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Introduction: Employment Discrimination and the Problems of Proof

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Introduction

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The following Articles were presented at a symposium on *Reeves v. Sanderson Plumbing Prods. Co.*[1] sponsored by the *Louisiana Law Review*. Presenting papers at the Lod Cook Alumni Center of Louisiana State University were five of the leading scholars on employment discrimination law: Professor Catherine J. Lanctot[2] of the Villanova University Law School, Professor Michael Selmi[3] of the George Washington Law School, Professor Linda Hamilton Krieger[4], University of California at Berkely School of Law, Professor Rebecca Hanner White[5] of the University of Georgia Law School, and Professor Michael Zimmer[6] of the Seton

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1. 530 U.S. 133, 120 S. Ct. 2097 (2000).

2. *See, e.g.*, Catherine J. Lanctot, *The Plain Meaning of* Oncale, 7 Wm. & Mary Bill of Rts. J. 913 (1999); Catherine J. Lanctot, *Symposium, Ad Hoc Decision Making and Per Se Prejudice: How Individualizing the Determination of "Disability" Undermines the ADA*, 42 Vill. L. Rev. 327 (1997); 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 (1991).

3. *See, e.g.*, Michael Selmi, *Response to Professor Wax, Discrimination as Accident: Old Whine, New Bottle*, 74 Ind. L. J. 1233 (1999); Michael Selmi, *Public v. Private Enforcement of Civil Rights: The Case of Housing and Employment*, 45 UCLA L. Rev. 1401 (1998); Michael Selmi, *Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric*, 86 Geo. L. J. 279 (1997); Michael Selmi, *The Value of the EEOC: Reexamining the Agency's Role in Employment Discrimination Law*, 57 Ohio St. L. J. 1 (1996); Michael Selmi, *Testing for Equality: Merit, Efficiency, and the Affirmative Action Debate*, 42 UCLA L. Rev. 1251 (1995).

4. *See, e.g.*, Linda Hamilton Krieger, *Foreword: Backlash Against the ADA: Interdisciplinary Perspectives and Implications for Social Justice Strategies*, 21 Berk. J. Empl. & Lab. L. 1 (2000); Linda Hamilton Krieger, *The Burdens of Equality: Burdens of Proof and Presumptions in Indian and American Civil Rights Law*, 47 Am. J. Comp. L. 89 (1999); Linda Hamilton Krieger, *Civil Rights Perestroika: Intergroup Relations After Affirmative Action*, 86 Calif. L. Rev. 1251 (1998); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 Stan. L. Rev. 1161 (1995).

5. *See, e.g.*, Rebecca Hanner White, *There's Nothing Special About Sex: The Supreme Court Mainstreams Sexual Harassment*, 7 Wm. & Mary Bill of Rts. J. 725 (1999); Rebecca Hanner White, De Minimis *Discrimination*, 47 Emory L.J. 1121 (1998); Rebecca Hanner White, *Modern Discrimination Theory and the National Labor Relations Act*, 39 Wm. & Mary L. Rev. 99 (1997); Rebecca Hanner White, *Symposium: Vicarious and Personal Liability for Employment Discrimination*, 30 Ga. L. Rev. 509 (1996); Rebecca Hanner White, *The EEOC, the Courts, and Employment Discrimination Policy: Recognizing the Agency's Leading Role in Statutory Interpretation*, 1995 Utah L. Rev. 51; Rebecca Hanner White & Robert D. Burssack, *The Proper Role of After-Aquired Evidence in Employment Discrimination Litigation*, 35 B. C. L. Rev. 49 (1993). *Cf.*, Rebecca Hanner White, *The Statutory and Constitutional Limits of Using Protected Speech as Evidence of Unlawful Motive under the National Labor Relations Act*, 53 Ohio St. L.J. 1 (1992) (examination of NLRA).

