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CREDULOUS COURTS AND THE TORTURED TRILOGY: THE IMPROPER USE OF SUMMARY JUDGMENT IN TITLE VII AND ADEA CASES†

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INTRODUCTION

Civil rights are under siege. In mid-1989, the United States Supreme Court decided several cases[1] that severely limit the civil rights claims and remedies available to a plaintiff claiming employment discrimination.[2] Experts have widely criticized those decisions,

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[1] *See* Public Employees Retirement Sys. of Ohio v. Betts, 492 U.S. 158, 161 (1989) (Age Discrimination in Employment Act § 4(f)(2), 29 U.S.C. §§ 621–634 (1988) ("ADEA"), exempts bona fide employee benefit plans from its scope unless a plaintiff can prove that the plan is a subterfuge for discrimination); Patterson v. McLean Credit Union, 491 U.S. 164, 171 (1989) (interpreting 42 U.S.C. § 1981 (1988) to cover racially motivated conduct only at the initial stages of contract formation and not applicable to on-the-job racial discrimination); Lorance v. AT&T Technologies, 490 U.S. 900, 911 (1989) (statute of limitations commences under Title VII when employer adopts a facially neutral seniority system, not when the system affects plaintiff claiming disparate impact); Martin v. Wilks, 490 U.S. 755, 759, 761–62 (1989) (consent decrees are not binding on third parties); Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 656–57 (1989) (plaintiff proving disparate impact under Title VII, 42 U.S.C. §§ 2000e–2000e-16 (1988), has the burden of showing not only a statistical disparity but also that the disparity is the result of one or more specific practices of the employer).

[2] These decisions were announced during the United States Supreme Court's 1988 Term. Because the decisions were actually handed down in the summer of 1989, however, this Article will refer to them as "the 1989 decisions."

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with one expert terming them a "tragedy"[3] for minorities and women.[4] In response to the Court's limitations on civil rights claims and remedies, which set back civil rights law eighteen years,[5] civil rights activists lobbied Congress to pass legislation that would restore the civil rights formerly enjoyed by members of protected classes. Congress passed the Civil Rights Act of 1990 by a wide margin, only to be thwarted by President Bush's veto.[6] Finally, two

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[3] *See* Charles A. Sullivan, *Accounting for* Price Waterhouse: *Proving Disparate Treatment Under Title VII*, 56 BROOK. L. REV. 1107, 1107 (1991).

[4] *See* Linda L. Holdeman, *Civil Rights in Employment: The New Generation*, 67 DENV. U. L. REV. 1 (1990); Candace S. Kovacic-Fleischer, *Proving Discrimination After* Price Waterhouse *and* Wards Cove: *Semantics as Substance*, 39 AM. U. L. REV. 615 (1990). In her article, Linda Holdeman notes that the civil rights decisions of 1989 signal a policy shift away from the goals Congress articulated at the time it enacted Title VII and furthered by the Court in its early decisions interpreting the Act. Holdeman, *supra*, at 46–47 & nn. 235–38. The Court's earlier decisions, including its creation of models of proof described in Part I of the text of this Article, furthered the congressional purpose of eradicating employment discrimination. The 1989 cases, however, elevate the interests of advantaged groups over those of disadvantaged groups. One possible explanation is that Congress passed Title VII when the country's economy was booming, and this was no longer the case in 1989. The Court's shift away from an aggressive policy to achieve racial and sexual equality may be the result of economic retrenchment.

Another justification for such a shift would be that the civil rights goals have been achieved, but this does not appear to be the case. Black unemployment was significantly higher than that of Whites in the first quarter of 1989. *Id.* at 53. The inability of minorities and women to rise in the ranks in their companies remains a significant problem. *See Today's Summary and Analysis*, Daily Lab. Rep. (BNA), at A-3 (Aug. 23, 1991) ("vast majority of suits now challenge discharge rather than hiring decisions"). Congress formally recognized this problem when it introduced the Glass Ceiling Act as part of the Civil Rights Act of 1991, Pub. L. No. 102-166, §§ 201–210, 105 Stat. 1071, 1081–87 (1991), to help women and minorities advance in the workplace.

[5] Griggs v. Duke Power Co., 401 U.S. 424 (1971), which established the disparate impact model, freeing a plaintiff from proving that a defendant intentionally discriminated against the plaintiff where the defendant's employment practices had a disparate impact on members of the protected class, was decided 18 years before. *Wards Cove*, 490 U.S. at 642, is generally considered to have overruled *Griggs*. *See* H.R. REP. No. 102-40(I), 102d Cong., 1st Sess. 1, 26 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 564.

[6] President Bush vetoed the Civil Rights Act of 1990 on October 22, 1990, arguing that the legislation would force employers to adopt quotas to avoid liability from lawsuits. The Senate voted 66 to 34 to overturn the veto but fell one vote short of the necessary two-thirds majority for an override. *See* Sam Fulwood III, *Bush's Veto of Rights Bill Survives in Senate by One Vote*, L.A. TIMES, Oct. 25, 1990, at A1.

The Bush veto, combined with the Bush Court's theory of "strict" construction of status had an anti-majoritarian result. For the Bush Court, strict construction seemed to be a synonym for narrow construction, with Reagan and Bush appointees implicitly reasoning that if the Court's interpretation of a statute were too restrictive, the Congress could always amend the statute. *See* Neil A. Lewis, *Selection of Conservative Judges Insures a President's Legacy*, N.Y. TIMES, July 1, 1992, at A13 ("True to the key tenets of the conservative judicial agenda, these judges tend to construe laws as narrowly as possible. . . . They also typically defer to Congress in deciding close constitutional issues."). This theory of statutory construction

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and a half years after the Supreme Court handed down its decisions, and in response to heightened political pressures, President Bush agreed to sign the Civil Rights Act of 1991.[7]

This Act restores many of the rights that plaintiffs suing under the civil rights laws had before the 1989 Supreme Court decisions.[8] It also grants some new rights to plaintiffs suing under the civil rights laws.[9] By all appearances, those favoring a strong national policy protecting the civil rights of minorities, women, the disabled and the aged have won the political battle. There remains, however, a significant stumbling block to the enjoyment of civil rights in the workplace. Few lawyers are unaware of the Supreme Court's devastating civil rights decisions in 1989 and the congressional battle to correct them. Another phenomenon, less obvious but equally destructive, silently curtails workers' civil rights claims: the increased

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ignores the reality of the frequency and success of the President Bush veto. As of October 1, 1992, the President had vetoed 35 bills. Congress had failed to override a single veto. *See* Adam Clymer, *House Votes to Sustain President's Veto of the Family Leave Bill*, N.Y. TIMES, Oct. 1, 1992, at D24.

[7] *See* Andrew Rosenthal, *Reaffirming Commitment, Bush Signs Rights Bill*, N.Y. TIMES, Nov. 22, 1991, at A1. Even though he signed the bill, there was significant controversy over whether President Bush was attempting to undermine the rights protected by the bill. *Id.* The President issued a "signing statement" explaining that the statement made by Senator Robert Dole interpreting the Civil Rights Act would "be treated as an authoritative interpretive guidance by all officials in the executive branch" with respect to the law. Statement on Signing the Civil Rights Act of 1991, 27 WEEKLY COMP. PRES. DOC. 1701, 1702 (Nov. 21, 1991). The Dole memorandum is generally considered to be the most conservative interpretation of the Act. *See* 137 CONG. REC. S15472–78 (daily ed. Oct. 30, 1991).

[8] The purpose of the Act is:

> to amend the Civil Rights Act of 1964 to strengthen and improve federal civil rights laws, to provide for damages in cases of intentional employment discrimination, to clarify provisions regarding disparate impact actions, and for other purposes.

Pub. L. No. 102-166, 105 Stat. 1071 (1991). The Act specifically finds that the decision in *Wards Cove* "has weakened the scope and effectiveness of federal civil rights protections." *Id.* § 2(2). Among its purposes are to overrule the proof burdens and meaning of business necessity in *Wards Cove*; to codify the proof burdens and the meaning of business necessity used in *Griggs*; and "to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination." *Id.* §§ 3(2), (4).

[9] For example, the Act creates a right for plaintiffs suing for intentional discrimination under Title VII of the Civil Rights Act to compensatory and punitive damages and, where the plaintiff seeks such damages, the Act grants to both parties a right to demand a trial by jury. *See* The Civil Rights Act of 1991 § 102, 105 Stat. 1072 (amending § 1977 of the Civil Rights Act of 1964, 42 U.S.C. § 1981 (1988)) [hereinafter "Civil Rights Act of 1991"]. The Act also creates a right of action for employees of Congress under Title VII § 19. *See* Civil Rights Act of 1991 § 301. Some opine, however, that although the Act may strengthen the cause of action of those suing for intentional discrimination, it does not do the same for plaintiffs suing under the disparate impact theory.

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inappropriate use of summary judgment. This misapplication of civil procedural rules to employment discrimination cases threatens substantive anti-discrimination law.

This Article examines the gradual and continuing erosion of the factfinder's role in federal employment discrimination cases and its replacement by an increasing use of summary judgment through which the courts make pretrial determinations formerly reserved for the factfinder at trial. This trend not only represents a major shift in court procedure and, in the case of age discrimination claims, a transfer of power from juries to judges, but also substantially undermines the efficacy of the nation's laws against discrimination.[10]

In 1986, the Supreme Court decided three summary judgment cases that have had perhaps an even more devastating effect on civil rights law than the substantive decisions of the 1989 cases. This "trilogy" of summary judgment cases—*Matsushita Electric Industrial Co. v. Zenith Radio Corp.*,[11] *Anderson v. Liberty Lobby*,[12] and *Celotex v. Catrett*[13]—changed the manner in which courts approach summary judgment, making it easier for defendants to obtain summary judgment in cases of at least arguable discrimination. Before the summary judgment trilogy, courts had been reluctant to grant summary judgment to a defendant in a civil rights case where questions of motive, intent and credibility existed.[14]

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[10] This Article will deal with the two federal statutes most frequently used by employees to bring discrimination claims against employers: Title VII, 42 U.S.C. §§ 2000e–2000e-16 and the Age Discrimination in Employment Act, 29 U.S.C. §§621–634. Under the Civil Rights Act of 1991, like the ADEA, the parties in a Title VII suit have an explicit right to a jury trial. *See* Civil Rights Act of 1991 § 102(c); *see also supra* note 9. Therefore, after the enactment of the Civil Rights Act of 1991, in both Title VII and ADEA cases, an improper grant of summary judgment not only substantially reduces the plaintiff's rights to redress a possible civil rights violation, but also impinges on the right to a jury trial by transferring power from the jury to a judge.

[11] 475 U.S. 574 (1986).

[12] 477 U.S. 242 (1986).

[13] 477 U.S. 317 (1986).

[14] *See, e.g.*, Lowe v. City of Monrovia, 775 F.2d 998, 1009 (9th Cir. 1985) (citing Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 255 n.8 (1981)) ("Once a prima facie case is established either by the introduction of actual evidence or reliance on the *McDonnell Douglas* presumption, summary judgment for the defendant will ordinarily not be appropriate on any ground relating to the merits because the crux of a Title VII dispute is the 'elusive factual question of intentional discrimination.'"); Leonard v. City of Frankfort Elec. & Water Plant Bd., 752 F.2d 189, 194 (6th Cir. 1985) (citing Smith v. Hudson, 600 F.2d 60, 66 (6th Cir. 1979)) ("The issue . . . of intent or motive was clearly raised by the pleadings and [plaintiff's] deposition and represented an unresolved issue of material fact which was improper for disposition of summary judgment."); Sweat v. Miller Brewing Co., 708 F.2d 655, 657 (11th Cir. 1983) (citing Hayden v. First Nat'l Bank, 595 F.2d 994, 997 (5th Cir. 1979))

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Many courts, however, have interpreted the trilogy, although ambiguous on the issue of pretrial judicial factfinding, to permit summary judgment in cases where plaintiffs' claims appear weak or unpersuasive.[15] In response to the trilogy, lower courts have granted summary judgment in cases where there exist questions of fact concerning the employer's motive,[16] thereby denying to employment discrimination plaintiffs their "day in court" historically promised by the American model of litigation.

Advocates of the courts' aggressive use of summary judgment argue that increased use of summary judgment will eliminate frivolous claims, and thus free up the courts to decide more meritorious claims.[17] There is evidence, however, that the courts' more aggres-

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(granting summary judgment is especially questionable in employment discrimination cases); Steckl v. Motorola, Inc., 703 F.2d 392, 393 (9th Cir. 1983) (citing Douglas v. Anderson, 656 F.2d 528, 535 (9th Cir. 1981)) ("It is true that courts are generally reluctant to grant summary judgment in a case in which motivation and intent of a party are at issue."); Conrad v. Delta Airlines, 494 F.2d 914, 918 (7th Cir. 1974) (questions of intent or motive are particularly ill-suited for disposition on summary judgment).

[15] Noted legal scholar and Seventh Circuit Judge Richard Posner in Shager v. Upjohn Co., 913 F.2d 398 (7th Cir. 1990), an employment discrimination case, acknowledged that growing docket pressures on trial courts make the courts of appeals extremely reluctant to overrule grants of summary judgments by lower courts "merely because a rational factfinder *could* return a verdict for the nonmoving party, if such a verdict is highly unlikely as a practical matter. . . ." *Id.* at 403. This admission that judges decide cases without trial even where a rational factfinder could find for the plaintiff after a trial on the merits is as troubling as it is candid. Judge David A. Nelson of the Sixth Circuit seems to agree with Judge Posner's approach. In what the other judges on the panel considered a "close case," Judge Nelson made a disturbing admission: "[G]iven the demands now being made on the time of most district courts, it seems to me that a full-scale trial in a case as lopsided as this one would probably be a misallocation of judicial resources." Canitia v. Yellow Freight Sys., 903 F.2d 1064, 1068 (6th Cir. 1990) (Nelson, J., concurring). *See also* EEOC v. Luckmarr Plastics, Inc., 884 F.2d 579 (6th Cir. 1989) (summary judgment affirmed even though the district court noted that "this is a close call" and "resolved many disputed facts," because "the EEOC's evidence was merely colorable"). In Healy v. New York Life Ins. Co., 860 F.2d 1209, 1219 (3d Cir. 1988), Judge Edward R. Becker "acknowledge[d] that this is a close case," regarding the balance of persuasion but nonetheless granted summary judgment.

This approach is faulty for two reasons. First, if the case were really so close, a reasonable factfinder could conclude that the defendant is liable. Summary judgment is therefore improper. Second, the court discounts the resources spent by trial and appeals courts in deciding summary judgment motions. Parties and judges expend a great deal of time, money and effort preparing and considering summary judgment motions while many Title VII and ADEA claims could be resolved by a relatively short, painless, almost irreversible trial. This remains true even after the passage of the Civil Rights Act of 1991, granting Title VII litigants a right to a jury trial. In ADEA cases, where plaintiffs historically have enjoyed a right to a jury trial, many of the trials are completed in only a few days.

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

[17] *See* William W. Schwarzer et al., *The Analysis and Decision of Summary Judgment Motions: A Monograph on Rule 56 of the Federal Rules of Civil Procedure*, 139 F.R.D. 441, 451 (1991); *see also* Mesnick v. General Elec. Co., 950 F.2d 816, 822 (1st Cir. 1991) ("summary judgment has

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sive use of summary judgment benefits defendants by increasing plaintiffs' costs and screening out many meritorious lawsuits.[18]

Most troublesome, perhaps, is the profound effect of increased use of summary judgment in defeating civil rights claims. Although the Supreme Court certainly wanted lower courts to approach summary judgment without timidity, many judges treat the trilogy as an attempt to limit the substantive rights of civil rights plaintiffs, a reading that distorts both the trilogy and substantive anti-discrimination law. Following the trilogy, the lower courts have granted summary judgment more aggressively in civil rights cases, even though these cases most often turn on subtle questions of credibility and intent that only a factfinder faced with a live witness should decide.[19] This increased use of summary judgment to dispose of

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proven its usefulness as a means of avoiding full dress trials in unwinnable cases, thereby freeing courts to utilize scarce judicial resources in more beneficial ways").

[18] There is also a question whether the increased use of summary judgment to dispose of claims achieves its goal of unclogging the court system. *See* Samuel Issacharoff & George Loewenstein, *Second Thoughts About Summary Judgment*, 100 YALE L.J. 73, 75 (1990). Issacharoff and Loewenstein explain that the increased use of summary judgment actually discourages settlement, the most efficient and common method of freeing the court's docket. *Id.* at 100–03. Furthermore, when considering whether increased use of summary judgment is more efficient, the advocates of more aggressive use of summary judgment must also consider lawyer time expended preparing the summary judgment motions as well as the time saved by the court by avoiding trial. It seems almost *de rigueur* for a defendant faced with a discrimination claim to file a summary judgment motion, whereas previously defendants may have discussed settlement more freely instead of moving for summary judgment.

[19] Probably due to the political composition of the federal bench, even before the trilogy, a number of courts seemed headed toward the improper use of summary judgment in discrimination cases. *See, e.g.*, Foster v. Arcata Assocs., 772 F.2d 1453, 1461, 1466–67 (9th Cir. 1985) (in age and sex discrimination case for failure to promote, even though plaintiff raised an issue of fact regarding her qualifications, court weighed evidence in favor of defendant, concluding that the articulated reason not to promote was legitimate.); Matthews v. Allis-Chalmers, 769 F.2d 1215, 1217 (7th Cir. 1985) (requiring plaintiff to prove defendant "more likely than not" fired plaintiff because of his age at summary judgment stage, rather than merely raise a genuine issue of material fact); Huhn v. Koehring Co., 718 F.2d 239, 242 (7th Cir. 1983) (concluding that there was no genuine issue of fact regarding employer's legitimate expectations of plaintiff's sales record in a period of economic decline).

This Article is not the result of an empirical study and therefore cannot claim to establish certain cause and effect between the trilogy and the overly aggressive granting of summary judgment in the lower courts. Whichever came first, the lower courts have used the trilogy to justify their decisions to grant summary judgment aggressively in discrimination cases. *See infra* note 111. Furthermore, practitioners in civil rights firms saw a difference in the frequency with which defendants' motions for summary judgment were granted after the trilogy was decided. *See* Jane L. Dolkart, *Summary Judgment in the Federal Courts After the Supreme Court Trilogy*, 18 BARRISTER MAG. 48, 50 (Summer 1991). A study by the Federal Judicial Center does not refute the conclusion that the trilogy encouraged defendants in civil rights claims to bring, and the courts to grant, more summary judgment motions following the trilogy. *See* Joe S. Cecil, *Trends in Summary Judgment Practice: A Summary of Findings*, FJC DIRECTIONS 11 (1991).

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civil rights actions has deprived plaintiffs of the fairer, more accurate decision-making assured by a factfinder's decision at trial.

