrimination training.[180] However, employers are already responsible for bearing the costs of anti-discrimination training,[181] and these increased costs will balance out as discrimination within a company becomes less common, thus leading to fewer incidents of discrimination for which the company would be liable.[182]

D. The Need for a More Plaintiff-Friendly Standard

Too many courts hold plaintiffs to a standard of proof that requires them to eliminate all of their employer's potential nondiscriminatory reasons for an employment decision, rather than requiring them to establish discrimination as the cause of the decision by a preponderance of the evidence.[183] Courts subject plaintiffs to these difficult standards because of a belief that judges are not as knowledgeable about job qualifications as are those who have training and experience in a particular field.[184] Accordingly, they conclude that judges should be hesitant to substitute their own opinions for those of the individuals making the promotion decisions who have experience working in the particular area in question.[185] Indeed, multiple courts have stated that courts should not function as "super personnel department[s],"[186] but rather, should take care to

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[178] Aka v. Wash. Hosp. Ctr., 156 F.3d 1284, 1293 (D.C. Cir. 1998) (en banc) (citing Price Waterhouse v. Hopkins, 490 U.S. 228, 271 (1989) (O'Connor, J., concurring), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, § 107, 105 Stat. 1071, 1075 (codified at 42 U.S.C. § 2000e-2 (2000))).

[179] Richard T. Seymour, *Evidence in Employment Cases*, 2006 A.L.I.–A.B.A. CONTINUING LEGAL EDUCATION 471, 497.

[180] Jarrett Haskovec, Note, *A Beast of Burden? The New EU Burden-of-Proof Arrangement in Cases of Employment Discrimination Compared to Existing U.S. Law*, 14 TRANSNAT'L L. & CONTEMP. PROBS. 1069, 1103 (2005).

[181] United States v. N. L. Indus., Inc., 479 F.2d 354, 366 n.11 (8th Cir. 1973).

[182] R. Bales, *Libertarianism, Environmentalism, and Utilitarianism: An Examination of Theoretical Frameworks for Enforcing Title I of the Americans with Disabilities Act*, 1993 DETROIT C.L. REV. 1163, 1198; Glenn Kramer, Note, *Reasonableness for Free: Why Buy Employment Practices Liability Insurance When EEOC.gov Gives Protection Away?*, 3 CARDOZO PUB. L. POL'Y & ETHICS J. 459, 470 (2005).

[183] *See* Michael Selmi, *Sex Discrimination in the Nineties, Seventies Style: Case Studies in the Preservation of Male Workplace Norms*, 9 EMP. RTS. & EMP. POL'Y J. 1, 27 (2005).

[184] Odom v. Frank, 3 F.3d 839, 847 (5th Cir. 1993).

[185] *Id.*

[186] *E.g.*, Bender v. Hecht's Dep't Stores, 455 F.3d 612, 627 (6th Cir. 2006); Mlynczak v. Bodman, 442 F.3d 1050, 1060 (7th Cir. 2006); Jaramillo v. Colo. Judicial Dep't, 427 F.3d 1303, 1308 (10th Cir. 2005) (per curiam); Cooper v. S. Co., 390 F.3d 695, 730 (11th Cir. 2004); Rathbun v. Autozone, Inc., 361 F.3d 62, 74 (1st Cir. 2004); Newsom-Lang v. Warren Int'l, Inc., 80 F. App'x 124, 126 (2d Cir. 2003).

ensure that they remain in their "proper role of preventing unlawful employment practices."[187]

Inquiring into whether an employer's reason for making a particular employment decision was discriminatory or not is "both sensitive and difficult" because it involves an inquiry into the employer's state of mind.[188] Those responsible for making promotion decisions may feel no incentive to base their decisions on nondiscriminatory factors because they are already in a dominant and prosperous position within the company and may not want to chance stirring things up by promoting someone they perceive as being different, which could make a change in the power structure more likely.[189] Some have argued that employers will see increased productivity by keeping their group of employees homogenous.[190] However, the limited evidence that allegedly supports this theory is mixed, and the general conclusion is that while homogeneity in the workplace may enhance employee satisfaction and productivity, it also harms the employer by limiting ideas and creativity within the company.[191]