6. *See, e.g.*, Zimmer et al., Cases and Materials on Employment Discrimination (5th ed., 2000). He is the author of several articles in the area of employment discrimination: Michael J. Zimmer, *Chaos or Coherence: Individual Disparate Treatment Discrimination and the ADEA*, 51 Mercer L. Rev. 693

Hall University School of Law.[7] Respondents were the authors and Professor George Strickler, Jr.[8] of Tulane Law School.

The Supreme Court's June decision in *Reeves* reinstated a jury verdict for plaintiff Roger Reeves, a supervisor at Sanderson Plumbing who was discharged on the basis of his age after forty years of service. The Fifth Circuit had reversed the District Court's denial of a motion for judgment as a matter of law under Rule 50 of the Federal Rules of Civil Procedure. The Fifth Circuit panel argued that the plaintiff's showing of "pretext"[9] along with the evidence he had presented to establish his prima facie case was insufficient to support judgment.[10] The Supreme Court's decision that such a showing *might* be adequate was a strong reaffirmation of a position it had implied seven years earlier in *St. Mary's Honor Center v. Hicks*[11] but which lower courts had not fully embraced.[12] Consequently, *Reeves* has

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(2000); Michael J. Zimmer, *Individual Disparate Impact Law: On the Plain Meaning of the 1991 Civil Rights Act*, 30 Loy. U. Chi. L.J. 473 (1999); Michael J. Zimmer, Taxman: *Affirmative Action Dodges Five Bullets*, 1 U. Pa. J. Lab. & Emp. L. 229 (1998); Michael J. Zimmer, *Symposium, The Emerging Uniform Structure of Disparate Treatment Discrimination Litigation*, 30 Ga. L. Rev. 563 (1996).

7. Professor Zimmer is visiting at the University of Illinois this year.

8. Professor Strickler is co-author of a leading text on employment discrimination, Friedman & Strickler, The Law of Employment Discrimination: Cases and Materials (2nd ed., 2001). He has also published in the area. *See* George M. Strickler, Jr., *Martin v. Wilkes*, 64 Tul. L. Rev. 1557 (1990).

9. The term derives from panelist Catherine Lanctot's 1991 article. *See* Lanctot, *The Defendant Lies, supra* note 2. Though never clearly defined in the cases, pretext means a showing that the defendant's non-discriminatory explanation has been shown to be false. *See* McDonnell Douglas v. Green, 411 U.S. 792, 93 S. Ct. 1817 (1973). Pretext-plus is the requirement that the plaintiff show additional evidence of discrimination apart from the prima facie case and the showing that the defendant's explanation was unbelievable. *See* St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 515, 113 S. Ct. 2742, 2752 (1993) ("a reason cannot be proved to be 'a pretext for discrimination' unless it is shown both that the reason was false, and that discrimination was the real reason").

10. The Supreme Court recounted the Fifth Circuit's view of the case:

> The Court of Appeals for the Fifth Circuit reversed, holding that petitioner had not introduced sufficient evidence to sustain the jury's finding of unlawful discrimination. After noting respondent's proffered justification for petitioner's discharge, the court acknowledged that petitioner "very well may" have offered sufficient evidence for "a reasonable jury [to] have found that [respondent's] explanation for its employment decision was pretextual." The court explained, however, that this was "not dispositive" of the ultimate issue—namely, "whether Reeves presented sufficient evidence that his age motivated [respondent's] employment decision." Addressing this question, the court weighed petitioner's additional evidence of discrimination against other circumstances surrounding his discharge. Specifically, the court noted that Chesnut's age-based comments "were not made in the direct context of Reeves's termination"; there was no allegation that the two other individuals who had recommended that petitioner be fired (Jester and Whitaker) were motivated by age; two of the decisionmakers involved in petitioner's discharge (Jester and Sanderson) were over the age of 50; all three of the Hinge Room supervisors were accused of inaccurate recordkeeping; and several of respondent's management positions were filled by persons over age 50 when petitioner was fired. On this basis, the court concluded that petitioner had not introduced sufficient evidence for a rational jury to conclude that he had been discharged because of his age.