Part I of this Article describes the methods of proving discrimination under Title VII and the Age Discrimination in Employment Act ("ADEA"), the two federal statutes employees use most frequently to sue employers for discrimination.[20] Part II examines recent changes in summary judgment law and their effects on employment discrimination plaintiffs.[21] Part III offers a proposal for improving summary judgment doctrine in employment discrimination claims, a proposal that preserves plaintiffs' right to trial while respecting defendants' legitimate rights and the judicial system's efficiency concerns.[22]

This proposal encourages courts deciding motions for summary judgment in employment discrimination claims to employ a different approach from that used in deciding summary judgment motions in other civil suits. *Anderson v. Liberty Lobby* requires courts to consider the substantive law when ruling on motions for summary judgment.[23] Courts must apply the construct set forth in *McDonnell Douglas Corp. v. Green*[24] which defines the proper allocation of burdens of proof and production in employment discrimination cases. Proper application of the *McDonnell Douglas* standard requires courts to impose a heightened burden on discrimination defendants moving for summary judgment. In ruling on whether a defendant has met this heightened burden, courts should use a sliding-scale approach. That is, the quantum and quality of the defendant's evidence should govern the quantum and quality of the evidence needed for a plaintiff to defeat the motion.

I. Proving Disparate Treatment Under Federal Law: Title VII and the Age Discrimination in Employment Act

Congress enacted Title VII[25] of the Civil Rights Act of 1964 "to eliminate, through utilization of formal and informal remedial

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[20] *See infra* notes 25–69 and accompanying text.
[21] *See infra* notes 70–198 and accompanying text.
[22] *See infra* notes 199–241 and accompanying text.
[23] 477 U.S. 242, 248 (1986). *See infra* Part II-A-1.
[24] 411 U.S. 792, 802 (1973). *See infra* Part I-B.
[25] Title VII of the Civil Rights Act states in relevant part:

> (a) 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,

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procedures,[26] discrimination in employment based on race, color, religion, or national origin."[27] In essence, Title VII makes it unlawful for employers to discriminate against any individual in hiring, in discharging or "with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex or national origin. . . ."[28]

In passing Title VII of the Civil Rights Act, Congress stressed that equal employment opportunity is a basic right in this country. The legislature noted that the other civil rights the Act guaranteed would be meaningless without the right to "gain the economic wherewithal to enjoy or properly utilize them."[29]

> 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 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.

42 U.S.C. § 2000e (1988).

[26] Title VII created the Federal Equal Employment Opportunity Commission ("EEOC") and delegated to it primary responsibility for preventing and eliminating unlawful and discriminatory employment practices. 42 U.S.C. §§ 2000e-4(a), 2000e-5(a) (1988). The EEOC is charged with investigating complaints of unlawful discrimination. *Id.* § 2000e-5(b). Once it has investigated the complaints, the EEOC issues an opinion that there is or is not reasonable cause to believe the charge is true. *Id.* Whether the EEOC finds reasonable cause or not, 180 days after filing with the EEOC, but after receiving a right to sue letter from that agency, the complainant has a right to file a complaint in federal court which will treat the complaint *de novo*. *Id.* § 2000e-5(f). Before the amendments to Title VII, known as the Civil Rights Act of 1991, were enacted into law on November 21, 1991, it was generally accepted that parties in a Title VII suit did not have a right to a jury trial. *See* Matthew F. Davis, Comment, *Beyond the Dicta: The Seventh Amendment Right to Trial by Jury Under Title VII*, 38 KAN. L. REV. 1003, 1016 & nn.125–26 (1990). The 1991 Act specifically grants plaintiffs the right to collect damages, and where such damages are sought, both parties may demand a jury trial. *See supra* notes 8, 9, 10 and accompanying text.

[27] H.R. REP. No. 914, 88th Cong., 2d Sess. (1964), *reprinted in* 1964 U.S.C.C.A.N. 2355, 2401. As originally envisioned, Title VII would not prohibit sex discrimination. Congress included sex as a protected class, at the last minute on the floor of the House of Representatives. 110 CONG. REC. 2,577–84 (1964).

[28] 42 U.S.C. § 2000e-2(a)(1)(1988).

[29] H.R. REP. No. 914, 88th Cong., 2d Sess., *reprinted in* 1964 U.S.C.C.A.N. 2516 (1964). The House Report stated:

> Aside from the political and economic considerations, however, we believe in the creation of job equality because it is the right thing to do. We believe in the inherent dignity of man. He is born with certain inalienable rights. His uniqueness is such that we refuse to treat him as if his rights and well-being are bargainable. All vestiges of inequality based solely on race must be removed in order to preserve our democratic society, to maintain our country's leadership, and to enhance mankind.

Id. at 2517.

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The ADEA[30] was enacted "to promote the employment of older workers based on their ability."[31] Congress modeled the ADEA on two existing federal statutes: Title VII of the Civil Rights Act and the Fair Labor Standards Act of 1938 ("FLSA").[32] Substantively, the language of the ADEA closely resembles that of Title VII. The courts uniformly apply Title VII substantive law to ADEA cases.[33] Procedurally, however, the ADEA follows the FLSA.[34]

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[30] 29 U.S.C. §§ 621–634. The ADEA, in its relevant part, makes it unlawful for an employer:

> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;
>
> (2) to limit, segregate, or classify his employees in any way which deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or
>
> (3) to reduce the wage rate of any employee in order to comply with this Act.

Id. § 623(a).

[31] H.R. Rep. No. 805, 90th Cong., 1st Sess. (1967), *reprinted* in 1967 U.S.C.A.A.N. 2213, 2214. In passing the Civil Rights Act of 1964, Congress was aware that older persons were discriminated against in the workplace. *Id.* Section 715 of the Civil Rights Act directed the Secretary of Labor to study the problem of age discrimination in employment. *Id.* In June, 1965, the Secretary of Labor acknowledged that age discrimination in employment was rampant and called for a clear-cut federal policy that would provide a basis for a vigorous nationwide campaign to promote hiring without discrimination on the basis of age. *Id.*

Congress responded by passing Section 606 of The Fair Labor Standards Amendments of 1966. *See* H.R. Rep. No. 805, *reprinted in* 1967 U.S.C.C.A.N. 2214. This section directed the Secretary to submit "his specific legislative recommendations for implementing the conclusions and recommendations contained in his report on age discrimination in employment made pursuant to [the Civil Rights Act of 1964]." *Id.*

[32] 29 U.S.C. §§ 201–219 (1988). The Fair Labor Standards Act addresses "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers. . . ." *Id.* § 202(a).

[33] *See, e.g.*, Owen v. Penton Publishing Inc., No. 91-3744, 1992 U.S. App. LEXIS 8482, at *14 (6th Cir. Apr. 22, 1992) (generally, the court applies the analysis used for Title VII discrimination cases to ADEA cases pursuant to *McDonnell Douglas Corp.*); Johnson v. Minnesota Hist. Soc'y, 931 F.2d 1239, 1242 (8th Cir. 1991) (citing Halsell v. Kimberly-Clark Corp., 683 F.2d 285, 289 (8th Cir. 1982)) ("guidelines set forth in *McDonnell Douglas* are applicable to cases arising under the ADEA"); Mauter v. Hardy Corp., 825 F.2d 1554, 1556 (11th Cir. 1987) ("In age discrimination cases, this circuit has elected to follow a burden of proof scheme substantially similar to that established for Title VII cases. . . ."); Williams v. Edward Apffels Coffee Co., 792 F.2d 1482, 1485 (9th Cir. 1986) ("Satisfaction of the *McDonnell Douglas* criteria is sufficient to establish a prima facie case" under the ADEA.).

[34] *See* 29 U.S.C. § 626(b) (1988). A Title VII complainant must file charges with the EEOC within 180 days of the alleged unlawful practice. 42 U.S.C. § 2000e-5(e) (1988). Before initiating a civil suit, however, a Title VII claimant must wait 180 days while the EEOC considers the complaint. *See id.* § 2000e-5(f)(1). If, after that time, the Commission has not reached a conciliation agreement with the employer, has not initiated a suit, has not taken action or has dismissed the complaint, the claimant may request a notice of a right to sue (a

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The methods of proof under Title VII and the ADEA are virtually identical. Under both statutes, plaintiffs can prove their case by direct or circumstantial evidence or both. Where direct evidence is lacking, the courts employ a burden-shifting approach first recognized in *McDonnell Douglas Corp. v. Green.*[35] Employment discrimination plaintiffs may proceed on two different theories. Plaintiffs who allege disparate treatment must prove that their employers intentionally discriminated against them because of their

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right to sue letter) from the EEOC. *Id.* The right to sue letter authorizes a claimant to bring a civil action within 90 days of its receipt. 29 C.F.R. § 1601.28(e)(1) (1991). If the claimant requests a right to sue letter within the 180 days, the EEOC, in its discretion, may issue a letter if it determines it will be unable to complete administrative processing of the charge within the 180 days. *Id.*

Although an ADEA claimant must also file a complaint with the EEOC within 180 days after the alleged unlawful practice occurred, it need not apply for a right to sue letter in order to bring a civil action. 29 U.S.C. § 626(c)(d) (1988); 29 C.F.R. § 1626.7 (1989). The ADEA claimant must wait 60 days after filing the charges with the EEOC to commence suit. 42 U.S.C. § 626(d). If the EEOC commences an action to enforce the claimant's rights, the right to bring an individual action terminates. *Id.* § 626(c)(1).

The ADEA provides two alternative routes for federal employees pursuing a claim. The claimant can invoke the EEOC's administrative process and then file a civil action if unsatisfied with the results, or bring a civil action after giving the EEOC not less than 30 days notice of an intent to file suit. Stevens v. Department of the Treasury, 111 S. Ct. 1562, 1566 (1991) (citing 29 U.S.C. § 633a(b)(c)). *See also* Emily J. Lawrence, Casenote, *Clarifying the Timing Requirements for Federal Employees' Age Discrimination Claims:* Stevens v. Department of the Treasury, 33 B.C. L. REV. 396 (1992).

It appears that Congress chose to create a new act to protect older employees from age discrimination rather than to amend Title VII, at least in part, to avoid overtaxing the EEOC. *See* Kimberly Fayssoux, Note, *The Age Discrimination in Employment Act of 1967 and Trial by Jury: Proposals for Change,* 73 VA. L. REV. 601, 606 & n.29 (1987). This choice, however, has encouraged some commentators to argue that Congress intended to give less protection to age discrimination victims than to victims of race, sex or national origin discrimination. *Id.* at 605 & n.26.

Because the ADEA's legislative antecedents include the FLSA as well as Title VII, plaintiffs suing under the ADEA actually have greater rights than those enjoyed by plaintiffs suing under Title VII. For example, courts had uniformly interpreted Title VII before its 1991 amendment as not providing a right to a jury trial, while a plaintiff bringing suit under the ADEA always had the right to a jury trial. *See supra* notes 9, 10 and accompanying text. *See also* Lorillard v. Pons, 434 U.S. 575, 580–82 (1978) (granting right to a jury trial for ADEA plaintiff seeking monetary damages because a plaintiff suing under the FLSA has a right to a jury trial and the ADEA was derived procedurally from the FLSA). In response to the Supreme Court decision, Congress amended the ADEA in 1978 expressly to include a right to a jury trial. 29 U.S.C. § 626(c)(2) (1988).

In addition, the ADEA provides for double damages where a defendant willfully violated the Act. *Id.* Section 626(b) states that "liquidated damages shall be payable only in cases of willful violations of this Act." 29 U.S.C. § 626(b) (1988). Historically, there has been no such provision under Title VII. The Civil Rights Act of 1991, however, provides the plaintiff a right to collect limited punitive damages. *See* Pub. L. No. 102-166 § 102(b)(3), 105 Stat. 1072–73 (amending § 1977 of the Civil Rights Act of 1964 by adding § 1977A(b)(3)).

[35] 411 U.S. 792 (1973). *See also* International Bhd. of Teamsters v. United States, 431 U.S. 324, 335–36 n.15 (1977).

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age, race, color, religion, sex or national origin. Plaintiffs who proceed under a disparate impact theory must prove that facially neutral employment criteria have a disparate, adverse impact on a protected group. In proving a disparate impact claim, individual plaintiffs or a class of plaintiffs need not prove that the employer intentionally discriminated. Rather, plaintiffs will prevail if they can prove, through the use of statistics, that facially neutral criteria, such as requiring a high school diploma, will have an adverse impact on the plaintiffs' class.[36]

To illustrate both how the courts currently treat discrimination plaintiffs, and this author's proposal for change, this Article will refer throughout to a hypothetical plaintiff, Connie Computer, who brings a sex discrimination suit against MBI for failure to hire her. In the hypothetical, Connie Computer is a twenty-eight-year-old white female who applies to MBI for an advertised position selling computers. Ms. Computer has a Bachelor of Arts degree in business and three years' experience selling computers for MBI's competitors. The advertisement states that MBI is looking for someone with a Bachelor of Arts degree in business and at least three years' experience selling computers. MBI does not hire Connie, but gives the position to Noel Knownothing, a white male, age thirty. Ms. Computer sues MBI alleging that MBI violated Title VII by discriminating against her because of her sex.

A. *Proof by Direct Evidence: Smoking Guns?*

Title VII and ADEA plaintiffs can prove by direct evidence that defendants discriminated against them, just as plaintiffs in any other civil case would prove their cause of action.[37] For example, if

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[36] *See* Griggs v. Duke Power Co., 401 U.S. 424 (1971). For a discussion of the different burdens between disparate treatment and disparate impact cases as they were understood before the Court decided Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989), see John F. Smith, III, *Employer Defenses in Employment Discrimination Litigation: A Reassessment of Burdens of Proof and Substantive Standards Following* Texas Department of Community Affairs v. Burdine, 55 TEMP. L.Q. 372 (1982). Most commentators agreed that there was little or nothing left of the disparate impact theory of discrimination after *Wards Cove. See* David O. Stewart, *Civil Rights: Just a Trim?*, 75 ABA J. 40 (Aug. 1989) (asserting *Wards Cove* "in effect overrules Griggs . . . in which the court required employers to justify employment policies that were shown by statistics to have a 'disparate impact' on minorities"); *see also* Pamela L. Perry, *Two Faces of Disparate Impact Discrimination*, 59 FORDHAM L. REV. 523 (1991); Mack A. Player, *Is* Griggs *Dead? Reflecting (Fearfully) on* Wards Cove Packing Co. v. Atonio, 17 FLA. ST. U. L. REV. 1 (1989). *But see The Supreme Court, 1988 Term—Leading Cases*, 103 HARV. L. REV. 320, 341–61 (1989) (arguing *Wards Cove* clarifies *Griggs*). The disparate impact theory has been revived to some extent by the Civil Rights Act of 1991.

[37] There is some controversy as to what constitutes direct evidence in the discrimination context. Some courts and commentators consider direct evidence to be any evidence that

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in our hypothetical case, MBI tells Connie Computer that it will not hire her because "women don't make good salesmen," Ms. Computer can prove by direct evidence that MBI refused to hire her because of illegitimate motives. Likewise, where an employer discharges an older individual because "old folks can't manage as well as younger employees," the plaintiff can prove illegal age discrimination.[38] As defendants become increasingly sophisticated about the law,[39] these admissions occur very rarely. Plaintiffs therefore normally use circumstantial evidence to prove their Title VII and ADEA cases.

B. *Proof by Circumstantial Evidence: The* McDonnell Douglas *Formula*

In *McDonnell Douglas Corp. v. Green,*[40] *Furnco Construction Corp. v. Waters*[41] and *Texas Department of Community Affairs v. Burdine,*[42] the

establishes that the employer has a prejudice against the protected class of which plaintiff is a member. For example, if defendant makes numerous remarks in the workplace such as, "Women are not as loyal workers as men," or, "Hispanics are lazy," some courts and commentators would argue that when a woman or an Hispanic is discharged, these comments are direct evidence of discriminatory motive. *See* EEOC v. M.D. Pneumatics, Inc., 779 F.2d 21, 22 (8th Cir. 1985) (upholding *sub silentio* the district court's conclusion that stray remarks such as, "It's going to be a cold day in hell before we really have women in this plant," constituted direct evidence of discrimination). Other courts would require that the comments be causally linked to the particular decision in question. That is, only if the employer tells the woman he is firing her (or refusing to promote her) because "women are not as loyal workers as men," or if he tells the Hispanic that he is making his adverse employment decision against him because "Hispanics are lazy," would these courts consider these comments direct evidence of discriminatory motive. *See, e.g.*, Rollins v. TechSouth, Inc., 833 F.2d 1525, 1528 n.6 (11th Cir. 1987) ("one example of direct evidence would be a scrap of paper saying 'fire Rollins—she is too old!,'" but without evidence of a causal connection it is not direct evidence); Robinson v. Montgomery Ward & Co., 823 F.2d 793, 797 (4th Cir. 1987) (requiring plaintiff to show "strong, direct evidence of intentional discrimination" through evidence of racial remarks); Maxfield v. Sinclair Int'l, 766 F.2d 788, 791 (3d Cir. 1985) ("Direct evidence would include statements by the employer to the employee that s/he was being fired because of age."). This latter view is probably more supportable under traditional rules of evidence. *See* IA JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW 948 (James Chadbourn ed., 1981). It also comports with Justice O'Connor's view in Price Waterhouse v. Hopkins, 490 U.S. 228, 277 (1989) (O'Connor, J., concurring) (stray discriminatory remarks in the workplace are not sufficient to create a Title VII claim). *See infra* note 63 and accompanying text. *But see* Beshears v. Ashbill, 930 F.2d 1348, 1354 (8th Cir. 1991) (while *Price Waterhouse* defines direct evidence negatively to exclude stray remarks, "this court has held that direct evidence may include evidence of actions or remarks of the employer that reflect a discriminatory attitude").

[38] See, e.g., *infra* note 63 and accompanying text for examples of the evidence courts will consider.

[39] See *infra* note 45 and accompanying text for one commentator's view.

[40] 411 U.S. 792 (1973).

[41] 438 U.S. 567 (1978).

[42] 450 U.S. 248 (1981).

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Supreme Court explained a three-stage method of allocating burdens of persuasion and production[43] in a Title VII case where the plaintiff attempts to prove discrimination by circumstantial evidence.[44] Because a plaintiff alleging discrimination under the disparate treatment theory must prove that the defendant *intended* to discriminate, and intent is generally difficult to prove absent a smoking gun,[45] the Court departed from the traditional order of proof in a civil case.[46]

1. The Prima Facie Case

According to *McDonnell Douglas,* our hypothetical Title VII plaintiff, Connie Computer, makes out a prima facie[47] case of dis-

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[43] While often the courts confuse burdens of persuasion and production, the terms refer to two very different burdens. A party with the burden of production, as the term implies, has the burden of going forward to produce evidence supporting his or her version of the facts. *See* Kovacic-Fleischer, *supra* note 4, at 620 (citing IX JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW 283, 294 (James Chadbourn ed., 1981)). A party with the burden of persuasion, however, must come forth with sufficient evidence to persuade the factfinder of the truth of those facts for which the party has the burden. *Id.* Under the *McDonnell Douglas/Burdine* model, the plaintiff has the burden of persuasion throughout the trial and the defendant has the burden of production only to rebut the plaintiff's prima facie case. *See infra* notes 46, 47 and accompanying text.