The United States has traditionally been more reluctant to intrude into employer-employee relationships than have other countries, perhaps because of the American emphasis on a deregulated economy and capitalism, as well as the importance of the employment at-will doctrine.[192] Countries in the European Union shift the burden of persuasion in employment discrimination cases to the employer once the employee establishes a prima facie case of discrimination.[193] France has even made racial discrimination in employment decisions a criminal offense.[194] While this Note is not suggesting that the United States should follow suit and impose criminal penalties in employment discrimination cases, it is important to recognize that America is not in accord with most other industrialized nations with respect to its anti-discrimination policies and laws. Furthermore, employment discrimination defendants who appeal a district court decision achieve a far higher rate of reversal than do plaintiffs in these cases.[195] This discrepancy exists at the pretrial stage (forty-two percent to eleven percent) and becomes even more disparate for appeals after the trial stage (forty-two percent to seven percent).[196] While this "anti-plaintiff effect" exists in most categories of cases (thirty-three percent to twelve percent), it is the most

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[187] *Bender*, 455 F.3d at 627.

[188] U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 716 (1983).

[189] *See* Selmi, *supra* note 183, at 41.

[190] *See* Devon W. Carbado & Mitu Gulati, *The Law and Economics of Critical Race Theory*, 112 YALE L.J. 1757 (2003) (book review).

[191] Frances J. Milliken & Luis L. Martins, *Searching for Common Threads: Understanding the Multiple Effects of Diversity in Organizational Groups*, 21 ACAD. MGMT. REV. 402, 403 (1996).

[192] Haskovec, *supra* note 180, at 1093-94.

[193] *Id.* at 1090.

[194] Donna M. Gitter, Comment, *French Criminalization of Racial Employment Discrimination Compared to the Imposition of Civil Penalties in the United States*, 15 COMP. LAB. L.J. 488, 489 (1994).

[195] Kevin M. Clermont, Theodore Eisenberg & Stewart S. Schwab, *How Employment-Discrimination Plaintiffs Fare in the Federal Courts of Appeals*, 7 EMP. RTS. & EMP. POL'Y J. 547, 551-52 (2003).

[196] *Id.* at 552.

pronounced in employment discrimination cases.[197] This is troubling considering the fact that witness credibility is more critical in employment discrimination cases than in many other types of civil cases because the focus of the dispute is based on the thought processes of the employer's decisionmaker. This should make reversals in such disputes rare. However, reversals appear to be rare only in employer victories, and the disparity exists in every circuit.[198] The Supreme Court has stated that "[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous."[199] It is well established that jury verdicts should be upheld unless they are against the great weight of the evidence,[200] that a trial judge's conclusion that a jury verdict is not against the weight of the evidence is subject to review under the highly deferential abuse of discretion standard,[201] and that questions of fact in bench trials are subject to the clearly erroneous standard of review.[202] However, the statistics reveal that appellate courts are not following these rules when reviewing decisions in employment discrimination cases.

The danger in applying such difficult standards is that they are all but impossible for a plaintiff to satisfy, thus sending a message to employers that they can discriminate without fear of legal repercussions. Some have justified the high burden on employee plaintiffs by claiming that without it, there would be a substantial increase in frivolous litigation from disgruntled employees.[203] There is evidence that the opposite may be true, however, as the increased use of summary judgment to dispose of claims may actually discourage parties from engaging in settlement negotiations, the most efficient manner of lightening court caseloads.[204]

Additionally, when employers know they are unlikely to face liability if an employee brings suit, they will lack any incentive to keep thorough records regarding employment decisions or to give their employees anti-discrimination training.[205] Conversely, when employers view legal liability as a serious threat, they are more likely to give their employees diversity training—in fact,

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[197] *Id.* at 554-55.

[198] *Id.* at 555.

[199] Anderson v. City of Bessemer City, 470 U.S. 564, 574 (1985); *see also* Inwood Labs., Inc. v. Ives Labs., Inc., 456 U.S. 844, 855 (1982); United States v. Yellow Cab Co., 338 U.S. 338, 342 (1949).

[200] *E.g.*, Brown v. Parker Drilling Offshore Corp., 444 F.3d 457, 458 (5th Cir. 2006) (per curiam); United States v. Hynes, 467 F.3d 951, 956 (6th Cir. 2006); Mems v. City of St. Paul, Dep't of Fire & Safety Servs., 327 F.3d 771, 786 (8th Cir. 2003).

[201] *E.g.*, Cigna Ins. Co. v. Oy Saunatec, Ltd., 241 F.3d 1, 8 (1st Cir. 2001); Butler v. French, 83 F.3d 942, 944-45 (8th Cir. 1996); Tragarz v. Keene Corp., 980 F.2d 411, 430 (7th Cir. 1992); McAlester v. United Air Lines, Inc., 851 F.2d 1249, 1260 (10th Cir. 1988).