Reeves v. Sanderson Plumbing Prods., 530 U.S. 133, 139-40, 120 S. Ct. 2097, 2104 (2000) (citations omitted).

11. 509 U.S. 502, 120 S. Ct. 2742 (1993). The *Hicks* Court held that pretext alone might be

been seen as both a strong rebuke of the Fifth Circuit's restrictive requirement of "pretext-plus" and, more generally, a plaintiff-friendly decision[13] meant to facilitate the prosecution of employment discrimination cases.

Reeves concerns the "disparate treatment" method for structuring proof of discrimination with circumstantial evidence. "'Disparate treatment' . . . is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex or national origin."[14] Or, as in *Reeves*, a case under the Age Discrimination in Employment Act, treats them differently because of their age. The disparate treatment proof is deceivingly complex and has been the subject of considerable controversy over the last decade. The proof proceeds in three stages: the plaintiff makes a *Reeves's* case, which the defendant must rebut by producing evidence of a legitimate, nondiscriminatory reason (or face entry of judgement against him), precipitating an opportunity for the plaintiff to respond by showing that the defendant's reasons are

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adequate to allow a case to go to the jury or to sustain a jury determination of discrimination:

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

Id. at 511, 113 S. Ct. at 2749 (citations omitted). However, *Hicks* also contains contrary language:

> We have no authority to impose liability upon an employer for alleged discriminatory employment practices unless an appropriate factfinder determines, according to proper procedures, that the employer has unlawfully discriminated. We may, according to traditional practice, establish certain modes and orders of proof, including an initial rebuttable presumption of the sort we described earlier in this opinion, which we believe *McDonnell Douglas* represents. But nothing in law would permit us to substitute for the required finding that the employer's action was the product of unlawful discrimination, the much different (and much lesser) finding that the employer's explanation of its action was not believable. The dissent's position amounts to precisely this, unless what is required to establish the McDonnell Douglas prima facie case is a degree of proof so high that it would, in absence of rebuttal, require a directed verdict for the plaintiff (for in that case proving the employer's rebuttal noncredible would leave the plaintiff's directed-verdict case in place, and compel a judgment in his favor). Quite obviously, however, what is required to establish the McDonnell Douglas prima facie case is infinitely less than what a directed verdict demands.

Id. at 514-15, 113 S. Ct. at 2751. And later, "a reason cannot be proved to be 'a pretext for discrimination' unless it is shown both that the reason was false, and that discrimination was the real reason." *Id.* at 15, 113 S. Ct. at 2752.

12. *See infra* notes 26-28.

13. *See, e.g., High Court Makes it Easier for Employees to Prove Discrimination*, 7 New York Employment Law Letter, Issue 8 (August 2000); *High Court Decision Eases Burden For Discrimination Plaintiffs*, The Indiana Lawyer, July 19, 2000, at 4; *Risks of Discrimination Suits Increase For Employers Following Supreme Court Ruling in* Reeves, 14 Employment Litigation Reporter, July 11, 2000, No. 16, at. 3; Marcia Coyle, *Dismissal of Bias Suits Harder*, The National Law Journal, June 26, 2000, Corporate Brief, at B1; Tamara Loomis, *'Pretext Plus' Rejected: Employment Discrimination Landscape Changed*, New York Law Journal, June 22, 2000, Corporate Update, at 5.

14. United States v. Teamsters, 431 U.S. 324, 335 n.15, 97 S. Ct.-1854 n.15 (1978).

not the true reasons—that they are "pretext."[15] The plaintiff's *Reeves's* showing is a minimal one, requiring that she dismiss the most likely reasons for the employment decisions (to wit, that the plaintiff did not apply or was unqualified or perhaps that the job was not open).[16] The defendant's burden is similarly light. The defendant must only articulate a non-discriminatory reason in the form of admissible evidence and of sufficient quantity to "meet" the plaintiff's prima facie case.[17] Predictably most cases quickly develop past these preliminary stages and are fought out over the nature of the plaintiff's pretext showing.