[44] This method has been applied consistently to ADEA cases as well. *See supra* note 33 and *infra* note 48 and accompanying text.

[45] Employers have become increasingly adept at protecting themselves from discrimination lawsuits. It is rare for an employer to make a direct statement to an employee such as, "I can't hire a woman for this job." *See* Iris Taylor, *Law Council Official Prods Companies on Hiring, Interviewing,* NEWARK STAR LEDGER, June 12, 1991, at 41.

[46] *See* Grigsby v. Reynolds Metals Co., 821 F.2d 590, 595 (11th Cir. 1987) ("*McDonnell Douglas-Burdine* patterns of proof were designed to ease the evidentiary burdens on employment discrimination plaintiffs, who rarely are fortunate enough to have access to direct evidence of intentional discrimination."). *See also* Kovacic-Fleischer, *supra* note 4, at 622–23. According to Kovacic-Fleischer, the courts should consider various factors in determining how to allocate burdens of persuasion and production. Those factors are policy, convenience, fairness and probability.

> Policy issues include factors such as burdening the plaintiff because the person seeks to change the status quo or burdening the defendant when certain defenses are disfavored or unusual. Included under convenience and fairness issues are factors such as who has knowledge and access to information and whether the burden follows the natural order of storytelling.

Id. But see Phyllis Tropper Baumann et al., *Substance in the Shadow of Procedure: The Integration of Substantive and Procedural Law in Title VII Cases,* 33 B.C. L. REV. 211, 236–38 (1992) (arguing that "the Court, pursuing its pro-defendant vision of title VII, placed only a minimum production burden on the defendant," and suggesting procedural choices the court might have employed).

[47] The Supreme Court in *Texas Dep't of Community Affairs v. Burdine* noted the distinction between the meaning of prima facie case as referred to in *McDonnell Douglas* and the traditional understanding of the term. 450 U.S. 248, 254 n.7 (1981). In the Title VII and ADEA contexts, a prima facie case refers to the plaintiff's burden at the first stage of

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crimination, the first step in proving discrimination, by demonstrating:

> 1) that she is a member of a protected class (women);
> 2) that she applied for and was qualified for the job (she met the posted qualifications);
> 3) that MBI did not hire her; and
> 4) that MBI hired Noel Knownothing, who is not a member of the protected class, to fill the position. (If MBI had not hired Mr. Knownothing, Ms. Computer could satisfy this requirement by demonstrating that MBI continued to look for a person to fill the position after rejecting Ms. Computer.)[48]

Once Ms. Computer successfully demonstrates these four elements of a prima facie case, the court presumes that MBI is guilty of intentional discrimination. If MBI presents no evidence at trial in response to Connie Computer's prima facie case, and Connie moves for a directed verdict, she will prevail. The presumption that MBI intentionally discriminated against Connie Computer, once she proves a prima facie case, efficiently furthers the Title VII policy

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litigation. It refers to the proof needed to shift the burden of production to the employer to come forward with a legitimate, non-discriminatory reason for its employment decision. In other words, it refers to the burden required to trigger a presumption that defendant acted in a discriminatory manner. *See infra* note 48 and accompanying text. A prima facie case traditionally refers to the material elements of a plaintiff's case that must be substantiated to survive dismissal or summary judgment. Many courts, in addressing defendant's motion for summary judgment in the Title VII and ADEA context confuse these meanings of prima facie case. *See* Healy v. New York Life Ins. Co., 860 F.2d 1209, 1226 (3d Cir. 1988) (Shapiro, J., dissenting) (arguing that the import of *Celotex* and *Liberty Lobby* is that the non-moving party is held to a higher level of proof at the prima facie stage, and that "[n]either case gives a judge the authority to assess the strength of the evidence or the credibility of witnesses' affidavits once the prima facie case . . . [is] established"). For an excellent discussion of the differences and the implications of the confusion, see Kovacic-Fleischer, *supra* note 4, at 628.

[48] The basic elements of a prima facie case apply to ADEA as well as Title VII cases. *See supra* note 33. The criteria for both ADEA and Title VII will vary somewhat depending on whether the basis of the complaint is a discharge or the failure to promote rather than to hire. *Compare* Mathew v. Virginia Union Univ., No. 91-2593, 1992 U.S. App. LEXIS 5450, at *10 (4th Cir. Mar. 27, 1992) (citing Alvarado v. Board of Trustees of Montgomery Community College, 928 F.2d 118, 121 (4th Cir. 1991)) (in a Title VII failure to promote case, plaintiff must show: "(1) he is a member of a protected group; (2) he applied for the promotion and tenure; (3) he was qualified for promotion and tenure; and (4) he was rejected under circumstances giving rise to an inference of unlawful discrimination" to make out a prima facie case) *with* EEOC v. Clay Printing Co., 955 F.2d 936, 941 (4th Cir. 1992) (citing EEOC v. Western Elec. Co., 713 F.2d 1011, 1014 (4th Cir. 1982)) (to demonstrate a prima facie case in an ADEA discharge claim, claimant must demonstrate: "(1) he is a member of a protected class, (2) he was discharged, (3) at the time of discharge, he was performing at a satisfactory level, meeting his employer's legitimate expectations, and (4) following his discharge, he was replaced by a person outside the protected class").

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of eliminating illegal discrimination in the workplace. It makes it easier for Connie to prove her case while respecting MBI's need to eliminate frivolous lawsuits.

The Supreme Court recognized the inherent difficulty of proving discriminatory intent when it adopted the presumption created by *McDonnell Douglas* and its progeny.[49] Plaintiffs in disparate treatment cases must prove that defendants acted with discriminatory intent, an "elusive factual question"[50] that is difficult to prove absent a "smoking gun."[51] The presumption raised by the prima facie case therefore gives the plaintiff the opportunity to flesh out the facts.[52] Most plaintiffs will not have access to evidence of motive or intent, should any exist.[53]

The *McDonnell Douglas* construct also screens out frivolous suits by requiring that Connie be a member of a protected class, be at least minimally qualified for the position, apply for a position and be rejected by MBI. Moreover, the fourth requirement—that MBI fill the position with a person who is not a member of the protected class or continue to seek other applicants for the position—gives rise to an inference that MBI has acted with discriminatory animus.[54]

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[49] Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978).

[50] *Burdine*, 450 U.S. at 255 n.8.

[51] *See* Visser v. Packer Eng'g Assocs., 924 F.2d 655, 662 (7th Cir. 1991) (Flaum J., with Bauer & Cudahy, JJ., dissenting) (citing Holzman v. Jaymar-Ruby, Inc., 916 F.2d 1298, 1303 (7th Cir. 1990)) ("Just as age discrimination cases rarely present the trier of fact with a 'smoking gun,' they rarely present the district courts with evidence that points inescapably to the conclusion that there is no question of material fact concerning the role age played in . . . [the] decision to . . . terminate. . . ."); Connell v. Bank of Boston, 924 F.2d 1169, 1175 (1st Cir. 1991) ("Proof along these lines need not be of the 'smoking gun' variety and, in some factual settings, the mere showing of the falsity of the employer's stated reasons may, along with the other facts and circumstances in the case, give rise to a reasonable inference of age discrimination."); Green v. USX Corp., 843 F.2d 1511, 1526 (3d Cir. 1988) ("The evidence of that intent need not be so direct and uncontrovertible as 'smoking gun' evidence to compel a *rebuttal* by the defendant, and to require that rebuttal be substantive and not mere pretext.") (emphasis in original). *See also* Bhaya v. Westinghouse Elec. Corp., 922 F.2d 184, 192 (3d Cir. 1990) (Mansmann, J., dissenting); Hollander v. American Cyanamid Co., 895 F.2d 80, 85 (2d Cir. 1990); Clements v. General Accident Ins. Co. of Am., 821 F.2d 489, 491 (8th Cir. 1987).

[52] *See Green*, 843 F.2d at 1527 ("The requirement of the prima facie showing was intended as a working tool to provide a means to determine which cases raise sufficiently compelling inferences of discrimination to require rebuttal. It was *not* intended as a hallmark of whether the complainant has *proved* his or her case.") (emphasis in original).

[53] *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 271 (1989) (O'Connor, J., concurring) ("the entire purpose of the *McDonnell Douglas* prima facie case is to compensate for the fact that direct evidence of intentional discrimination is hard to come by"). *See also* Taylor, *supra* note 45, at 41.

[54] Goldberg v. B. Green & Co., 836 F.2d 845, 849 (4th Cir. 1988) illustrates the protection the fourth *McDonnell Douglas* prong gives an employer. In *Goldberg*, the court affirmed the

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2. Defendant's Burden of Production

After Connie Computer makes out a prima facie case, the second stage of the suit occurs. The burden of production shifts to MBI to "articulate a legitimate,[55] non-discriminatory reason"[56] for hiring Noel Knownothing over Connie Computer. The rationale for the plaintiff's victory if the defendant cannot articulate a legitimate, non-discriminatory reason for the hiring decision is that employers normally act rationally unless motivated by an illegal prejudicial motive.[57]

MBI can satisfy its burden by having its personnel director testify that it hired Mr. Knownothing because he was better qualified than Connie Computer. The burden now shifts to the plaintiff. Because Connie Computer has the ultimate burden of persuasion, if she puts nothing into evidence, the defendant will prevail.[58]

3. Plaintiff's Proof of Pretext

At the third and final stage of the suit, once MBI has articulated a legitimate, non-discriminatory reason for selecting Mr. Knownothing over the plaintiff, she must have a "full and fair opportunity"

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lower court's grant of summary judgment to the defendant because the plaintiff did not make out a prima facie case. He demonstrated no direct or circumstantial evidence of age discrimination and he could not meet the fourth *McDonnell Douglas* requirement because he was replaced by a man who was six years older than he. *See also* Young v. General Foods Corp., 840 F.2d 825 (11th Cir. 1988) discussed *infra* note 235.

[55] "Legitimate" has not been interpreted by the courts to have a meaning other than "non-discriminatory." *See* Sullivan, *supra* note 3, at 1115 n.38. It seems odd that the Court, in defining the defendant's burden of production, would not have used the word "legitimate" to mean something different from, and in addition to, non-discriminatory. Likewise, it would make sense to interpret legitimate to require the employer to demonstrate that its motive was something in addition to non-discriminatory. Assuming that the Court intended legitimate to mean something more than non-discriminatory, perhaps the Court originally intended that the lower courts look a little more closely at the adequacy of the employer's reason for the adverse employment decision. *See* Hannah A. Furnish, *A Path Through the Maze: Disparate Impact and Disparate Treatment Under Title VII of the Civil Rights Act of 1964 After* Beazer *and* Burdine, 23 B.C. L. REV. 419, 437 (1982). *But see* Catherine J. Lanctot, *The Defendant Lies and the Plaintiff Loses: The Fallacy of the "Pretext-Plus" Rule in Employment Discrimination Cases*, 43 HASTINGS L.J. 57, 136–40 (1991) (concluding that courts have argued that the defendants should have a "rational business reason" for their terminations of plaintiffs in order to fulfill the "legitimate" requirement, and arguing that any reason, including an illegal one, should suffice to meet defendant's burden).

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

[57] Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978).

[58] Although this approach may work at trial, there is a serious question whether a court should grant summary judgment motions against plaintiffs who present no evidence in response to a mere articulation that they were not as well qualified as the person hired. *See* discussion following Case One, *infra* Part III-B.

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to rebut the defendant's proffered reason for the hiring decision.[59] In order to prevail at trial, Ms. Computer must prove that the defendant's proffered reason is a pretext for discrimination. At this point the plaintiff's burden to prove pretext merges with her ultimate burden of persuasion.[60] That is, if Connie Computer proves that MBI's proffered reason is pretextual, she wins the case.[61]

According to *Burdine*,[62] Ms. Computer has two avenues by which she can prove that the defendant discriminated against her. Suppose the defendant's proffered reason for rejecting her is that Mr. Knownothing is better qualified. The company representative, however, told Ms. Computer at her job interview that MBI found that women had a difficult time in the computer sales division because their understanding of technical language is inferior to that of men. Ms. Computer could then establish by direct evidence that it was more likely than not that the company rejected her because she was a woman. If, however, the employer made no such statements, Ms. Computer could meet her burden of proof indirectly by demonstrating that Mr. Knownothing was not better qualified than she. In other words, Ms. Computer will have proven by either of these methods that defendant's proffered reason for not hiring her was pretextual.[63]

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[59] *McDonnell Douglas*, 411 U.S. at 804–05.

[60] Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981).

[61] *See infra* note 64.

[62] 450 U.S. at 256 (citing *McDonnell Douglas*, 411 U.S. at 804–05).

[63] In determining whether plaintiffs have met their burden of proof, courts are free to consider a variety of types of circumstantial evidence. A factfinder may consider whether the employer's selection or promotion methods lead to arbitrary results because they lack objective standards or procedures. *See* Warren v. Halstead Indus., 802 F.2d 746, 753 (4th Cir. 1986). The factfinder can also consider evidence of the general atmosphere in the workplace. Evidence of company policies or practices that have historically limited opportunity for, or led to harassment of, members of a protected group are relevant to whether the defendant discriminated against the plaintiff.

Nonetheless, there are two troubling trends regarding evidence of racial or gender harassment in the workplace. First, some courts have held that evidence of "stray remarks" in the workplace that are offensive are not sufficient in themselves to create a genuine issue of material fact. *See, e.g.*, Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989) ("Remarks at work that are based on sex stereotypes do not inevitably prove that gender played a part in a particular employment decision."). *See also* Guthrie v. Tifco Indus., 941 F.2d 374, 379 (5th Cir. 1991) ("stray remarks" alone were insufficient to establish discrimination); Gagne v. Northwestern Nat'l Ins. Co., 881 F.2d 309, 314 (6th Cir. 1989) ("solitary remark" insufficient to preclude summary judgment). *But see* Beshears v. Ashbill, 930 F.2d 1348, 1354 (8th Cir. 1991) (citing *Price Waterhouse*, 490 U.S. at 278 (O'Connor, J., concurring)) (interpreting *Price Waterhouse* to mean that "[c]omments which demonstrate a discriminatory animus . . . or those uttered by individuals closely involved in employment decisions may constitute direct evidence. . .").

The second troubling trend is that courts often hold that racist or sexist statements are

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Once the plaintiff can make this showing, she wins the case.[64]

The Court initially sculpted the *McDonnell Douglas/Burdine* approach with the trial setting in mind.[65] The purpose of allowing the

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not probative of discriminatory intent unless they are made by the decisionmaker, the person who took the allegedly discriminatory action against the plaintiff. *See* Williams v. Williams Elecs., Inc., 856 F.2d 920, 922, 925 (7th Cir. 1988) (that "some of [plaintiff's] fellow technicians had said that a black person should not be working as an electronics technician, was not direct evidence of discrimination" because "[n]one of these individuals were involved in the layoff decision"). *See also* Randle v. LaSalle Telecommunications, 876 F.2d 563, 569 (7th Cir. 1989) (citing Furr v. AT&T Tech., 824 F.2d 1537, 1549 (10th Cir. 1987)). These cases ignore the power an employer has in eliminating racism from its workforce by not permitting racist remarks or incidents to take place. *See* Daniel Goleman, *New Way to Battle Bias: Fight Acts, Not Feelings*, N.Y. TIMES, July 16, 1991, at C1. Furthermore, management's tolerance of such remarks may permit an inference that management holds (and acts upon) similar views.

A plaintiff may also prove his or her case by the use of statistical evidence. *See* International Bhd. of Teamsters v. United States, 431 U.S. 324, 334–43 (1977). From a statistical disparity of two or three standard deviations from the norm between the number of qualified members of a protected class and the number of qualified members of a non-protected class in the workplace, a reasonable jury can infer that the defendant discriminated against the plaintiff, a member of a non-protected class. *Id.* at 338–40.

[64] The majority of jurisdictions interpret *Burdine* to require only that a plaintiff prove the defendant's reason is unworthy of belief in order to meet his or her burden of persuasion. *See* Chippolini v. Spencer Gifts, Inc., 814 F.2d 893, 898 (3d Cir. 1987). The First Circuit, however, requires additional evidence of discriminatory animus before the plaintiff will prevail. *See* Mesnick v. General Elec. Co., 950 F.2d 816, 829 (1st Cir. 1991); Samuels v. Raytheon Corp., 934 F.2d 388, 392 (1st Cir. 1991); Connell v. Bank of Boston, 924 F.2d 1169, 1178 (1st Cir. 1991). According to the First Circuit, the plaintiff is "required 'to do more than simply refute or cast doubt' on the employer's rationale. He must also 'show a discriminatory animus based on age.'" *Id.* at 1172 (quoting Medina-Munoz v. R.J. Reynolds Tobacco Co., 896 F.2d 5, 9 (1st Cir. 1990)). *But see* Rossy v. Roche Prods., Inc., 880 F.2d 621, 625 (1st Cir. 1989) (following majority approach).

The Fourth, Seventh and Eleventh Circuits, in some cases, have required additional evidence of discriminatory animus, but the additional evidence rule is not well established in these circuits yet. *See* Lanctot, *supra* note 55, at 82–86 nn.92–97. *See also Guthrie*, 941 F.2d at 379 (requiring plaintiff to specifically disprove, not merely rebut, defendant's articulated reason to terminate). This author agrees with Professor Lanctot's premise that *Burdine* requires that the plaintiff prevail upon proving that the defendant's legitimate, non-discriminatory articulated reason is false without any additional showing of pretext. To the extent Professor Lanctot argues that the requirement of proving discriminatory animus in addition to pretext (the "pretext-plus" rule) is the sole, or even the primary cause of improper decisions, I disagree. The courts in all jurisdictions, including those that do not apply the pretext-plus rule, have at some time usurped the factfinder's role in discrimination cases where defendants have moved for summary judgment. This Article argues that it is the courts' misapplication of the summary judgment standard that causes this usurpation. The pretext-plus rule only compounds the problem because it leads to an increased misuse of summary judgment.

[65] When the parties allege that the defendant had mixed motives for its employment decision, the *McDonnell Douglas* allocation of burdens of proof will not apply because there will be at least one illegitimate reason for the adverse employment decision which the defendant argues is not the "but for" cause of its decision. The defendant will seek to prove

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defendant to articulate a legitimate, non-discriminatory reason for the hiring decision is to "meet the plaintiff's prima facie case by presenting a legitimate reason for the action and to frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext."[66] Thus, when formulating the approach, the Supreme Court contemplated that the defendant's "articulation" would set up a factual question for the factfinder to determine at trial after hearing all the evidence.[67]

Courts have uniformly applied the *McDonnell Douglas/Burdine* approach to summary judgment,[68] and rightfully so. In adapting the approach to the summary judgment setting, however, many courts, particularly those deciding motions following the summary judgment trilogy, have misapplied the *McDonnell Douglas/Burdine* test.[69]

II. The "New" Summary Judgment and Employment Discrimination

A. *The Summary Judgment Trilogy*

1. *Anderson v. Liberty Lobby*

In *Anderson v. Liberty Lobby*, the Supreme Court granted certiorari to decide whether the court of appeals erred in refusing to consider the evidentiary standard in a libel case when determining whether to grant summary judgment.[70] The Court concluded that the federal courts must consider the substantive evidentiary stan-

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that it would have made the adverse decision anyway in the absence of illegitimate factors. *See Price Waterhouse*, 490 U.S. 228, 239–53 (1989) (if the plaintiff can prove that the employer had used impermissible factors in reaching its decision, the burden of persuasion shifts to the employer to prove by a preponderance of the evidence that it would have reached the same decision absent its consideration of illegitimate factors).