[202] *E.g.*, *Anderson*, 470 U.S. at 573; Eyler v. Comm'r, 88 F.3d 445, 448 (7th Cir. 1996).

[203] *See, e.g.*, William W. Schwarzer, Alan Hirsch & David J. Barrans, *The Analysis and Decision of Summary Judgment Motions: A Monograph on Rule 56 of the Federal Rules of Civil Procedure*, 139 F.R.D. 441, 450-51 (1992); Bena Varughese, Opoku-Acheampong v. Depository Trust Co., 19 N.Y. INT'L L. REV. 187, 192 (2006).

[204] Samuel Issacharoff & George Loewenstein, *Second Thoughts About Summary Judgment*, 100 YALE L.J. 73, 75 (1990).

[205] *See* Haskovec, *supra* note 180, at 1098.

the threat of litigation is the most common reason for diversity training.[206] Another justification used by some courts is that if the standard plaintiffs were required to satisfy was too low, employers would be afraid to make the decision that truly serves their best interests out of fear of liability.[207] If employers truly base their decisions on their best interests and not on discriminatory reasons, however, they will have little difficulty proving that their reasons for making a promotion decision were legitimate.[208]

The legal rights involved in an employment discrimination case are only a small part of what is at stake. In our modern, achievement-oriented society, one's sense of self-worth often relates closely to one's job.[209] When individuals perceive their employers have discriminated against them, they suffer adverse psychological effects including anger, abandonment, helplessness, paranoia, betrayal, and depression.[210] Research shows that victims of discrimination not only care about whether the law will give them the results they seek, but also whether the legal procedures in place feel just and fair.[211] Because of the enormous financial and psychological consequences of employment discrimination, it is critical that employers have an incentive to eliminate the discrimination that remains prevalent in the workplace, despite the laws designed to eradicate it.

V. CONCLUSION

A standard that is fair to employee plaintiffs is critical because, while employees' rights have come a long way since the passage of Title VII, the federal courts continue to erect significant barriers for employee plaintiffs to overcome in the form of overly burdensome burdens of proof. Society has an interest in promoting better workplace service and production through discrimination free employment decisions by eliminating, or at least reducing, the remains of this country's history of discrimination. Because employment discrimination is still so common, employers are likely viewing the benefits of discrimination as outweighing the costs; otherwise, economic reasons would force them to stop. This could be due to a lack of severe penalties. It could also be due to employer beliefs that even if their employees sue them for engaging in unlawful discrimination, they will escape liability because the evi-

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[206] Katrina Jordan, *Diversity Training in the Workplace Today: A Status Report*, 58 J. CAREER PLAN. & EMP. 46, 51 (1998).

[207] *See* David M. Young, Note, *The Ninth Circuit Requires Alaskan Employers to Prove Misconduct to Justify Termination of Employees in Hazardous Workplaces:* Sanders v. Parker Drilling, 14 GEO. MASON L. REV. 201, 227 (1991).

[208] *See, e.g.*, Rosanna K. McCalips, Comment, *What Recent Court Cases Indicate About English-Only Rules in the Workplace: A Critical Look at the Need for a Supreme Court Ruling on the Issue*, 4 U. PA. J. LAB. & EMP. L. 417, 422 (2002).

[209] Jean R. Sternlight, *In Search of the Best Procedure for Enforcing Employment Discrimination Laws: A Comparative Analysis*, 78 TUL. L. REV. 1401, 1474 (2004).

[210] *Id.* at 1474-75 (citing Edward Dunbar, *Counseling Practices to Ameliorate the Effects of Discrimination and Hate Events: Toward a Systematic Approach to Assessment and Intervention*, 29 COUNSELING PSYCHOLOGIST 279, 281 (2001)).

[211] *Id.* at 1483-84.

dentiary standard that the courts will require of employees is too high for a plaintiff to succeed.

The legal system must do something to send a message to employers that it will no longer tolerate employment discrimination. One way to do this would be to make the evidentiary hurdle easier for plaintiffs to clear so that their claims can progress further into the justice system, thus warning employers that they cannot escape liability for discrimination and forcing them to make serious changes in their employment practices. If the government is to eliminate or seriously reduce employment discrimination on a national level, the federal courts must form a coherent burden of proof standard that explains how to evaluate evidence based on common experience so that factfinders can better understand the standard and apply it in a manner that is fair to both employers and employees.