The controversy has concerned the consequences following a plaintiff's showing of pretext. In terms set out by panelist Professor Lanctot in her seminal 1989 article,[18] several outcomes are possible. A showing of pretext alone might require a verdict for the plaintiff. Or, such a showing might only allow a verdict for the plaintiff. Finally, "pretext-plus" other evidence established in the record might be required to support a verdict for the plaintiff.[19] The first of these options was rejected by the Supreme Court in its important 1993 decision, *St. Mary's Honor Center v. Hicks*.[20] In *Hicks* the Court held that, because a plaintiff bears the burden of proof throughout the litigation and because any presumption of discrimination created by the prima facie case "falls away" or "bursts" when rebutted, the plaintiff's showing of pretext could have no automatic consequence.[21] Rather, the Court implied that such a showing *might* support a verdict for the plaintiff, but only if its evidentiary weight were sufficient to establish discrimination (the plaintiff's ultimate factual burden).[22]

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15. *See* McDonnell Douglas v. Green, 411 U.S. 792, 93 S. Ct. 1817 (1973); Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089 (1981); *Hicks*, 509 U.S. at 502, 113 S. Ct. at 2742.

16. *See, e.g.*, Furnco Constr. Corp. v. Waters; 438 U.S. 567, 98 S. Ct. 2943 (1978).

17. *See Burdine*, 450 U.S. at 254, 101 S. Ct. at 1094.

18. *See* Lanctot, *Pretext, supra* note 2.

19. As our colleague William Corbett reminded us, pretext-only and pretext-plus can be applied to burden of production or burden of persuasion. *Hicks* involved only burden of persuasion.

> In the nature of things, the determination that a defendant has met its burden of production (and has thus rebutted any legal presumption of intentional discrimination) can involve no credibility assessment. For the burden-of-production determination necessarily precedes the credibility-assessment stage. . . .If, on the other hand, the defendant has succeeded in carrying its burden of production, the *McDonnell Douglas* framework—with its presumptions and burden—is no longer relevant. To resurrect it later, after the trier of fact has determined that what was "produced" to meet the burden of production is not credible, flies in the face of our holding in *Burdine* that to rebut the presumption "[t]he defendant need not persuade the court that it was actually motivated by the proffered reasons." The presumption, having fulfilled its role of forcing the defendant to come forward with some response, simply drops out of the picture. The defendant's "production" (whatever its persuasive effect) having been made, the trier of fact proceeds to decide the ultimate question: whether plaintiff has proved "that the defendant intentionally discriminated against [him]" because of his race.

Hicks, 509 U.S. at 509-11, 113 S. Ct. at 2748-49 (citations omitted).

20. 509 U.S. 502, 511, 113 S. Ct. 2742, 2749 (1993).

21. *Id.* at 510-11, 113 S. Ct. at 2749.

22. *Id.* at 511, 514-15, 113 S. Ct. at 2742, 2751.

The *Hicks* decision proved controversial and ultimately a poor guide for lower courts. It was marked by statements suggesting that the Court believed that the existence of discrimination *vel non* was proved only when pretext was accompanied with additional evidence—when the plaintiff showed pretext-plus.[23] Moreover, the tone of Justice Scalia's opinion for the Court was antagonistic toward and suspicious of claims of discrimination.[24] Perhaps predictably, lower courts soon split over the meaning of *Hicks*.[25] In particular, some circuits took the position that *Hicks* required pretext-plus;[26] other circuits accepted that pretext-alone could support a finding of discrimination, but generally required additional evidence to support a verdict for the plaintiff;[27] still other circuits, read *Hicks* for as little as it stood for, and thus allowed plaintiffs to prevail on pretext alone.[28]

Reeves had established a prima facie case[29] which was rebutted.[30] He had offered substantial evidence of pretext[31] and his case had gone to the jury which ruled for him. After surviving a motion for a judgement as a matter of law, Reeves's judgment was reversed on appeal. The Fifth Circuit held that Reeves's evidence of pretext was insufficient to support the jury verdict in his favor.[32] When

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23. *See id.* at 514-15, 113 S. Ct. at 2751.