[66] Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981).

[67] *Id.*

[68] *See, e.g.*, Villanueva v. Wellesley College, 930 F.2d 124, 127–28 (1st Cir. 1991); Visser v. Packer Eng'g Assocs., 924 F.2d 655, 660 (7th Cir. 1991) (Flaum, J., with Bauer & Cudahy, JJ., dissenting); Merrick v. Farmers Ins. Group, 892 F.2d 1434, 1437 (9th Cir. 1990); Jackson v. University of Pittsburgh, 826 F.2d 230, 232–33 (3d Cir. 1987). In fact, courts are grappling with the burden-shifting analysis at the summary judgment stage more frequently than ever as summary judgment has emerged as the predominant "battleground for employers seeking to avoid discrimination trials." Lanctot, *supra* note 55, at 67 n.38.

[69] *See* discussion *infra* Part II-B.

[70] 477 U.S. 242, 244 (1986). Fed. R. Civ. P. 56 provides that a litigant can obtain summary judgment where there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law in this uncontested factual context.

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dards that apply to the case when ruling on summary judgment motions.[71] Thus, after *Anderson v. Liberty Lobby*, there should be no doubt that the *McDonnell Douglas* construct will apply at the summary judgment phase.

The *Liberty Lobby* Court equated the inquiry a district judge makes when hearing a summary judgment motion to that which the trial court makes when faced with a directed verdict motion.[72] Accordingly, in determining whether to grant a defendant's summary judgment motion in a libel case where plaintiff is a public figure,[73] the Court held that the lower court must decide whether there is sufficient evidence in the record from which a reasonable jury could conclude that plaintiff has shown actual malice by clear and convincing evidence.[74]

Although the Supreme Court in *Liberty Lobby* claimed that it was not changing the law but merely clarifying it,[75] many scholars believe that the decision was a significant adjustment of previous summary judgment law.[76] The Court's language forbids judges from assessing a witness's credibility and from weighing the evidence,[77] but the holding—that a judge must determine whether there is sufficient evidence to support a jury verdict for the non-movant—encourages, if not requires, judges to weigh the evidence.[78]

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[71] *Id.* at 252.

[72] *Id.* at 250. FED. R. CIV. P. 50 gives the court the power to direct a verdict.

[73] *See* New York Times v. Sullivan, 376 U.S. 254, 279–80 (1964).

[74] 477 U.S. at 255–56.

[75] Justice Brennan, in his dissenting opinion, expresses his concern that the majority "purports to restate the summary judgment test, but with each repetition, the original understanding is increasingly distorted." *Id.* at 265 (Brennan, J., dissenting).

[76] *See* Issacharoff & Loewenstein, *supra* note 18 at 73, 118; Jeffrey W. Stempel, *A Distorted Mirror: The Supreme Court's Shimmering View of Summary Judgment, Directed Verdict, and the Adjudication Process*, 49 OHIO ST. L.J. 95, 144–50, 193 (1988); D. Michael Risinger, *Another Step in the Counter-Revolution: A Summary Judgment on the Supreme Court's New Approach to Summary Judgment*, 54 BROOK. L. REV. 35, 35–43 (1988); Richard L. Marcus, *Completing Equity's Conquest? Reflection on the Future of Trial Under the Federal Rules of Civil Procedure*, 50 U. PITT. L. REV. 725, 739–42 (1989). *But see* Schwarzer et al., *supra* note 17, at 487; Jack H. Friedenthal, *Cases on Summary Judgment: Has There Been a Material Change in Standards?*, 63 NOTRE DAME L. REV. 770, 771, 787 (1988); Linda S. Mullenix, *Summary Judgment: Taming the Beast of Burden*, 10 AM. J. TRIAL ADVOC. 433, 437, 474–75 (1987).

[77] "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge. . . ." 477 U.S. at 255.

[78] *But see* Schwarzer et al., *supra* note 17, at 488–89. Weighing the evidence at the summary judgment stage can be especially problematic where there is a heightened evidentiary standard as there was in *Liberty Lobby*. For example, in Liberty Lobby v. Anderson, 746 F.2d 1563, 1570 (D.C. Cir. 1984), then-appellate Judge Scalia stated:

> Imposing the increased proof requirement at this stage would change the threshold summary judgment inquiry from a search for a minimum of facts

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Furthermore, the Court stated that a plaintiff faced with a properly supported summary judgment motion must present affirmative evidence to defeat the motion, even when the evidence is within the possession of the defendant, assuming the plaintiff has had an opportunity to conduct discovery.[79] Plaintiffs cannot rely merely on their cross-examinations of the defendants in order to destroy their credibility, but must present concrete evidence of the defendants' lack of credibility in response to summary judgment motions.[80]

2. *Celotex v. Catrett*

In *Celotex v. Catrett*, the Court granted certiorari to determine exactly what burden the defendant had when moving for summary judgment.[81] The administratrix of the plaintiff's estate had filed suit against an asbestos manufacturer, alleging in the wrongful death suit that the decedent had been exposed to asbestos manufactured by defendant.[82] After discovery, the defendant moved for summary judgment but did not file an affidavit in support of its motion.[83] Rather, the defendant's motion simply asserted that there was no evidence in the record, as established through discovery, that the decedent had been exposed to a product manufactured by the defendant.[84] The district court granted summary judgment.[85] The court of appeals reversed, holding that the defendant had an affirmative duty to negate the possibility that the decedent had been exposed to the defendant's product.[86] The Supreme Court disagreed. It held that where the defendant is the movant on a summary judgment motion, it is sufficient for the defendant to point out to

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> supporting plaintiff's case to an evaluation of the weight of those facts and (it would seem) of the weight of at least the defendant's uncontroverted facts as well. . . . In other words, disposing of a summary judgment motion would rarely be the relatively quick process it is supposed to be.

[79] 477 U.S. at 250 n.5 ("we assume that both parties have had ample opportunity for discovery").

[80] *Liberty Lobby*, 746 F.2d at 1570 (an increased burden on plaintiff would effectively force plaintiff to "try his entire case in pretrial affidavits and depositions—marshalling for the court all the facts supporting his case, and seeking to contest as many of the defendant's facts as possible").

[81] 477 U.S. 317, 319 (1986).

[82] *Id.*

[83] *Id.* at 319–20.

[84] *Id.* at 320.

[85] *Celotex*, 477 U.S. at 320.

[86] *Id.* at 321.

the district court "that there is an absence of evidence to support the nonmoving party's case."[87]

Before *Celotex,* a defendant bringing a motion for summary judgment had the burden of proving the absence of any genuine issue of material fact. Yet the *Celotex* majority appeared to rule that defendants need not prove the absence of any genuine issue of material fact to meet their initial burden.[88] Justice White, however, who joined the majority opinion but also wrote a separate concurrence, clearly stated in his opinion that it is not sufficient for the movant to move for summary judgment "without supporting the motion in any way or with a conclusory assertion that the plaintiff has no evidence to prove his case."[89] He concluded that the plaintiff need not initiate discovery by deposing his or her own witnesses or by producing their affidavits if the defendant has merely asserted in a summary judgment motion that the plaintiff has failed to produce support for his or her case.[90] Rather, "[i]t is the defendant's task to negate, if he can, the claimed basis for the suit."[91]

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[87] *Id.* at 325. This language implies that the moving party who does not have the burden of persuasion at trial need not conduct discovery on the questions raised in the pleadings. Thus, if the plaintiff had not created a record demonstrating a valid case, theoretically, the defendant would meet its burden on the motion by pointing to the absence of facts in the record that support the plaintiff's case. This is an odd standard given the reality of practicing law. Unless otherwise required by the Federal Rules of Civil Procedure, the plaintiff has no incentive to reveal his or her case to the defendant by deposing his or her own witnesses or by producing affidavits stating the substance of the plaintiff's witnesses' testimony. The Supreme Court probably did not intend to require a plaintiff to depose his or her own witnesses in order to create a record to protect his or her case against the defendant's motion for summary judgment. Although there is little surprise left in the way cases are tried in the federal courts, the Court could not have intended the defendant's summary judgment motion to be a cheap way to discover the plaintiff's evidence. The Federal Judicial Center interprets *Celotex* to require defendants to present differing amounts of proof depending on the thrust of the motion:

> If the motion asserts that the opponent lacks proof to establish a requisite element of its case, as in *Celotex,* the movant must show the absence of facts, usually by producing relevant excerpts from the opponent's discovery responses, supplemented as needed by affidavits. If the motion purports to negate an essential element of the nonmovant's case, for example, to establish that no reasonable jury could return a verdict for the nonmovant, a more elaborate showing on affidavits may be necessary.

Schwarzer et al., *supra* note 17, at 478.

[88] 477 U.S. at 323.

[89] *Id.* at 328 (White, J., concurring).

[90] *Id.*

[91] *Id. Celotex* may actually deal with no more than a discovery dispute. In fact, the gravamen of Justice White's opinion is the court of appeals' failure to address the questions of whether the respondent had failed to produce any basis for her case upon defendant's "request," and whether the plaintiff had "revealed enough" information about her witnesses

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Because Justice White's vote was necessary to form a majority, his opinion, rather than the majority's, should define the confines of the majority's decision. Thus, even before the burden shifts to the plaintiff to respond to the summary judgment motion, the defendant must do more than make conclusory assertions that the plaintiff does not have a case. Exactly what this burden is remains unclear, however.[92] At the very least, the defendant should be required to depose witnesses of which the plaintiff has made the defendant aware before filing the summary judgment motion and, in its motion, to point to relevant portions of the depositions that demonstrate an absence of support for the plaintiff's claim.[93]

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and evidence to defeat the motion for summary judgment. *Id.* at 328. This discussion in Justice White's opinion seems muddled. He confuses the defendant's initial burden when moving for summary judgment that will require a response from the plaintiff with the plaintiff's burden of responding to the motion once the defendant has met its burden. It appears that the majority also questioned whether the plaintiff was forthright in her responses to the defendant's interrogatories and other discovery requests. *Id.* at 320. The key issue on summary judgment was whether the plaintiff had any proof that her husband, who had died of asbestosis, had ever been exposed to the defendant's product. *Id.* The majority opinion states that the defendant argued in its motion for summary judgment that the plaintiff had "failed to identify, in answering interrogatories specifically requesting such information, any witnesses who could testify about the decedent's exposure to petitioner's asbestos products." *Id.* Thus, the Court may have concluded that it would have been more appropriate for the lower courts to handle a discovery matter. The Court therefore had an incentive to remand the case to the lower court. *See Celotex*, 826 F.2d 33, 40 (D.C. Cir. 1987) (panel over Bork dissent refused to affirm the lower court's grant of summary judgment on remand because record indicated non-deposed witness subject to subpoena had information helpful to plaintiff).

[92] *See generally, e.g.*, Melissa L. Nelken, *One Step Forward, Two Steps Back: Summary Judgment After* Celotex, 40 HASTINGS L.J. 53 (1988). In Clark v. Coats & Clark, Inc., 929 F.2d 604 (11th Cir. 1991), the plaintiff brought an action under the Employment Retirement Income Security Act of 1974, 29 U.S.C. § 1140, § 510 (1988). The district court granted the defendant's motion for summary judgment. On appeal, the Eleventh Circuit in *Clark* read *Celotex* narrowly, stressing that it was the defendant's initial burden to prove the absence of any genuine issues of material fact when moving for summary judgment. According to the Eleventh Circuit, the burden does not shift to the plaintiff to establish that there is a genuine issue of material fact for trial until the defendant meets its initial burden. *See* 929 F.2d at 608. The court of appeals criticized the lower court's misreading of *Celotex* and noted that a recent empirical study had found that in 60% of cases in which summary judgment had been entered for the defendant, the district courts had granted the motion without discussing whether defendant had met its initial burden. *Id.* at 608–09 n.8 (citing Issacharoff & Loewenstein, *supra* note 18, at 92). In Holmberg v. Baxter Healthcare Corp., 901 F.2d 1387, 1392 n.4 (7th Cir. 1990), however, the Seventh Circuit Court of Appeals seemed to reach the opposite conclusion concerning the import of *Celotex.*

Professor Nelken suggests that if the plaintiff makes the defendant aware of the existence of a witness that would support the plaintiff's claim, the defendant is required to depose the witness before bringing its motion for summary judgment if it hopes to satisfy the defendant's burden of proof. *See* Nelken, *supra*, at 74–75 n.105.

[93] *See* Nelken, *supra* note 92, at 74–75; *see also* Eastman Kodak Co. v. Image Technical

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3. *Matsushita Electrical Industrial Co. v. Zenith Radio Corp.*

In *Matsushita,* the Supreme Court granted certiorari to determine whether the court of appeals applied the proper standards in overturning the district court's grant of summary judgment.[94] The plaintiffs, two manufacturers of American consumer electronic products, brought an antitrust suit against a group of Japanese manufacturers of electronics. The complaint alleged that the defendants had violated the Sherman Act by conspiring to engage in a predatory pricing scheme to sell their products below marginal cost in the United States in order to establish a market here and to drive the American manufacturers out of business.[95] The complaint also alleged that the defendants funded their predatory policy in the United States by conspiring to sell electronic products at artificially high prices in Japan.[96]

Disregarding substantial expert witness testimony to the contrary, the Court concluded that the plaintiffs' theory was economically implausible and would not support a favorable verdict.[97] The Court remanded to the Third Circuit, instructing the court of appeals to examine the record to see if sufficient direct evidence existed to overcome the defendants' right to judgment.[98] Although *Matsushita* directed the lower courts not to draw inferences in favor of the moving party,[99] the Supreme Court in *Matsushita* did just that. The Court emphasized that the plaintiffs' theory was not plausible because the defendants had been pricing their products low for many years.[100] This conclusion ignored the testimony of the plaintiffs' expert witnesses who averred that Japanese business executives approach such issues differently from the way Americans do.[101] The Court assumed that Japanese entrepreneurs conduct business in a manner similar to that of Americans, an assumption

Servs., 112 S. Ct. 2072 (1992), which supports the more liberal reading of *Celotex. Kodak* stated that the defendant, when moving for summary judgment in an antitrust claim, had a "substantial burden" to show it is entitled to summary judgment. *See infra* note 106 and accompanying text.

[94] 475 U.S. 574, 582 (1986).

[95] *Id.* at 578.

[96] *Id.*

[97] *Id.* at 594 n.19, 597.

[98] *Matsushita,* 475 U.S. at 598, *on remand, In re* Japanese Elec. Prods. Antitrust Litig., 807 F.2d 44 (3d Cir. 1986), *cert. denied,* Zenith Radio Corp. v. Matsushita Elec. Indus., 481 U.S. 1029 (1987).

[99] *Id.* at 587 (citing United States v. Diebold Inc., 369 U.S. 654, 655 (1962)).

[100] *Id.* at 590–91.

[101] *Id.* at 594 & n.19.

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contrary to the plaintiffs' expert testimony.[102] By examining the plausibility of the plaintiffs' theory, the Court seemed to instruct the lower courts to weigh the evidence and to decide which inference was more reasonable in light of the evidence. This had traditionally been a function of the factfinder.[103] The *Matsushita* Court denied that it was weighing competing interests. Rather, it concluded that the plaintiffs had asked the court to draw irrational inferences.[104]

Even if one were to apply the *Liberty Lobby* standard, however, the plaintiffs in *Matsushita* seemed to meet the standard. Sufficient evidence existed in the record from which a jury could reasonably conclude that the Japanese defendants had acted in concert in order to monopolize the market in the United States. *Matsushita,* which was decided before *Liberty Lobby,* appears to go further than *Liberty Lobby* by permitting courts faced with summary judgment motions to conclude that a theory is implausible based on assumptions that have no basis in the evidence presented by either party.[105]

Eastman Kodak Co. v. Image Technical Services,[106] decided recently, casts doubt on such a broad interpretation of *Matsushita.* In *Eastman Kodak,* the Court held by a six-to-three majority that there were genuine issues of material fact for the jury to decide whether the defendant had violated sections 1 and 2 of the Sherman Act.[107] The majority opinion stressed that *Matsushita* did not "introduce a special burden on plaintiffs facing summary judgment in antitrust cases."[108]

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[102] *Id.* at 589.

[103] *See supra* note 77.

[104] 475 U.S. at 597.

[105] In a monograph prepared before Eastman Kodak Co. v. Image Technical Servs., 112 S. Ct. 2072 (1992), was decided, the Federal Judicial Center disagreed with this conclusion, interpreting *Matsushita* to be a decision based on substantive antitrust law and not one permitting the courts to usurp the jury's function of selecting between competing inferences. *See* Schwarzer et al., *supra* note 17, at 491. The Supreme Court openly criticized Judge Schwarzer's theory that *Matsushita* placed a special burden on plaintiffs in antitrust suits facing summary judgment motions. *Eastman Kodak,* 112 S. Ct. at 2083. But the Court agreed that *Matsushita* did not permit the court to select between reasonable competing inferences. *Id.* at 2088. Although this characterization of *Matsushita* may be somewhat disingenuous on the part of the Supreme Court, it signals a slight shift to the left, a shift that supports this author's theory that the lower courts may have gone too far in deciding summary judgment cases in the defendants' favor in the discrimination law area. Other cases decided during this term confirm this slight shift. *See, e.g.,* Planned Parenthood v. Casey, 112 S. Ct. 2791, 2796–97 (1992); United States v. Fordice, 112 S. Ct. 2727, 2743 (1992); Lee v. Weisman, 112 S. Ct. 2649, 2661 (1992).

[106] 112 S. Ct. 2072 (1992).

[107] *Id.* at 2089, 2091–92. Sherman Antitrust Act, 15 U.S.C. §§ 1, 2 (1988).

[108] 112 S. Ct. at 2083.

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Appearing to limit *Matsushita* to its facts, the Court in *Kodak* interpreted *Matsushita* to add nothing new to summary judgment jurisprudence. It limited *Matsushita's* holding to require only that "the nonmoving party's inferences be reasonable in order to reach the jury, a requirement that was not invented, but merely articulated in that decision."[109] The Court emphasized that defendant Kodak bore a "substantial burden in showing that it is entitled to summary judgment."[110]

B. *Post-Trilogy Summary Judgment: Undermining Employment Discrimination Law*

Since the summary judgment trilogy, the federal courts of appeals have decided hundreds of discrimination cases on appeal from a grant of summary judgment. In the vast majority of these cases the courts of appeals have affirmed the district courts' grant of summary judgment.[111] Many of the opinions decided by different panels within the same circuit appear to conflict with one another.[112]

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[109] *Id.*

[110] *Id.*

[111] In an effort to estimate the effect of the trilogy on the use of summary judgment to dispose of employment discrimination claims, this author conducted a survey of all reported decisions of federal courts of appeals reviewing grants of summary judgment in ADEA and Title VII cases decided during two six-month time periods, one in 1983 before the Court decided the trilogy and one in 1992, after the trilogy. The survey included opinions available only on Lexis or Westlaw. Excluded from the count were cases that granted summary judgment for the defendant because of a plaintiff's failure to meet the statute of limitations or to exhaust administrative remedies.

Between January and June 1992, the courts of appeals reviewed 53 ADEA and Title VII cases in which the lower courts had granted summary judgment. The appeals courts affirmed 50 of the 53 grants of summary judgment. Of the 53 cases, there were 17 ADEA cases, 30 Title VII cases and 6 cases alleging both ADEA and Title VII violations. In 15 of the ADEA cases, 29 of the Title VII cases and all of the cases alleging violations of both statutes, the courts of appeals affirmed. Summary judgment was reversed in only two ADEA cases and one Title VII case.

Before the trilogy, from January to June 1983, the courts of appeals reviewed only two ADEA and two Title VII cases on appeal from grants of summary judgment for the defendant. The courts of appeals affirmed all four cases. Thus, whereas in the first half of 1992 the appeals courts affirmed 50 grants of summary judgment in discrimination cases, during the first half of 1983 the courts affirmed only four grants of summary judgment. Although it is unclear how much, if any, of this increase is the result of increased litigation alleging employment discrimination, these results suggest that the trilogy has had a profound effect on defendants' actions when faced with an employment discrimination suit. The trilogy has encouraged defendants in employment discrimination claims to file motions for summary judgment. It has also given trial courts a means to dispose of employment discrimination claims without trial, dispositions which are usually affirmed by the courts of appeals.

[112] *Compare* Healy v. New York Life Ins. Co., 860 F.2d 1209, 1220 (3d Cir. 1988) (court affirms summary judgment for employer by assessing the credibility of the defendant's

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Some panels approach summary judgment cautiously; others do not.[113] Many recent decisions wrongly interpret the trilogy to permit courts to draw inferences in defendants' favor,[114] to weigh evidence,[115] to decide the credibility of witnesses[116] and to require plaintiffs to prove their cases at the summary judgment stage.[117] Many courts compound these errors by examining plaintiffs' circumstantial evidence in a piecemeal fashion.[118] Other panels, fewer in number, continue to hold that questions of intent, motive and credibility are better left to the factfinder.[119]

Furthermore, although the Supreme Court initially adopted the *McDonnell Douglas* approach to make it easier for plaintiffs to prove a prima facie case,[120] the courts of appeals now use this construct to defeat plaintiffs' claims. For example, there is a growing trend toward placing a much higher burden on the plaintiff to meet the "qualified" prong of a prima facie case.[121] Previously, in determining whether the plaintiff made out a prima facie case, most

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witnesses over those of plaintiff) *with* Sorba v. Pennsylvania Drilling Co., 821 F.2d 200, 205 (3d Cir. 1987) (court concludes issue as to credibility of employer's proffered reason exists and reverses summary judgment). *See also supra* note 64.

[113] *See infra* notes 153, 169, 198.

[114] *See infra* Part II-B-2. *See also* Mesnick v. General Elec. Co., 950 F.2d 816, 828 (1st Cir. 1991).

[115] *See infra* Part II-B-1.

[116] *See infra* Part II-B-3.

[117] *See* Mathew v. Virginia Union Univ., No. 91-2593, 1992 U.S. App. LEXIS 5540 (4th Cir. Mar. 27, 1992) (requiring the plaintiff to prove the case at the summary judgment stage); EEOC v. Techalloy Md., Inc., No. 91-1027, 1992 U.S. App. LEXIS 6499, at *10 (4th Cir. Mar. 31, 1992); *see also infra* Part II-B-4.

[118] *See* Flynn v. Portland Gen. Elec. Co., No. 90-35891, 1992 U.S. App. LEXIS 6382, at *20 (9th Cir. Mar. 23, 1992) (quoting Steckl v. Motorola, Inc., 703 F.2d 392, 393 (9th Cir. 1973)); *see also supra* Part II-B-1.

[119] *See, e.g.*, Owens v. New York City Hous. Auth., 934 F.2d 405, 410 (2d Cir. 1991) (inferences drawn properly in non-movant's favor); Shager v. Upjohn Co., 913 F.2d 398, 401 (7th Cir. 1990) ("The point is only that if the inference of improper motive *can* be drawn, there must be a trial.") (emphasis in original); Holland v. Jefferson Nat'l Life Ins. Co., 883 F.2d 1307, 1313 (7th Cir. 1989) (reversing district court's conclusion of the plaintiff's failure to allege pretext).

[120] *See supra* note 45 and accompanying text.

[121] *See, e.g.*, Kizer v. Children's Learning Ctr., 962 F.2d 608, 611–12 (7th Cir. 1992) (plaintiff must prove she met employer's expectations in order to establish "qualified" prong of prima facie case); Owen v. Penton Publishing Inc., No. 91-3744, 1992 U.S. App. LEXIS 8482 at *15 (6th Cir. Apr. 22, 1992) (plaintiff without proof of satisfaction of employer's legitimate expectations did not make out a prima facie case); Richmond v. Board of Regents Univ. of Minn., 957 F.2d 595, 598 (8th Cir. 1992) (in order to make out qualified prong of prima facie case employee must disprove defense that she was not performing adequately); Aungst v. Westinghouse Elec. Corp., 937 F.2d 1216, 1221 (7th Cir. 1991) (plaintiff "must disprove Westinghouse's primary reason for choosing him for the RIF—lack of versatility").

courts merely looked at the objective qualifications of employees: their education and qualifying experience. Under this objective qualifications interpretation, a person who has held a job with an employer for a number of years would almost always meet the "qualified" requirement.[122] Even today, most courts will not consider the employer's testimony that a person is "unqualified" for subjective reasons such as an employee's lack of leadership potential or inability to get along with people.[123] According to the majority view, a court should consider these factors at the stage when the plaintiff rebuts the employer's articulation of its legitimate, non-discriminatory reason for the adverse employment decision.[124]

Recently, however, some courts have imposed a higher burden on plaintiffs trying to make out a prima facie case.[125] These deci-

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[122] *See, e.g.*, Karazanos v. Navistar Int'l Transp. Corp., 948 F.2d 332, 336 (7th Cir. 1991) (even though plaintiff, who was hired in 1968, and employer disagreed over the plaintiff's performance, court relied on the plaintiff's testimony to prove that he met the employer's legitimate expectations); *Owens*, 934 F.2d at 409 ("Owens only needs to demonstrate that she 'possesses the basic skills necessary for performance of the job.'"); Weihaupt v. American Medical Ass'n, 874 F.2d 419, 427–29 (7th Cir. 1989) (testimony by plaintiff hired in 1965 that he met employer's expectations was sufficient).

[123] *See, e.g.*, Fowle v. C&C Cola, 868 F.2d 58, 59, 66 (3d Cir. 1989); Chipollini v. Spencer Gifts, Inc., 814 F.2d 893, 901 (3d Cir. 1987) (because proffered reason, "lack of cooperation," is subjective and turns on issue of credibility, plaintiff is entitled to jury trial); Warren v. Halstead Indus., 802 F.2d 746, 758 (4th Cir. 1986) (the term "lack of cooperation" was "hopelessly elastic and subjective and only served a pretextual—rather than a legitimate—company function").

[124] *Fowle*, 868 F.2d at 65. This interpretation is in keeping with the purpose of allocating proof under the *McDonnell Douglas/Burdine* standard.

[125] *See* Menard v. First Sec. Servs. Corp., 848 F.2d 281, 285 (1st Cir. 1988) (quoting Loeb v. Textron, Inc., 600 F.2d 1003, 1112 (1st Cir. 1979)) ("To establish that he was qualified a complainant must show that he was doing his job well enough to rule out the possibility that he was fired for inadequate job performance, absolute or relative."); Johnson v. Burnley, 887 F.2d 471, 479 (4th Cir. 1989) (plaintiff's tardiness proved as a matter of law she was not qualified for the position and could not establish a prima facie case).

The Fourth Circuit conceptually collapsed the pretext proof into the prima facie case. This construct requires much more of a plaintiff faced with a summary judgment motion than of a plaintiff at trial. At the summary judgment stage, the court will have before it evidence in support of the defense because it is the defendant's burden to bring the motion and the defendant will have filed its motion papers detailing its defense before the plaintiff proves its prima facie case. Thus, the court will require the plaintiff to rebut the defendant's defense in order to defend against the summary judgment motion. At trial, however, the court will presumably have no evidence before it of the defendant's defense when ruling on whether the plaintiff has made out a prima facie case. At most, the court will have the cross-examination testimony of the plaintiff, admitting to some discrepancies in his or her performance. Therefore, the trial judge will likely adhere to the majority view, looking merely to objective qualifications to determine whether the plaintiff has made out his or her prima facie case.

Moreover, once at trial, the judge has less incentive to grant a defendant's motion because a dismissal will not save the judge the time and resources that an earlier grant of summary

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sions force plaintiffs to rebut the defense in order to prove that they are "qualified." This trend is particularly damaging to a plaintiff who is defending against a summary judgment motion because it shifts the burden from the movant to the plaintiff to disprove the defense without the benefit of cross-examination.[126]

There is a further perversion of the *McDonnell Douglas/Burdine* formula in the summary judgment context. Courts believe defendants when they articulate their non-discriminatory reasons for the employment decision and disbelieve plaintiffs when they attempt to prove that defendants' articulated reasons are pretextual.[127] This tendency occurs for two reasons. First, the defendant has no burden to prove that the articulated reason is the actual reason for discrimination; the burden is merely to produce a non-discriminatory reason for the actions. Thus, once the defendant has "articulated" a reason for the decision, the burden shifts to the plaintiff to rebut the articulated reason.[128]

Second, many courts are extremely hesitant to interfere with the business decisions of the employer.[129] For example, the court will not allow the plaintiff to present evidence to the factfinder that an employer's articulated, legitimate, non-discriminatory reason for the employment decision is not an adequate reason for the decision.[130] But the courts misunderstand the argument. The plaintiff

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judgment would. Most judges will hear all the evidence before making the decision to dismiss the plaintiff's case rather than risk the chance of an appeal and reversal. It is therefore likely that at trial the plaintiff will have the opportunity to have his or her evidence heard by a factfinder on a lesser showing of a prima facie case. This discrepancy turns *McDonnell Douglas* on its ear. *See infra* note 230 and accompanying text.

[126] *See infra* note 230 and accompanying text.

[127] *See generally* Lanctot, *supra* note 55.

[128] The courts do not require the employer to present any documentary evidence beyond the employer's statement of its reason for its employment decision. Nor do the courts require defendants to state specific reasons for their decision. *See, e.g.,* Aungst v. Westinghouse Elec. Corp., 937 F.2d 1216, 1220 (7th Cir. 1991) (describing defendant's burden as "not difficult to satisfy," the court concluded defendant met its burden by stating plaintiff lacked versatility); *Menard,* 848 F.2d at 285 ("Once plaintiff has carried out his burden of proving a prima facie case, the burden then shifts to the employer to *articulate,* not prove, a nondiscriminatory reason for its action.") (emphasis in original). *See generally* Baumann et al., *supra* note 46. *See also infra* Part III.

[129] Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 259 (1981). *See also* Villanueva v. Wellesley College, 930 F.2d 124, 129 (1st Cir. 1991) (in a failure to award tenure case, the court stated, "It is not the function of the courts to sit as 'super-tenure committees.'") (citations omitted); *Aungst,* 937 F.2d at 1220 ("We must give the employer the benefit of the doubt regarding its explanation of employment decisions."); Rossy v. Roche Prods. Inc., 880 F.2d 621, 625 (1st Cir. 1989) ("Our role is not to second-guess the business decisions of an employer. . . .").

[130] *See* Gadson v. Concord Hosp., No. 91-2047, 1992 U.S. App. LEXIS 13010, at *7–8

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does not argue that the employer should not be permitted to discharge employees because the reason for their discharge is inadequate, but rather, that the employer's reason makes no sense. If the employer's alleged reason is nonsensical, the court should allow a factfinder to infer that the story told by the employer is not credible.[131]

It is illogical to prevent an employee from proving pretext by questioning the adequacy of the employer's reason for discharging or refusing to hire or promote the plaintiff. For example, if MBI claimed that it had failed to hire Connie Computer because she had an ugly green raincoat, that reason would be a legitimate, nondiscriminatory reason for refusing to hire her, because it is not illegal to base one's hiring decisions on the color of the applicant's raincoat. In evaluating Connie's response to a summary judgment motion made by MBI, the court should permit Connie the reasonable inference that because the reason articulated by MBI is not one that a rational employer would use as a criterion for making business decisions, the employer's articulated reason is not the real reason but a pretext for discrimination.[132] The court's automatic crediting of the defendant's articulation is proper when the plaintiff has the burden of persuasion on the motion, but when the defendant brings the motion, it skews the result in favor of the defendant. Nevertheless, courts are drawing inferences in favor of the moving party even though the movant supposedly has a burden to show the absence of evidence supporting the plaintiff's position.[133] This practice prejudices plaintiffs opposing summary judgment motions and transposes the proper application of summary judgment.[134]

(1st Cir. June 9, 1992) ("Gadson cannot meet burden of proving pretext by simply questioning [defendant]'s articulated reasons.").

[131] *See supra* notes 77, 78 and accompanying text; Sparks v. Pilot Freight Carriers, 830 F.2d 1554, 1563–64 (11th Cir. 1987) (question of fact whether defendant's alleged reason for discharge is plausible where defendant claimed plaintiff had not abided by company rule requiring plaintiff to call the company to explain she would be absent from work when plaintiff had already notified the proper person that she was ill during a telephone conversation initiated by the employer).

[132] *See also* Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978) (permitting plaintiff to prevail once he or she has shown that the employer's reason for adverse employment decision is not credible).

[133] See *supra* Part I-B-2 and *infra* Part III-A for discussions concerning the defendant's burden as movant.

[134] As a practical matter, however, a plaintiff who has had the opportunity to discover the defendant's evidence will almost invariably have some evidence to rebut the defendant's articulated reason for the employment decision. A plaintiff therefore should be able to produce some evidence in response to the defendant's summary judgment motion that would

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Although some may argue that this approach is proper because the burden of production, not the burden of persuasion, shifts to the defendant to articulate a legitimate reason for its decision, and the plaintiff bears the burden of persuasion throughout, it is inappropriate at the summary judgment stage because it sanctions the drawing of inferences against the non-movant and permits the court to find facts. This approach deprives plaintiffs of their right to present their cases to the factfinder. If competing reasonable inferences can arise from the evidence, the case should go to trial.

1. A Piecemeal Approach to Circumstantial Evidence

In most discrimination cases plaintiffs attempt to prove subtle issues of intent and motive by circumstantial evidence.[135] The factfinder considers the totality of the evidence to determine whether it is more likely than not that the defendant had a discriminatory motive.[136] In affirming a lower court's grant of summary judgment to the defendant, however, the courts of appeals often examine and describe the evidence in a piecemeal fashion.[137] This piecemeal examination of the evidence undercuts the plaintiff's case.[138]

Mechnig v. Sears, Roebuck & Co.[139] is a good example of the courts' piecemeal approach to circumstantial evidence, assessment of witness credibility and the drawing of inferences in the defendant's favor. In *Mechnig*, an ADEA case, the plaintiff, an older employee, had worked at Sears as an "outside" salesperson.[140] The United States Court of Appeals for the Seventh Circuit affirmed the lower court's grant of summary judgment, concluding that the plaintiff was unable to rebut the defendant's articulated legitimate,

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create a genuine issue of material fact whether the employer's stated reason is the real reason for the defendant's action. The problem is that courts at the summary judgment stage tend to believe a defendant's articulation and disbelieve the plaintiff's evidence. *See infra* Part II-B-3. Given that plaintiff is the non-movant, it is not the court's role to weigh credibility at the summary judgment stage. *See* Schwarzer et al., *supra* note 17, at 487.

[135] See *supra* note 63 and accompanying text for a discussion of the types of evidence available to plaintiffs in discrimination cases.

[136] *See* MACK A. PLAYER, EMPLOYMENT DISCRIMINATION LAW § 5.44 (1988) ("[t]he trial court must weigh all evidence and determine whether plaintiff has carried the burden of convincing the court that illegal considerations motivated" defendant). *See also* United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 714 n.4 (1982) ("The trier of fact should consider *all* the evidence, giving it whatever weight and credence it deserves.") (emphasis added).

[137] *See infra* note 151 and accompanying text.

[138] *See infra* note 151 and accompanying text.

[139] 864 F.2d 1359 (7th Cir. 1988).

[140] *Id.* at 1360.

non-discriminatory reason for firing him: that plaintiff had falsified his time records.[141]

The plaintiff presented two kinds of evidence to show that the defendant's alleged reason for firing him was pretextual. First, he offered evidence illustrating how Sears had instructed outside salespersons to complete timesheets.[142] Second, he offered evidence tending to show that the defendant had discriminated against other older employees.[143]

While admitting that on the occasion in question he had arrived at work a half hour later than his time card stated, the plaintiff testified that Sears' representatives had told him and other "outside" salespeople automatically to record forty hours on their weekly timesheets.[144] The plaintiff's immediate supervisor corroborated his testimony, adding that outside salespeople generally worked more than forty hours weekly and that Sears did not want to pay overtime.[145] The supervisor would have approved the timesheet in question because Mechnig was not habitually late.[146] Another division manager testified that there was an unwritten rule that outside sales personnel did not record more than forty hours.[147]

Mechnig's statistical evidence analyzed all the sales employees of Sears stores in the area who had left their positions in 1981 and 1982. The statistical expert testified that persons over forty years old made up a higher proportion of those terminated.[148] Affidavits of former sales personnel and their supervisors at the Irving Park store where Mechnig worked averred that full-time employees at the store who were over forty years of age were more intensely supervised than younger employees and that Sears had reduced the number of department managers at the store, a group consisting primarily of persons over the age of forty.[149] In spite of the strong evidence in the plaintiff's favor, the court of appeals concluded that the plaintiff had presented insufficient evidence for a jury to conclude that the defendant's articulated reason for firing him—the falsified timesheet—was a pretext for age discrimination.[150]

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[141] *Id.* at 1366.
[142] *Id.* at 1361.
[143] *Id.* at 1362–63.
[144] *Mechnig,* 864 F.2d at 1361.
[145] *Id.*
[146] *Id.*
[147] *Id.*
[148] *Id.* at 1362.
[149] *Mechnig,* 864 F.2d at 1367.
[150] *Id.*

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The court analyzed the plaintiff's evidence in classic piecemeal fashion.[151] It discounted the plaintiff's expert testimony because the expert had included in his statistical analysis as "terminated" those older persons who had "voluntarily" accepted Sears' early retirement package.[152] In support of his inclusion of these persons, the plaintiff argued that the early retirement program was really a severance program and offered evidence of the limited nature of benefits provided to older employees taking early retirement.[153] The court rejected the plaintiff's argument, stating that the amount of the benefits did not indicate Sears had violated the ADEA.[154]

The court, however, acted inappropriately. The plaintiff had argued that the early retirement program was not voluntary and that the limited benefits were relevant to the question of whether employees took early retirement voluntarily. The court, instead of permitting the jury to draw its own conclusions, concluded that the defendant's program was a bona fide voluntary early retirement program.[155] The court thus impermissibly drew an inference in the defendant's favor.[156]

In addition, the court discounted the testimony plaintiff offered of the accepted method of filling out timesheets.[157] Even though the defendant's employees testified that Mechnig completed his timesheets according to instruction, the court concluded that this testimony did not create a genuine issue of material fact as to whether he falsified his timesheets. The court stated that the plaintiff needed to demonstrate that the defendant was aware that others

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[151] By discussing each piece of evidence separately and pointing out the weakness of each piece, the courts distort the plaintiff's case. Normally the factfinder infers discriminatory intent on the part of the defendant by examining the totality of the evidence. See *supra* note 63 discussing the types of evidence a plaintiff can use to prove his or her case.