24. *See, e.g.*, Justice Scalia's hypothetical discussion, *id.* at 513-14.

25. We granted certiorari, to resolve a conflict among the Courts of Appeals as to whether a plaintiff's prima facie case of discrimination (as defined in *McDonnell Douglas Corp. v. Green)*, combined with sufficient evidence for a reasonable factfinder to reject the employer's nondiscriminatory explanation for its decision, is adequate to sustain a finding of liability for intentional discrimination.

Reeves v. Sanderson Plumbing Prods., 530 U.S. 133, 140, 120 S. Ct. 2097, 2104 (2000).

26. Fisher v. Vassar College, 114 F.3d 1332 (2d Cir. 1997) (en banc) (plaintiff must introduce sufficient evidence for jury to find both that employer's reason was false and that real reason was discrimination), *cert. denied*, 522 U.S. 1075, 118 S. Ct. 851 (1998); Rhodes v. Guiberson Oil Tools, 75 F.3d 989 (5th Cir. 1996) (same) (*Rhodes* did not use the language "pretext plus," but nevertheless applied the analysis); Theard v. Glaxo, Inc., 47 F.3d 676 (4th Cir. 1995) (same); Woods v. Friction Materials, Inc., 30 F.3d 255 (1st Cir. 1994) (same).

27. Aka v. Washington Hosp. Ctr., 156 F.3d 1284 (D.C. Cir. 1998) (en banc) (plaintiff's discrediting of employer's explanation is entitled to considerable weight, such that plaintiff should not be routinely required to submit evidence over and above proof of pretext).

28. Kline v. TVA, 128 F.3d 337 (6th Cir. 1997) (prima facie case combined with sufficient evidence to disbelieve employer's explanation always creates jury issue of whether employer intentionally discriminated); Combs v. Plantation Patterns, 106 F.3d 1519 (11th Cir. 1997) (same), *cert. denied*, 522 U.S. 1045, 118 S. Ct. 685 (1998); Sheridan v. E. I. DuPont de Nemours & Co., 100 F.3d 1061 (3rd Cir. 1996) (same) (en banc), *cert. denied*, 521 U.S. 1129, 117 S. Ct. 2532 (1997); Gaworski v. ITT Commercial Fin. Corp., 17 F.3d 1104 (8th Cir.) (same), *cert. denied*, 513 U.S. 946, 115 S. Ct. 355 (1994); Anderson v. Baxter Healthcare Corp., 13 F.3d 1120 (7th Cir. 1994) (same); Washington v. Garrett, 10 F.3d 1421 (9th Cir. 1993) (same).

29. *See Reeves*, 530 U.S. at 142-43, 120 S. Ct. at 2106-07.

30. *See id.* at 143-44, 120 S. Ct. at 2107-08.

31. *See id.* at 144-45, 120 S. Ct. at 2109.

32. The Fifth Circuit held:

Based on this evidence, claims Reeves, a reasonable jury could have found that Sanderson's explanation for its employment decision was pretextual. On this point, Reeves very well may be correct. Even so, whether Sanderson was forthright in its explanation for firing Reeves is not dispositive of a finding of liability under the ADEA. We must, as an essential final step, determine whether Reeves presented sufficient evidence that his age motivated

the Supreme Court granted certiorari, the case promised to resolve the ambiguous role of pretext in the poof of discrimination. Some perhaps expected or hoped that the Court would discard the three-step formula altogether.[33]

The *Reeves* opinion does resolve the basic controversy generated by *Hicks*:

> [T]he Court of Appeals misconceived the evidentiary burden borne by plaintiffs who attempt to prove intentional discrimination through indirect evidence. This much is evident from our decision in *St. Mary's Honor Center*.... In [*Hicks*] we reasoned that it is permissible for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer's explanation.[34]

Fairly read, the opinion holds that pretext alone *might* support a verdict of discrimination for a Title VII plaintiff.[35] The decision emphatically does not question the propriety of the three-step formula. Quite the contrary, the opinion

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Sanderson's employment decision.