For cases where courts have analyzed the plaintiff's evidence in a piecemeal fashion, thereby prejudicing the plaintiff's case, see Flynn v. Portland Gen. Elec. Co., No. 90-35891, 1992 U.S. App. LEXIS 6382 (9th Cir. Mar. 23, 1992); Villanueva v. Wellesley College, 930 F.2d 124 (1st Cir. 1991); Hanchey v. Energas Co., 925 F.2d 96 (9th Cir. 1990); Russell v. Teledyne Ohio Steel, No. 89-3254, 1990 U.S. App. LEXIS 344 (6th Cir. Jan. 8, 1990); Rose v. Wells Fargo & Co., 902 F.2d 1417 (9th Cir. 1990); Wiggins v. Firestone Tire & Rubber Co., 876 F.2d 105 (6th Cir. 1989); Fowle v. C&C Cola, 868 F.2d 58, 65–68 (3d Cir. 1989); Menard v. First Sec. Servs. Corp., 848 F.2d 281 (1st Cir. 1988).

For examples of courts viewing evidence as a whole, see Shager v. Upjohn Co., 913 F.2d 398 (7th Cir. 1990); Siegel v. Alpha Wire Corp., 894 F.2d 50 (3d Cir. 1990).

[152] *Mechnig*, 864 F.2d at 1367.

[153] *Id.* at 1367 n.8.

[154] *Id.* at 1367.

[155] *Id.*

[156] *See id.*

[157] *See id.*

had filled out their timesheets in the same way as plaintiff but had fired only the plaintiff.[158] According to Federal Rule of Evidence 801, however, the defendant's agents' testimony should have been treated as admissions that the practice existed at Sears.[159] Knowledge that this practice existed without firing the employees who engaged in it should have been imputed to the defendant.

By requiring the plaintiff to prove at the summary judgment stage that Sears knew that there were others filling out forty-hour timesheets, the court created a major obstacle for the plaintiff. Seemingly nothing short of a Sears memorandum admitting to the practice would satisfy the court. Such evidence is nearly impossible for a plaintiff to produce. Instead of recognizing that there was a genuine issue of material fact concerning the reason why the defendant fired the plaintiff, the court believed the defendant's witnesses and documents and ignored the plaintiff's evidence of pretext. The court's language is instructive in understanding its bias in favor of the defendant's proof of motivation. It stated that Sears had "clear good faith reliance upon its time card policy," even though good faith is obviously a question of fact that the court could not resolve in this case without live witness testimony.

2. Drawing Inferences in the Defendant's Favor

In *McCoy v. W.G.N. Continental Broadcasting Co.*, the plaintiff, transferred and discharged at age forty-six, alleged that the defendant had violated the ADEA.[160] The defendant alleged that McCoy was fired for poor performance and for budgetary reasons. The district court granted summary judgment to the defendant and the court of appeals affirmed, concluding that there were no genuine issues of material fact regarding pretext.[161]

To prove that there was a genuine issue of material fact, McCoy presented evidence that he had received good performance reviews throughout his five years with the company and that the defendant

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[158] *Mechnig*, 864 F.2d at 1367.

[159] See FED. R. EVID. 801(d)(2)(C) and (D), providing that a statement is not hearsay if it is offered against a party and is:

> (C) a statement by a person authorized by him to make a statement concerning the subject or (D) a statement by his agent or servant concerning a matter within the scope of his agency or employment made during the existence of the relationship. . . .

The Court will treat such a statement as an admission of a party opponent.

[160] 957 F.2d 368 (7th Cir. 1992).

[161] *Id.* at 374.

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had failed to raise poor performance as a defense for the firing during an administrative hearing on the same issue.[162] Moreover, McCoy rebutted the claim that he was fired for budgetary reasons by demonstrating that when he was transferred and fired, the company replaced him in both positions with younger persons who made substantially more money.[163] Despite this very strong evidence in the plaintiff's favor, however, the court drew the inferences in favor of the defendant, citing to a single piece of evidence: a performance review in which the plaintiff's supervisor stated that he and McCoy were not on the same "wave length."[164] The court concluded that there was no genuine issue of material fact whether the defendant's articulated reasons for the transfer and firing were its true reasons.[165]

3. Assessing Credibility

Courts of appeals have affirmed grants of summary judgment where the lower courts have made credibility determinations that

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[162] *Id.* at 373.

[163] *Id.*

[164] *Id.* at 370.

[165] *Id.* at 374. Other cases where the courts of appeals have drawn inferences against the plaintiffs, the non-movants, when considering a summary judgment motion include: Hanchey v. Energas Co., 925 F.2d 96, 98–99 (9th Cir. 1990) (plaintiff did not prove that defendant's articulated reason for firing her—that it was having an economic downturn—was pretextual even though the company, only months after eliminating her position bought another gas company for $61 million); Fowle v. C&C Cola, 868 F.2d 58, 59, 66 (3d Cir. 1989) (plaintiff did not rebut the defendant's assertion that it did not promote him to vice president because the job required the person filling the position to be a "backup" to the president, and defendant did not believe plaintiff had qualifications to take over the company, even though the person who eventually filled the position admittedly was not qualified to back up the president); Menzel v. Western Auto Supply Co., 848 F.2d 327, 329 (1st Cir. 1988) (court stated that defendant's proffered reason for firing plaintiff—that he was a poor recordkeeper—was something it "may presume became more intolerable" and concluded that the plaintiff failed to show pretext even though he presented uncontested evidence that he had received many awards and had been chosen to head defendant's credit office in Puerto Rico).

Some cases that have properly drawn all inferences in favor of the non-moving party include: Owens v. New York City Hous. Auth., 934 F.2d 405, 409 (2d Cir. 1991) (court reversed summary judgment, concluding that plaintiff established prima facie case that requires only minimum proof to show she was qualified, and finding a genuine issue of fact existed as to pretext because plaintiff's supervisor, who brought a "vast majority" of disciplinary charges against her, made comments regarding plaintiff's age and admitted having a poor relationship with her); Burns v. Gadsden State Community College, 908 F.2d 1512, 1518 (11th Cir. 1990) (plaintiff's affidavits in which defendant stated that it would never name a woman to a "schedule B" job for which plaintiff applied and was rejected created a genuine issue of material fact); EEOC v. Mount Lebanon, Pa., 842 F.2d 1480, 1487 (3d Cir. 1988) (jury question whether the official responsible for implementing disability plan in 1982 was aware of the termination of insurance benefits).

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the factfinder should make. In *Merrick v. Farmers Insurance Group,*[166] an age discrimination case, the court of appeals affirmed the lower court's grant of summary judgment to the defendant.[167] Plaintiff D. James Merrick began working for the defendant in 1970. Merrick was promoted throughout the years, but in 1981, when he was forty-nine, the company passed him over for a promotion to Division Area Manager, giving the job to twenty-five-year-old Craig Schienost.[168]

The defendant conceded that Merrick made a prima facie case, but averred that Merrick was not promoted to the position of Division Area Manager because he did not command the respect needed or have the necessary positive demeanor for the position.[169] Farmers also claimed that the two employees responsible for selection of Division Area Managers recommended Schienost for the job.[170]

Merrick submitted substantial evidence to prove that the defendant's alleged reasons for hiring Schienost instead of Merrick were pretextual. First, Merrick had greater experience than Schienost, had performed his job better than Schienost and was recommended highly by his supervisor.[171] Second, Merrick also argued that Farmers' alleged reasons for not promoting him were not credible because they were not documented until after Merrick commenced the lawsuit.[172] Finally, Merrick argued that the recommendations of Schienost were questionable because Schienost had never interviewed for the position.[173]

Despite Merrick's superior credentials and the defendant's after-the-fact explanations for not promoting him, the court of appeals agreed with the trial court that Merrick had failed to create a genuine issue of material fact as to whether the defendant's articulated reasons for refusing to promote the plaintiff were pretextual.[174] The court of appeals stated that the plaintiff should have specifically rebutted the defendant's general assertion that the plaintiff lacked professionalism and the proper demeanor for the posi-

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[166] 892 F.2d 1434 (9th Cir. 1990).
[167] *Id.* at 1436.
[168] *Id.*
[169] *Id.* at 1437.
[170] *Id.*
[171] *Merrick*, 892 F.2d at 1438.
[172] *Id.*
[173] *Id.* at 1437.
[174] *Id.* at 1438.

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tion.[175] The court of appeals affirmed the trial court's ruling despite significant and substantial evidence supporting the plaintiff's position. In reaching this conclusion, the court of appeals accepted the lower court's improper inferences and determination of witness credibility.

Similarly, in *Healy v. New York Life Insurance Co.*,[176] the plaintiff, a fifty-six-year-old man employed by the defendant for twenty-five years, alleged that his employer had discharged him in violation of the ADEA. Healy, the marketing vice president, had regularly received promotions and excellent performance reviews until 1986, when he was notified that he was being discharged as part of a staff reduction.[177] The bulk of Healy's responsibilities were reassigned to Paul Russell, Healy's forty-seven-year-old subordinate.[178] Company representatives testified that they intended to combine the vice presidents in charge of agent training and management training into one position[179] and that the plaintiff could not effectively handle the increased responsibility a combined division of agent and management training would require.[180]

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[175] *Id.* Other courts have also defeated the plaintiff's claims at the summary judgment stage by requiring the plaintiff to prove pretext by rebutting the defendant's articulated reason for the adverse employment decision with great specificity. *See, e.g.*, Menzel v. Western Auto Supply Co., 848 F.2d 327, 330 (1st Cir. 1988) (summary judgment in defendant's favor affirmed because plaintiff had not specifically proven false defendant's articulated legitimate, non-discriminatory reason for firing him even though plaintiff had produced a plethora of evidence that he had worked for defendant for eight years, had received awards and promotions and his overall job performance ratings were very good). For other cases that require the plaintiff to specifically prove pretext, see *infra* note 239. This approach undermines the purpose of the *McDonnell Douglas* formula. By requiring such specificity the courts actually draw an inference in favor of the defendant that the articulated reason for firing the plaintiff is the "real" reason. This determination is a jury question.

Two cases that properly refused to require specificity when there was ample evidence of overall good performance are Shager v. Upjohn Co., 913 F.2d 398 (7th Cir. 1990) and Chipollini v. Spencer Gifts, Inc., 814 F.2d 893 (3d Cir. 1987).

[176] 860 F.2d 1209 (3d Cir. 1988).

[177] *Id.* at 1210–12. Healy was also experienced in agent training. *Id.*

[178] *Id.*

[179] *Id.*

[180] *Healy*, 860 F.2d 1210–12. Granting summary judgment to a defendant where that defendant states that it used subjective criteria such as a person's potential to take on more responsibility, leadership potential or ability to get along with people is especially problematic. Although most employment decisions for personnel operating at the highest level of the corporation may be made by use of subjective criteria such as these, subjective criteria can mask discrimination based on illegal criteria. When an employer's reason for the adverse employment decision is allegedly based on subjective, rather than objective qualifications, the factfinder must therefore have the opportunity to scrutinize the defendant's credibility carefully. This scrutiny can take place only at trial where the witnesses are subject to cross-examination. *See* Giacoletto v. Amax Zinc Co., 954 F.2d 424, 427 (7th Cir. 1992) ("Although

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This position merger ultimately took place, with Russell in charge, but it did not take place immediately.[181] The job was not combined until four months after Healy's discharge, and when Russell took over, he initially received weak performance reviews.[182] This evidence calls into question the defendant's assertions that it believed that Russell was clearly better prepared to handle the job than the more experienced Healy.[183]

In support of its position, New York Life averred that Healy had performed poorly on the Management by Objectives Report. New York Life pointed to isolated statements in prior performance reviews and to Healy's last review. Apparently, Healy's supervisor completed the last review in preparation for litigation because he filled it out six months *after* Healy's discharge, just one month after Healy filed a complaint of age discrimination against the company with the EEOC.[184]

Healy disputed the company's position on the Management by Objectives Report. The defendant averred that Healy had performed poorly in preparing the report because he had merely collected information from others and collated it instead of exercising initiative and insight. Healy testified that he believed his function in the project was to assemble the raw data, incorporate it into the report and send it on to his supervisors.[185] The trial court, ruling against Healy, credited the defendant's witnesses instead of reserving that function for the jury.[186]

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relying on subjective factors is not per se illegal, the jury may under some circumstances, reasonably consider subjective reasons as pretexts for discrimination."). Such scrutiny is especially necessary where the defendant's reasons for termination were never articulated before the employment decision and thus appear to be after-the-fact justifications, as is the case in *Healy*. *See* Warren v. Halstead Indus., 802 F.2d 746, 757 n.12 (4th Cir. 1986) (lower court's finding of fact that plaintiff was not discriminated against in his discharge was clearly erroneous where reason for discharge was "lack of cooperation" and employer could not explain clearly what it meant by this term).

[181] 860 F.2d at 1212.

[182] *Id.* at 1224 (Shapiro, J., dissenting).

[183] *Healy* demonstrates my point that, although I agree with Catherine Lanctot that the pretext-plus jurisdictions wrongly apply the substantive Title VII and ADEA law, the improper application of pretext-plus is not the entire problem with the courts' interpretation of discrimination law. *See supra* note 55 and accompanying text. This application does not account for the courts' affirmation of improper grants of summary judgment where issues of credibility exist or where the lower courts weigh the evidence. In the Third Circuit, where *Healy* was decided, the law was clear that it was *not* a pretext-plus jurisdiction. *See* Chippolini v. Spencer Gifts, Inc., 814 F.2d 893, 900 (3d Cir. 1987).

[184] Under the ADEA, a plaintiff seeking to file suit must first file a complaint with the EEOC. *See supra* note 34 and accompanying text.

[185] *Healy*, 860 F.2d at 1217.

[186] *See id.*; *id.* at 1220 (Shapiro, J., dissenting).

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In affirming the lower court's decision, the court of appeals held that Healy had made out a prima facie case[187] but had not raised a genuine issue of material fact.[188] *Healy* therefore went beyond the trilogy. Even if *Anderson v. Liberty Lobby* countenances weighing the evidence to determine whether a jury could reasonably find for the non-movant before refusing to grant summary judgment to a defendant, the opinion cannot be interpreted in its broadest swath to require, or even to permit, courts to judge the credibility of witnesses who are before them on paper only.[189]

4. Requiring the Plaintiff to Prove the Case at the Summary Judgment Phase

When a defendant moves for summary judgment, the proper inquiry is whether the defendant has demonstrated that there are insufficient facts from which a jury could reasonably conclude that the defendant discriminated against the plaintiff.[190] Many courts approaching a summary judgment motion in a civil rights case, however, require a plaintiff to prove that she was discriminated against.[191]

There are two problems with the courts' approach. First, the courts, citing to *Celotex*, have shifted the burden of proof on a motion for summary judgment from the moving party to the plaintiff.[192] Second, the courts require the plaintiff to meet the ultimate

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[187] 860 F.2d at 1214 n.1.

[188] *Id.* at 1220 (Shapiro, J., dissenting).

[189] *See* Hull v. Cuyahoga Valley Bd. of Educ., 926 F.2d 505, 514 (6th Cir. 1991) (summary judgment reversed because district court made credibility determination and drew inferences in defendant's favor); Colgan v. Fisher Scientific Co., 935 F.2d 1407, 1423 (3rd Cir. 1991) (on review, court properly inferred employer discharged plaintiff in retaliation, because plaintiff declined to accept early retirement and had consistently received good to outstanding reviews since 1942); Johnson v. Minnesota Hist. Soc'y, 931 F.2d 1239, 1244 (8th Cir. 1991) (summary judgment reversed because lower court resolved conflicting evidence as to whether plaintiff's job continued to exist); Taggart v. Time Inc., 924 F.2d 43, 48 (2d Cir. 1991) (court properly inferred that defendant's reason not to hire plaintiff, overqualification, raised inference of age discrimination). *But see* Karazanos v. Navistar Int'l Transp. Corp., 948 F.2d 332, 336 (7th Cir. 1991); Williams v. Williams Elecs., Inc., 856 F.2d 920, 921 (7th Cir. 1988); Cotton v. City of Alameda, 812 F.2d 1245, 1245 (9th Cir. 1987).

[190] *See* Weldon v. Kraft, Inc., 896 F.2d 793, 797 (3d Cir. 1990).

[191] *See, e.g.*, Mathew v. Virginia Union Univ., No. 91-2593, 1992 U.S. App. LEXIS 5540 at *3 (4th Cir. Mar. 27, 1992) ("In order to prevail . . . [plaintiff] must prove that 'but for' defendant's discriminatory intent, no adverse employment decisions would have been taken against him.").

[192] *See, e.g.*, Holmberg v. Baxter Healthcare Corp., 901 F.2d 1387, 1392 n.4 (7th Cir. 1990) (court concluded that to prevail at summary judgment plaintiff should have produced evidence that she was qualified for alternative positions, but defendant is not required to

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burden of proof at the summary judgment stage.[193] For example, courts granting summary judgment to a defendant generally use language appropriate for proof at trial, such as "plaintiff has not proved that defendant's reason for firing her is pretextual."[194]

This is an inappropriate inquiry at the summary judgment stage. Instead, the court should examine whether there is a question of fact as to the defendant's articulated reason for firing the plaintiff.[195] This confusion, likely generated by *Liberty Lobby* and *Celotex,* when combined with the courts' misuse of the *McDonnell Douglas* construct,[196] puts plaintiffs at a distinct disadvantage when faced with a summary judgment motion. There is no indication in *Liberty Lobby* or *Celotex* that the Supreme Court intended plaintiffs in employment discrimination cases to suffer to this extent. Furthermore, although the Court has recently exhibited hostility to civil rights claims,[197] it has not withdrawn its support of the use of the *McDonnell Douglas* construct.[198]

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negate plaintiff's claim if she failed to set forth sufficient evidence for an element of her prima facie case).

[193] *See, e.g.,* Kizer v. Children's Learning Ctr., 962 F.2d 608, 613 (7th Cir. 1992) ("we hold that plaintiff has failed to make out a prima facie case . . . because she is unable to demonstrate that despite her violation of [defendant]'s call-in procedure, she was doing her job well enough to meet her employer's legitimate expectations and nonetheless, she was discharged"); *Karazanos,* 948 F.2d at 336–37 (although plaintiff offered facts that another employee in the protected age group who worked on the same project was discharged, plaintiff presented no reasons for the employee's discharge, and although plaintiff presented statistical evidence of age discrimination, he did not provide a "causal link" between the graph and his termination); Menzel v. Western Auto Supply Co., 848 F.2d 327, 330 (1st Cir. 1988) (in responding to summary judgment motion, "Menzel had to address [the reasons offered by the employer] and show, by a preponderance of the evidence that they were most probably not the actual reasons.").

[194] *See Menzel,* 848 F.2d at 327.

[195] Some courts use the appropriate inquiry. *See, e.g.,* Rossy v. Roche Prods., 880 F.2d 621, 626 (1st Cir. 1990) ("All of Roche's explanations may in fact be accurate, but they must be decided after trial, especially in cases such as this where Roche's intent is the central issue."); Russo v. Trifari, Krussman & Fishel, 837 F.2d 40, 43 (2d Cir. 1988) ("While Russo's case is hardly a powerful one, we believe that a trier of fact might find that Trifari's avowed reasons . . . were pretextual."); Jackson v. Univ. of Pittsburgh, 826 F.2d 230, 233 (3d Cir. 1987) ("At the summary judgment stage . . . all that is required [for the non-moving party to survive the motion] is that sufficient evidence supporting the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth [at trial].").

[196] *See supra* note 128 and accompanying text.

[197] *See supra* notes 1, 3, 4 and accompanying text.

[198] United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 715 (1983) (although the Court ruled that *McDonnell Douglas* need not be slavishly followed, nowhere in that decision did the Court overrule the use of the approach).

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III. Harmonizing the "New" Summary Judgment with Substantive Law: A Proposal for Change

Before the Supreme Court handed down the summary judgment trilogy, lower courts were hesitant to grant summary judgment to defendants in federal discrimination suits because they believed that the factfinder should decide questions of intent and motivation with the benefit of live witness testimony.[199] Even then, however, courts granted summary judgment to the defendant if the plaintiff presented only a "bare bones" prima facie case.[200] Courts uniformly required plaintiffs to present some evidence of pretext in order to withstand a summary judgment motion.[201]

The Supreme Court has never addressed the trilogy's effect on motions for summary judgment in employment discrimination claims. Since the Court decided the trilogy, however, lower courts have expanded their use of summary judgment to dispose of these discrimination claims beyond the limited number of cases where the plaintiff presented merely a bare bones prima facie case.[202] Federal courts of appeals have affirmed judgments granted summarily even in cases where the lower courts made credibility determinations, drew inferences in the defendant's favor and weighed the evidence.[203] As this Article demonstrates, these decisions are misguided.

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[199] *See supra* note 14.

[200] A "bare bones" prima facie case for purposes of this Article is the minimum amount of proof required to prove a prima facie case. Many plaintiffs, however, offer much more as part of their prima facie case than the bare bones. See *supra* notes 47–48 and accompanying text for a discussion of the minimum prima facie case.

[201] *See* Steckl v. Motorola, Inc., 703 F.2d 392 (9th Cir. 1983) (plaintiff cannot rely on her prima facie case and intent to cross-examine at trial to withstand summary judgment). *See also* Lindahl v. Air France, 930 F.2d 1434 (9th Cir. 1991) (plaintiff cannot defeat summary judgment motion simply by making out a prima facie case if the defendant articulates a legitimate, non-discriminatory reason for the adverse employment decision). Where, however, the plaintiff produces more than a bare bones prima facie case, the plaintiff should be able to rebut the defendant's articulation of a legitimate, non-discriminatory reason for the employment decision. *See* Sischo-Nownejad v. Merced Community College Dist., 934 F.2d 1104, 1111 (9th Cir. 1991) ("Specifically, in evaluating whether the defendant's articulated reason is pretextual, the trier of fact must, at a minimum, consider the same evidence that the plaintiff introduced to establish her prima facie case. When that evidence, direct or circumstantial, consists of more than the *McDonnell Douglas* presumption, a factual question will almost always exist with respect to any claim of a nondiscriminatory reason. The existence of this question of material fact will ordinarily preclude the granting of summary judgment.") (citations omitted).

[202] *See supra* Part II-B.

[203] *See supra* Part II-B.

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A workable standard can exist, however, to guide courts deciding whether to grant summary judgment motions in federal employment discrimination cases. The standard proposed here accommodates the interest of judicial economy heralded by the trilogy's supporters while respecting the rights of civil rights plaintiffs. By keeping in mind the import of the *McDonnell Douglas/Burdine* formula and how it interrelates with the trilogy, courts can consistently and fairly decide summary judgment motions brought by defendants in discrimination cases. Courts must avoid making determinations of credibility and intent at the summary judgment stage precisely because the factfinder can make these determinations fairly and accurately only after hearing the witnesses testify in court.

A. *The Defendant's Heightened Burden*

To implement this standard, the courts must first acknowledge that the confluence of *Liberty Lobby* and *McDonnell Douglas* requires courts to treat civil rights claims differently from other civil cases. *Liberty Lobby* holds that the courts must consider the substantive law in determining when to grant summary judgment.[204] The *McDonnell Douglas/Burdine* formula is the substantive anti-discrimination law.[205] While *Celotex* seems to lower the threshold proof required of a defendant moving for summary judgment in the ordinary case,[206] a defendant moving for summary judgment of a civil rights claim has a higher burden because of the *McDonnell Douglas* formula.

A defendant seeking summary judgment in a disparate treatment case has a higher burden because two burdens actually exist. The defendant must first demonstrate the absence of evidence in the record supporting the plaintiff's case,[207] a burden that a defendant bringing a summary judgment motion carries in an ordinary civil suit. A discrimination defendant must then also satisfy the second burden, imposed by *McDonnell Douglas,* of articulating a legitimate, non-discriminatory reason for its business decision once plaintiff has shown that a prima facie case of discrimination exists.

As a practical matter, a discrimination defendant moving for summary judgment will not wait for the plaintiff to establish a prima facie case in response to the motion. Rather, in the moving papers, the defendant will attempt to articulate a legitimate, non-discrimi-

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[204] 477 U.S. 242, 255–56 (1986).
[205] *See supra* Part I-B.
[206] *See supra* note 87 and accompanying text.
[207] *See supra* Part II-A-2.

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natory reason for the employment decision. Thus the two burdens merge, heightening the burden on an employer seeking summary judgment.[208] Placing a higher burden on the employer is consistent with *McDonnell Douglas*'s goal of eliminating discrimination in the workplace, because the higher burden assists the plaintiff to obtain a factual hearing on the question of defendant's intent.[209]

B. *A Sliding-Scale Approach*

The defendant's heightened burden does not mean, of course, that a court should never grant summary judgment to a defendant charged with discrimination. Rather, the courts should use a sliding scale. The defendant in a discrimination suit has a higher burden when moving for summary judgment. Accordingly, the quantum and quality of proof the defendant presents in its motion for summary judgment should be determinative of the quantum and quality of proof a discrimination plaintiff will be required to present in order to respond successfully to the motion. This sliding-scale approach encourages the courts to avoid assessing witness credibility and inference-drawing in the movant's favor.[210] There are four possible combinations of proof to consider in order to understand

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[208] Although it may appear that I am mixing apples and oranges in that the initial burden on the defendant is a procedural one and the burden to articulate a legitimate, non-discriminatory reason for the employment decision is substantive, in this case procedure is substance. In order for a defendant to prove an absence of evidence supporting the plaintiff's claim, the defendant must articulate a legitimate, non-discriminatory reason for its adverse employment decision. *See generally* Baumann et al., *supra* note 46.

[209] *See supra* note 46 and accompanying text. Some may argue that the purpose of *McDonnell Douglas/Burdine* was merely to allow a plaintiff alleging discrimination to survive a motion to dismiss, thereby giving the plaintiff adequate opportunity to discover evidence of discriminatory intent. Although this argument is not inconsistent with the view that the Court intended to allow plaintiffs an opportunity to prove their cases, the Court in *Burdine* seems to belie this argument. In *Burdine*, the Court made clear that it believed that the shifting of the burden of production, rather than the burden of persuasion would adequately protect plaintiffs in this type of case for three reasons. *See* 450 U.S. at 258. First, the defendant's explanation of its legitimate reasons must be clear and specific in order to rebut the prima facie case and to afford the plaintiff "a full and fair opportunity" to demonstrate that the defendant's alleged reason is pretextual. *Id.* Second, the defendant will have an incentive to persuade the trier of fact that the employment decision was lawful and will attempt to prove the factual basis for its explanation. *Id.* Third, the plaintiff will have access to the EEOC investigatory files that supplement discovery. *Id.* In its discussion of the second reason for not shifting the burden of persuasion to the defendant, the Court strongly implied that it envisioned that these cases would be heard by a factfinder at trial. *See id.*

[210] Only a few panels have discussed this sliding-scale approach to summary judgment in discrimination claims. *See, e.g.*, Sischo-Nownejad v. Merced Community College Dist., 934 F.2d 1104 (9th Cir. 1991); Mesnick v. General Elec. Co., 950 F.2d 816, 823 n.5 (1st Cir. 1990).

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the application of a sliding-scale approach to a defendant's motion for summary judgment.

1. Defendants' Assertions and Plaintiffs' "Bare Bones" Prima Facie Case

A defendant articulates a legitimate, non-discriminatory reason for the adverse employment decision by making bare assertions without any documentary proof. A plaintiff responds by presenting a "bare bones" prima facie case.[211] Most courts would grant the motion for summary judgment.[212] Under the sliding-scale approach proposed here, however, the court would deny the motion because in order to grant the motion, the court would have to find the defendant's witnesses credible and draw inferences in favor of the defendant, the moving party.

2. Defendants' Assertions and Plaintiffs' Prima Facie Case Plus Some Evidence of Pretext

The defendant offers the same articulation as in Number One above. The plaintiff responds with a prima facie case plus some evidence of pretext.[213] Under current Title VII and ADEA juris-

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[211] *See supra* note 204.

[212] *See* Gadson v. Concord Community College, 966 F.2d 32, 35 (1st Cir. 1992); Rush v. McDonald's Corp., 966 F.2d 1104, 1109 (7th Cir. 1992); Young v. General Foods Corp., 840 F.2d 825 (11th Cir. 1988); Hankins v. Temple Univ., 829 F.2d 437, 441–42 (3d Cir. 1987).

[213] *See supra* note 64. This concept can be very confusing for the courts. *See* Holmberg v. Baxter Healthcare Corp., 901 F.2d 1387, 1391 (7th Cir. 1990) ("Rather than make our inquiry more difficult through the rigid and mechanistic application of the *McDonnell-Douglas* burden shifting analysis, we will analyze the case shifting our focus as appropriate from [plaintiff]'s prima facie burden to her burden of showing pretext.") (citations omitted). Many courts characterize evidence that would ordinarily be considered evidence of pretext as evidence supporting the prima facie case.

Whatever this evidence is called, whether it be in support of a prima facie case or to demonstrate pretext, the courts should consider it in determining whether the defendant's motion should be granted. *See Sischo-Nownejad*, 934 F.2d at 1112 ("[T]he evidence [the plaintiff] introduced is direct and consists of more than the *McDonnell-Douglas* presumption. Accordingly that evidence serves a dual purpose. It is sufficient not only to establish her prima facie case, but also to create a genuine issue of material fact regarding whether the defendant's articulated reasons are pretextual.") (emphasis added); Johnson v. Minnesota Hist. Soc'y, 931 F.2d 1239, 1244 (8th Cir. 1991) ("The factually oriented case by case nature of discrimination claims requires the court not to be overly rigid in considering evidence of discrimination offered by plaintiff."); Yartzoff v.Thomas, 809 F.2d 1371 (9th Cir. 1987) (evidence already introduced to establish a prima facie case may be considered, and may suffice to discredit the defendant's explanation). *See also Sischo-Nownejad*, 934 F.2d at 1112 (court considered evidence that the plaintiff was one of the oldest faculty members, the only female, was referred to as "an old warhorse" and whose students were called "little old ladies"

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prudence, there would be inconsistent results. Many courts would grant the motion,[214] while others would deny it.[215] A court using the sliding-scale approach would deny the motion for the same reasons as in Number One—the competing evidentiary positions permit a reasonable factfinder to find for the plaintiff.

3. Defendants' Documentary Proof and Plaintiffs' "Bare Bones" Prima Facie Case

The defendant's articulation includes more than bare assertions (i.e., it includes documentary evidence of poor performance). The plaintiff responds with a "bare bones" prima facie case.[216] In the same way as the courts using the current approach, a court employing the proposed sliding-scale approach would grant summary judgment. This is the proper result because the defendant has presented more than mere assertions. The defendant has offered proof that the plaintiff would have to rebut at trial in order to win, but the plaintiff has responded with insufficient evidence for a reasonable jury to find in his or her favor. By granting the motion, the court does not choose between the credibility of the plaintiff's and the defendant's witnesses. Rather, because the quantum and quality of the defendant's proof overwhelms the plaintiff's proof, the court correctly concludes that no reasonable jury could find that the defendant's articulated non-discriminatory reason is pretextual. Even if the plaintiff plans to rely on cross-examination at trial to establish pretext, there should be some evidence to use to cross-

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sufficient to create a genuine issue of material fact); Lindahl v. Air France, 930 F.2d 1434 (9th Cir. 1991) (evidence that supervisor believed both female candidates for the position were inadequate because they got "nervous" and another female candidate "gets easily upset" was sexual stereotyping and evidence of sex discrimination under Title VII).

[214] *See, e.g.*, EEOC v. Techalloy Md. Inc., No. 91-1027, 1992 U.S. App. LEXIS 6499, at *3 (4th Cir. Mar. 31, 1992) (although plaintiff in a sex discrimination case presented evidence that she was as qualified as the man chosen for the position she sought, the court concluded that "the mere fact that a man was picked instead of a woman is insufficient to establish a case of sex discrimination"); Mesnick v. General Elec. Co., 950 F.2d 816, 825 (1st Cir. 1990) (although the court conceded plaintiff created a triable issue of fact concerning pretext, it was unable to find "enough evidence of age discrimination").

[215] *See* Alphin v. Sears, Roebuck & Co., 940 F.2d 1497, 1501 (11th Cir. 1991) (concluding defendant's remark that plaintiff was "too old" in addition to prima facie case was sufficient to establish an issue of fact); Chauhan v. M. Alfieri Co., 897 F.2d 123, 124 (3d Cir. 1990) ("This case is close, but we find that the inconsistencies and implausibilities contained within [defendant's] explanation for its conduct are of sufficient magnitude to constitute enough evidence of pretext for the plaintiff to survive summary judgment.").

[216] *See supra* note 204.

examine the witness. In order to survive the motion for summary judgment, the plaintiff should present that evidence here.

4. Defendants' Documentary Proof and Plaintiffs' Prima Facie Case Plus Some Evidence of Pretext

The defendant's articulation is the same as Number Three above. The plaintiff responds with a prima facie case plus some evidence of pretext.[217] Under the current approach, some courts would grant the motion, and some would deny the motion.[218] A court employing the sliding-scale approach would consider the evidence presented by both sides and would most likely deny the motion in order to avoid making credibility determinations and drawing improper inferences.

a. Computer v. MBI: *An Illustration*

To illustrate the sliding-scale approach, we will return to our hypothetical of Connie Computer and MBI[219] and examine the outcome of summary judgment motions filed by MBI in the four different combinations of proof described above.

Case One: Assume that after discovery, defendant MBI moves for summary judgment. In its papers, MBI avers in an affidavit, without presenting any documentary evidence, that it failed to hire Ms. Computer because Noel Knownothing was better qualified than the plaintiff. The affidavit does not describe with specificity why MBI believed that Mr. Knownothing was better qualified than Connie Computer. If the plaintiff's response does nothing more than make out a bare bones prima facie case,[220] the case is now in equipoise. Most federal courts today would say that the presumption created by the plaintiff's prima facie case is defeated now that the defendant has met its burden of production.[221] Connie Computer

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[217] *See supra* note 64.

[218] For an example of summary judgment granted under similar circumstances, see Guthrie v. Tifco Indus., 941 F.2d 374, 376–77 (5th Cir. 1991) (requiring the plaintiff to specifically disprove all of defendant's proffered reasons for his discharge even though plaintiff presented enough evidence to show there was disagreement between him and his employer on material issues). *Chauhan*, 897 F.2d at 123, is a good example of a court's denying summary judgment where the plaintiff presented some evidence of pretext.

[219] *See supra* Part I.

[220] *See supra* note 204 and accompanying text.

[221] *See* Karazanos v. Navistar Int'l Transp. Corp., 948 F.2d 332, 336 (7th Cir. 1991) (defendant's articulated non-discriminatory reason "dissolved the presumption created by the prima facie case"); Connell v. Bank of Boston, 924 F.2d 1169, 1173 (1st Cir. 1991) (by

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would lose her case under currently accepted Title VII jurisprudence.[222]

This result, however, is improper. The court is placing a higher burden on a Title VII plaintiff responding to summary judgment motions than on Title VII plaintiffs at trial. It is not clear that MBI met its *Celotex* burden of demonstrating an absence of proof supporting Connie's position. Moreover, there exists a distinct possibility that the factfinder may choose to disbelieve MBI at trial.

If the case were to go to trial, Connie would present her evidence of a prima facie case, and MBI would articulate its reason for not hiring her. Suppose MBI's representative merely testifies, without producing any documentary or other proof, that it hired Mr. Knownothing over Ms. Computer because Mr. Knownothing was better qualified. MBI then moves for a directed verdict at the end of the trial. Here, MBI should lose the motion because it would be for the factfinder, after hearing Connie's cross-examination of MBI's representative, to decide whether to believe MBI's asserted reason for not hiring plaintiff. This is a simple question of credibility. If the factfinder finds MBI's story incredible, it should be permitted to find for Connie Computer because she has demonstrated that the defendant's story is a pretext through her cross-examination. Once the plaintiff has shown that the defendant's true reason is not the articulated reason for its actions, the plaintiff wins the case.[223]

Despite the virtually ironclad logic favoring plaintiffs in such circumstances, courts ruling on summary judgment motions under

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articulating a legitimate, non-discriminatory reason for the plaintiff's discharge, the defendant "nullified any discriminatory inference raised by the prima facie case"); Mesnick v. General Elec. Co., 950 F.2d 816, 824–25 (1st Cir. 1988) ("It is settled that the presumption arising from a discrimination plaintiff's prima facie case vanishes once the employer has articulated a legitimate, nondiscriminatory reason for dismissing the employee.") (citations omitted). *See also* 1 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE, COMMENTARY ON THE RULES OF EVIDENCE FOR THE UNITED STATES COURTS AND MAGISTRATES §§ 301–59 (1992) ("Upon the submission of some credible evidence by the defendant, the presumption of discrimination drops from the case.").