Sanderson Plumbing Prods. v. Reeves, 197 F.3d. 688, 693 (5th Cir. 1999). *See Reeves*, 530 U.S. at 138-40, 120 S. Ct. at 2104.

33. *See* Denny Chin & Jodi Golinsky, *Moving Beyond* McDonnell Douglas: *A Simplified Method for Assessing Evidence in Discrimination Cases*, 64 Brook. L. Rev. 659 (1998) (three step formula should be abandoned because it is not used or useful); Stephen W. Smith, *Title VII's National Anthem: Is there a Prima Facie Case for the Prima Facie Case?*, 12 Lab. Law. 371, 395-98 (1997) (formula should be replaced with "restatement-like" construct); Deborah C. Malamud, *The Last Minuet: Disparate Treatment After* Hicks, 93 Mich. L. Rev. 2229 (1995) (defending *Hicks* and arguing for abandonment of three step formula). *See also*, George Rutherglen, *Reconsidering Burdens of Proof: Ideology, Evidence, and Intent in Individual Claims of Employment Discrimination*, 1 Va. J. Soc. Pol'y & L. 43 (1993) (arguing three-step formula prejudices plaintiffs); Hannah Arterian Furnish, *Formalistic Solutions to Complex Problems: The Supreme Court's Analysis of Individual Disparate Treatment Cases Under Title VII*, 6 Indus. Rel. L.J. 353, 372 (1984) (three step formula "excessively formalistic"); Kenneth R. Davis, *The Stumbling Three-Step, Burden Shifting Approach in Employment Discrimination Cases*, 61 Brook. L. Rev. 703-04 (1995) (formula is an "inapt mold" for assessing facts).

34. *Reeves*, 530 U.S. at 146-47, 120 S. Ct. at 2108. The Court explained that, in *Hicks*:

> [w]e held that the factfinder's rejection of the employer's legitimate, nondiscriminatory reason for its action does not compel judgment for the plaintiff. The ultimate question is whether the employer intentionally discriminated, and proof that "the employer's proffered reason is unpersuasive, or even obviously contrived, does not necessarily establish that the plaintiff's proffered reason ... is correct." In other words, "it is not enough ... to disbelieve the employer; the factfinder must believe the plaintiff's explanation of intentional discrimination."
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> Specifically, we stated: "The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will permit the trier of fact to infer the ultimate fact of intentional discrimination." Proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive. In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose.

Id. at 146-47 (quoting *Hicks*, 509 U.S. 502, 113 S. Ct. 2472 (1993)).

35. *Id.* at 146-48, 120 S. Ct. at 2108-09.

strongly reaffirms the three-step formula, suggesting that the Court believes that approach adequate to structuring circumstantial proofs of discrimination.

Still, the *Reeves* opinion leaves some questions open. The facts in *Reeves* involve strong statements of bias by a supervisor against the plaintiff because of his age.[36] Although these statements were not sufficiently closely connected to the ultimate decisionmaker to make *Reeves* a direct poof case, they served as strong evidence of age-bias and prejudice. In this sense the case was easy; *Reeves*, consequently, raises some doubt about whether the Court's ruling that pretext-alone might support a verdict of discrimination can be extended to cases that lack such statements. Also, *Reeves,* like the *Hicks* decision, has language that can be taken as supporting a pretext-plus requirement.[37] Together these observations suggest that there might be support in *Reeves* for a limited requirement of pretext-plus, at least in weak cases.