[222] *See* Gadson v. Concord Community College, No. 91-2047, 1992 U.S. App. LEXIS 13010 at *2 (1st Cir. June 9, 1992) (citing Villanueva v. Wellesley College, 930 F.2d 124, 128 (1st Cir. 1991)) ("[P]laintiff may not simply refute or question the employer's reasons. To defeat summary judgment at this stage, a plaintiff must produce evidence that the real reason for the employer's action was discrimination."); Cotton v. City of Alameda, 812 F.2d 1245, 1248 (9th Cir. 1987) (quoting Steckl v. Motorola, Inc., 703 F.2d 392, 393 (9th Cir. 1982)) (in order to avoid summary judgment, plaintiff must "tender a genuine issue of material fact as to pretext").

[223] *See supra* note 64 and accompanying text.

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similar circumstances have uniformly held that the mere chance that the jury may disbelieve the defendant at trial, absent any evidence of pretext, is not sufficient to allow the case to go to trial.[224] This approach does not make sense, because the plaintiff has already made out a prima facie case,[225] and MBI, for example, has done nothing more than make unsupported assertions that Mr. Knownothing is better qualified than Connie Computer—a bare bones denial. If the court grants summary judgment in such a circumstance, it is indisputedly and improperly making a credibility determination in the defendant's favor. This is the situation where MBI's initial burden upon moving for summary judgment under *Celotex* and its burden to articulate a legitimate, non-discriminatory reason for its action should merge to heighten the defendant's burden.

Under *Burdine,* the defendant should be required to articulate a much clearer, more specific reason for its decision.[226] For example, at the summary judgment stage a mere assertion that Mr. Knownothing is better qualified than Connie Computer should not be sufficient to meet the defendant's burden of articulating a legitimate, non-discriminatory reason for the discharge, because Connie Computer has no opportunity to test MBI's witnesses' credibility on

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[224] *See* Lindahl v. Air France, 930 F.2d 1434, 1437–38 (9th Cir. 1991) (plaintiff cannot successfully respond to a summary judgment motion by stating a prima facie case and expressing an intent to challenge defendant's credibility on cross-examination); Chauhan v. M. Alfieri Co., 897 F.2d 123, 128 (3d Cir. 1990) (that a factfinder might disbelieve defendant's asserted, non-discriminatory reason for the employment decision is not enough to create a genuine issue of material fact—plaintiff must submit some evidence from which the jury could reasonably conclude that defendant's explanation is incredible).

[225] In her dissent in Healy v. New York Life Ins. Co., 860 F.2d 1209, 1220 (3d Cir. 1988), Judge Shapiro argues that *Celotex* and *Liberty Lobby* do not require the same level of proof when the non-moving party has already made out a prima facie case and must merely rebut the defendant's showing. 860 F.2d at 1226–27 (Shapiro, J., dissenting). *See also* Warren v. Halstead Indus., 802 F.2d 746, 753 (4th Cir. 1986) ("plaintiff's initial evidence should be combined with the evidence arising from cross-examination in order to determine whether the defendant's reasons are legally sufficient or whether they should be discredited" at trial).

Warren, which is riddled with instances of conflicting testimony by the defendant's own witness, demonstrates the importance of cross-examination at trial. For example, defendant's decision to terminate Alvin Warren was based on documentation of his "lack of cooperation." *Id.* at 757. The clearly pretextual nature of such subjective criteria became apparent by the cross-examination of defendant's personnel manager. *Id.* at 758 n.13. Unable to articulate a standard for uncooperative behavior, one personnel manager commented that "it is just a discretionary concept." *Id.* The plant manager, however, stated that lack of cooperation meant that an employee failed to get work done. *Id.* at 758 n.14. Without the benefit of cross-examination, plaintiff would not have been able to demonstrate pretext.

[226] 450 U.S. 248, 255 (1981).

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cross-examination.[227] If the court were to conclude that MBI's proof is sufficient to shift the burden to the plaintiff, the court would actually be drawing the inference in MBI's favor, a practice that should not occur at the summary judgment stage when the defendant is the moving party.

Case Two: Let us change our hypothetical slightly. Assume that Ms. Computer and Mr. Knownothing worked side by side as computer sales representatives for MBI and that an opening arises for a management position at MBI. Both Connie and Noel apply for the promotion. Noel gets the promotion. Connie sues MBI for sex discrimination. MBI moves for summary judgment, supporting its motion with the same affidavits it submitted in Case One, claiming that Mr. Knownothing was better qualified than Connie Computer. Ms. Computer opposes MBI's motion for summary judgment with an affidavit setting forth a prima facie case and additionally averring that she worked with Mr. Knownothing and that he is not better qualified than she is for the position. Courts have uniformly granted the defendant's motion under similar circumstances.[228] First, courts have concluded that the defendant's assertions shift the burden back to the plaintiff, requiring a demonstration that the defendant's articulated reason is a pretext.[229] Second, a plaintiff's testimony that she is better qualified for the job is an example of "subjective belief" testimony that is insufficient to raise a genuine issue of material fact of whether the reason given for not hiring the plaintiff is pretextual.[230] Courts opine that it is not the plaintiff's subjective belief but rather, the defendant's subjective intent at the time of the alleged discriminatory action, that will control whether the plaintiff should prevail.[231]

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[227] Courts currently require no more than these bare assertions for a defendant to meet its burden of production. See *supra* Part I-B-2 for a discussion of the defendant's burden.

[228] *See supra* Part III-B.

[229] *See supra* note 64. At the summary judgment stage, this should mean that a plaintiff must set forth evidence from which a jury could reasonably conclude that the defendant's articulated reason is a pretext for discrimination. *See supra* Part III-B.

[230] *See* Allen v. Denver Pub. Sch. Bd., 928 F.2d 978, 985 (10th Cir. 1991) (plaintiff's subjective belief that she was more qualified than the successful applicants insufficient to raise genuine issue of material fact even though defendants never put into evidence any proof that the persons selected were better qualified); Billopa v. Methodist Hosp. of Chicago, 922 F.2d 1300, 1303 (7th Cir. 1991) ("Subjective beliefs of the plaintiff, however, are insufficient to create a genuine issue of material fact."); Spangle v. Valley Forge Sewer Auth., 839 F.2d 171, 174 (3d Cir. 1988) (plaintiff's subjective belief, without proof of his qualification to perform supervisory duties where such duties were assumed by a considerably younger person, is not enough to raise an inference of age discrimination).

[231] *See supra* note 180 and accompanying text; *see also Weihaupt*, 874 F.2d at 429 ("even

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Although at first blush this holding seems supportable, there are two problems. First, a defendant may not meet its burden under *Burdine* merely by testifying that the person hired is better qualified than the plaintiff.[232] Thus, the burden should not shift to the plaintiff to demonstrate that a genuine issue of material fact exists as to whether the defendant's reason for the decision is pretextual. Second, even assuming that the defendant has met the burden of articulating a legitimate, non-discriminatory reason for promoting another candidate, by crediting the defendant's explanation over the plaintiff's, the court makes a veiled credibility determination in the defendant's favor. This simplistic approach assumes that defendants will always tell the truth. If courts could be assured that defendants would always tell the truth when they articulate their legitimate, non-discriminatory reason for not hiring a plaintiff, the courts' analysis would be supportable. Obviously, however, defendants have an incentive to misrepresent the truth.[233] The only check on the defendant's misrepresentations is the factfinder's viewing the competing evidence in context. Where the plaintiff has no basis for her belief that the defendant discriminated against her because of her sex, the factfinder will most likely find for the defendant. But where the defendant's articulation is merely a statement unsupported by documentary proof, or perhaps documentary proof created after the lawsuit commenced,[234] the plaintiff's rebuttal need not do much to obtain a trial. To create a question of fact concerning the defendant's credibility,[235] a plaintiff should not be required to set forth much more than the prima facie case.

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if [defendant]'s conclusions on [plaintiff]'s abilities might be without a sound basis, [plaintiff] fails to establish an ADEA violation if the evaluation was in good faith").

[232] *See supra* Part III-A.

[233] *See generally* Lanctot, *supra* note 55.

[234] *See* Healy v. New York Life Ins. Co., 860 F.2d 1209, 1223 (3d Cir. 1988) (Shapiro, J., dissenting) (post-termination evaluation without more suggests proffered reason is pretextual).

[235] In Young v. General Foods Corp., 840 F.2d 825 (11th Cir. 1988), the court applied the quantum and quality of proof theory properly. In that case, there was overwhelming evidence that the plaintiff, a salesperson alleging he was fired because of his age, consistently had performed below par and in an inferior way to all the other members of the salesforce. *Id.* at 826–27. The defendant submitted evidence demonstrating that statistical information had been used to evaluate the plaintiff, concluding that the plaintiff's sales volume growth and "budget accomplishment" had trailed the salesforce average. *Id.* at 827. The plaintiff's 1982 evaluation had criticized the plaintiff for his lack of account development and his lack of aggression. *Id.* As a consequence, the plaintiff was put on probation. *Id.* The next year Young's boss once again reviewed his work and kept him on formal probation from month to month. *Id.* The majority of the plaintiff's sales figures continued to be below average. *Id.* The performance review also criticized the plaintiff for his damaged merchandise expenses

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Where the quantum and quality of proof produced by the plaintiff and the defendant are equal, a court's decision that the plaintiff has not raised a genuine issue of material fact is either a credibility finding in the defendant's favor or a presumption that its articulated reason is the real reason for the defendant's action. The former is forbidden by *Liberty Lobby*, while the latter is barred by *McDonnell Douglas*. Given that the plaintiff has already made out a prima facie case at this stage, creating a presumption in the defendant's favor contravenes the Supreme Court's reasons for establishing a prima facie case by use of the *McDonnell Douglas* construct.[236]

Case Three: Assume once again that Connie Computer sues MBI for sex discrimination in its failure to promote her over Mr. Knownothing. MBI moves for summary judgment. This time, MBI presents clear, specific documentary proof, including: testimony from its personnel director that Mr. Knownothing is better qualified than Connie Computer; the performance evaluations for Mr. Knownothing and Ms. Computer; college transcripts; evaluations of the relevance of their prior work experience and its relation to the job in question; and the announced job specifications. Connie Computer responds with nothing more than a bare bones prima facie case. The court should grant the motion using the sliding-scale approach. Because the defendant has met its heightened burden, the burden shifts to the plaintiff to prove that the defendant's articulated reason for promoting Mr. Knownothing over Connie Computer is pretextual. Although the plaintiff may satisfy this burden at trial simply by destroying the defendant's evidence (and likewise its credibility) on cross-examination, in order to conduct

which were the highest in the region. *Id.* The review further noted that his sales volume figures, excluding those of *Crystal Light*, a new product that was marketed only in the plaintiff's sales region, placed him last among sales personnel in the southeast. *Id.* In response to this evidence, the plaintiff had very little evidence from which discrimination could be inferred. *Id.* He did not dispute the defendant's evidence of his inferior sales, but rather argued that the defendant had fired him because of his age. The court of appeals properly upheld the grant of summary judgment. *Id.* at 828. It did not automatically credit the defendant's articulated reason for firing the plaintiff. Rather, it looked at the evidence presented by the defendant and the plaintiff and concluded that although it is improper for the court to weigh evidence in deciding a summary judgment motion, this was not a case where the district court weighed the evidence of both parties to conclude that the defendant's argument was weightier. *Id.* at 831. Instead, it was a case where the defendant's justification evidence completely overwhelmed any inference to be drawn from the plaintiff's evidence. *Id.* Thus, the court could affirm the lower court's grant of summary judgment.

[236] In light of the Civil Rights Act of 1991, such a presumption contravenes congressional intent as well.

this cross-examination, a plaintiff will presumably need evidence to shake the witness. Thus, at the summary judgment stage, Connie Computer should present at least some of this evidence, either documentary or testamentary, in opposition to the summary judgment motion. Because the defendant offered substantial evidence tending to show that Mr. Knownothing was promoted over Connie Computer because he was better qualified for the job, Ms. Computer must respond with similar quantum and quality of evidence to survive the motion.[237] This is not to suggest that the plaintiff must specifically rebut each and every piece of evidence that the defendant offers.[238] Rather, the totality of the plaintiff's evidence should permit an inference that MBI promoted Mr. Knownothing over Ms. Computer for reasons other than superior job qualifications.

Whatever evidence the court considers in determining whether a genuine issue of material fact exists, the court should keep in mind that the plaintiff has already made out a prima facie case of discrimination and that the evidence creating a prima facie case is still relevant to the factfinder's ultimate decision. A plaintiff can prove discrimination by showing that an inference can be drawn from the totality of the evidence that, more likely than not, the defendant made the employment decision with discriminatory intent. Therefore, to determine whether a question of fact exists for the factfinder, the court must look at the evidence in its totality, just as the factfinder would examine the evidence.

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[237] For example, if the defendant alleges that the plaintiff was fired because of an inability to get along with subordinates and presents the affidavit of its corporate representative with no documentary proof or with weak documentary proof, the plaintiff should be able to rebut this articulation with personal testimony establishing an ability to get along well with subordinates, citing to examples.

If, on the other hand, the defendant offers documentary proof of consistent criticisms in performance evaluations and warnings that the plaintiff will be fired if the situation is not corrected, then the plaintiff may need to present more evidence than personal testimony to create a genuine issue of material fact for the factfinder. The plaintiff could offer the affidavit of a subordinate or some other person with an opportunity to observe the situation averring that plaintiff got along well with subordinates. Likewise, the plaintiff could offer testimony that other persons not within the protected class were not repeatedly warned and disciplined as she had been for the same offense.

[238] Some courts have required plaintiffs to respond with such specificity that it is impossible for a plaintiff to survive a motion for summary judgment. *See* Anderson v. Stauffer Chem. Co., No. 91-1173, 1992 WL 121705, at *7 (7th Cir. June 8, 1992) ("Unless he attacks the specific reasons given for a termination, a plaintiff who stresses evidence of satisfactory performance is simply challenging the wisdom of the employer's decision, which we have consistently refused to review."); Cotton v. City of Alameda, 812 F.2d 1245 (9th Cir. 1987) (requiring the plaintiff to specifically produce evidence to discredit the defendant's proffered reasons of "instability" and "lack of commitment" by comparing "prior employment histories of applicants" or offering an "empirical study of police officer employment patterns").

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In determining how much proof and what quality of proof is needed to rebut the defendant's articulated reason for its employment decision, courts should consider the sophistication of today's defendants.[239] Many companies are known to keep bad comments in all employee files in order to defend against potential suits.[240] Consequently, negative comments in an employee's earlier performance reviews are not necessarily reliable. Performance reviews and notes placed in an employee's files *after* the conflict between the employee and employer arises should have little or no probative value because they are after-the-fact justifications for the employer's actions.[241]

Case Four: Assume that MBI moves for summary judgment, supporting its motion with the same evidence as in Case Three. Connie Computer responds by setting out a prima facie case but also submits statistical evidence demonstrating that MBI has very few women in management positions along with evidence of sexist remarks that her supervisor had made to her, or her own testimony that her performance reviews were not as glowing as those of Mr. Knownothing because he had been given a better sales territory, or both. This evidence should raise a genuine issue of material fact whether the defendant's articulated reason for promoting Mr. Knownothing over Ms. Computer was the real reason for its actions. The court should therefore deny the motion.

CONCLUSION

The Supreme Court's 1986 summary judgment trilogy has had the effect, whether intended or not, of depriving many deserving Title VII and ADEA plaintiffs of the right to a trial. Too many lower courts have interpreted the trilogy as a license to weigh evidence, draw inferences in favor of the defendant when it moves

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[239] *See supra* note 45.

[240] *See* Victor Scachter & Joanne Dellaverson, *Employee Relations*, ABA BANK. J. 78 (Sept. 1983) (suggesting preventive actions against discrimination suits including an evaluation process that includes recording both positive and negative comments); *see also* Tony Mauro, *How the EEOC Is Reaching Out to Employers; Voluntary Assistance Program*, NATION'S BUS. 25 (Aug. 1984) (responding to the question of how to fire an employee who happens to be a minority, EEOC official stated, "With proper documentation and a consistent policy, they can fire people.").

[241] *See* Healy v. New York Life Ins. Co., 860 F.2d 1209, 1223 n.4 (3d Cir. 1988) (Shapiro, J., dissenting) ("its very existence is aberrational and pretextual"); Giacoletto v. Amax Zinc Co., 954 F.2d 424, 427 (7th Cir. 1992) (negative performance evaluation placed in personnel file after plaintiff was asked to retire and six days before termination valuable only because it entitled jury to conclude defendant acted with discriminatory intent).

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for summary judgment, assess witness credibility and require plaintiffs to prove their cases at the summary judgment stage.

In discrimination suits, the courts must interpret the trilogy in light of the purposes behind the substantive legal standard set forth in *McDonnell Douglas* and *Burdine*. Because those who discriminate rarely admit to discrimination and almost never leave "smoking gun" evidence in their files, plaintiffs necessarily resort to subtle circumstantial evidence to prove their cases. In *McDonnell Douglas* and *Burdine,* the Supreme Court recognized the inherent difficulties for plaintiffs in discrimination cases and established a formula that would make it easier for plaintiffs to prove that their employers had discriminated against them.

Contrary to the clear holding of *Anderson v. Liberty Lobby,* which requires the courts to consider the substantive evidentiary standards applicable in the case in deciding whether to grant summary judgment, lower courts have misapplied the *McDonnell Douglas/Burdine* standard when considering an employer's motion for summary judgment in Title VII and ADEA cases. Because of this improper use of the trilogy and *McDonnell Douglas/Burdine,* Title VII and ADEA plaintiffs have a greater burden defending motions for summary judgment than they would have at trial.

Courts can reconcile the trilogy with the *McDonnell Douglas/Burdine* formula. Courts must avoid automatically crediting defendants' reasons, drawing inferences in defendants' favor, deciding witnesses' credibility on paper and requiring plaintiffs to prove their cases at the summary judgment stage.

Although *Celotex* seems to have lightened a defendant's initial burden in bringing a summary judgment motion in an ordinary civil case, courts must interpret *Celotex* in light of the *McDonnell Douglas/Burdine* standard, a standard that places a burden on defendants to articulate legitimate, non-discriminatory reasons for employment decisions. Thus, courts should require a defendant moving for summary judgment to prove more than a defendant in an ordinary civil case before the burden is shifted to the plaintiff to show that a genuine issue of material fact exists as to whether the defendant's alleged reason for its employment decision is pretextual. Furthermore, courts should employ a sliding scale in determining whether to grant the motion. That is, the quantum and quality of the defendant's proof should determine the proof the plaintiff needs to present in order to raise a genuine issue of material fact. When a plaintiff raises a genuine issue of material fact as to whether a defendant's articulated reason is pretextual, the court should deny the defendant's motion.

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