The anticipation that *Reeves* would resolve the pretext question and the let-down caused by the factually specific and hedged opinion that emerged, has created a great basis for a symposium. The meaning of *Reeves* is not so evident that participants would be forced to debate only its propriety. Rather, the long-term value of the opinion is an open question which each of the participants addressed from a different perspective.

Professor Zimmer discussed the case itself and speculated on whether the decision would have any effect on lower courts. While he believes it will eventually

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36. *See* decision below, Sanderson Plumbing Prods. v. Reeves, 197 F.3d 688, 691 (5th Cir. 1999) ("Reeves based his claim on two age-related statements allegedly made by Chesnut several months before Reeves'ss dismissal, namely (1) that Reeves was so old that he 'must have come over on the Mayflower,' and (2) that he was 'too damn old to do the job.'").

37. An extensive passage from the *Reeves* opinion illustrates this:

> This is not to say that such a showing by the plaintiff will always be adequate to sustain a jury's finding of liability. Certainly there will be instances where, although the plaintiff has established a prima facie case and set forth sufficient evidence to reject the defendant's explanation, no rational factfinder could conclude that the action was discriminatory. For instance, an employer would be entitled to judgment as a matter of law if the record conclusively revealed some other, nondiscriminatory reason for the employer's decision, or if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred. To hold otherwise would be effectively to insulate an entire category of employment discrimination cases from review under Rule 50, and we have reiterated that trial courts should not "treat discrimination differently from other ultimate questions of fact."
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> Whether judgment as a matter of law is appropriate in any particular case will depend on a number of factors. Those include the strength of the plaintiff's prima facie case, the probative value of the proof that the employer's explanation is false, and any other evidence that supports the employer's case and that properly may be considered on a motion for judgment as a matter of law. For purposes of this case, we need not—and could not—resolve all of the circumstances in which such factors would entitle an employer to judgment as a matter of law. It suffices to say that, because a prima facie case and sufficient evidence to reject the employer's explanation may permit a finding of liability, the Court of Appeals erred in proceeding from the premise that a plaintiff must always introduce additional, independent evidence of discrimination.

Reeves, 530 U.S. at 148-49, 120 S. Ct. at 2109.

change lower court practice, his preliminary review of lower court reaction is markedly mixed.

Professor Michael Selmi examined the underlying assumption of both *Hicks* and lower court opinions applying the pretext-plus approach: the assumption that employment discrimination plaintiffs win discrimination cases at a high rate and that it is quite easy to prevail in such cases. Drawing on the database of federal litigation at Cornell University, Professor Selmi argued that, contrary to this impression, employment discrimination litigants are especially unsuccessful in their litigation. (They are surpassed in futility only slightly by pro se prisoner litigants.) Speculating on the reasons for this poor success rate, Professor Selmi offers a basis for determining whether courts will continue to view these cases as needing to be restricted and thereby ignore the lesson of *Reeves*.

Professor Lanctot argued that *Reeves* still fails to address the basic problem in disparate treatment proof. Though she supports the *McDonnell Douglas* proof structure, she regards the proof as inadequate because it is not a "rule" of law. In addition to this, the poof is riddled with loopholes which have and will continue to allow lower courts to require ever-higher proof thresholds of plaintiffs. Offering a revised version of *McDonnell Douglas*, she contends that a rule of law can be established that would give clarity to these cases.

Professors White and Kreiger addressed the unspoken assumption of enterprise liability in disparate treatment cases. Through this approach they are able to support the notion that the Court's incessant references to the need for the plaintiff to prove "intent" really refer to a test of "causation." So understood, intent is a gateway to understanding that the Court's disparate treatment jurisprudence employs the "because of" requirement of Title VII to resolve difficult questions of institutional liability for decisions of certain individuals in an enterprise. Using *Reeves* to set up this study proves quite illuminating as the case concerns a potentially vexing relationship between biased official and ultimate decision maker. On another level, the authors pose questions about how discrimination is conceptualized and how responses thereto should be framed.