The Title VII Pretext Question: Resolved in Light of *St. Mary's Honor Center v. Hicks*

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> The trend has emerged slowly, drawing scant attention in the past two years, but there is little doubt today that the nation's highest court has virtually abandoned the idea of giving minorities preferential treatment to help end racial inequality.[1]
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> The Supreme Court has overturned established civil rights law to make it more difficult, if not downright impossible, for employees to win bias suits. When the dominant conservatives last flexed their muscles in this way, Congress passed the Civil Rights Act of 1991 to set things right again. It must do the same now.[2]

INTRODUCTION

Headlines and language similar to the captions above filled newspapers throughout the country shortly following the Supreme Court's decision in *St. Mary's Honor Center v. Hicks*[3] on June 25, 1993. Scholars and critics have repeatedly assailed the Supreme Court recent years for limiting the protection afforded to certain classes under Title VII of the Civil Rights Act of 1964.[4] For instance, the Court has been specifically accused of misapplying procedural rules to employment discrimination cases, thereby threatening substantive anti-discrimination law.[5] In response to several recent Supreme Court rulings, Congress passed the Civil Rights Act of 1991 in order to restore abrogated civil rights.[6]

Individual civil rights have been affected substantially by Supreme Court activity. This Note analyzes court-created evidentiary burdens of proof in

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1. Dick Lehr, *High Court Backs Off Race-Based Preferences*, BOSTON GLOBE, July 11, 1993, at 1.

2. *Overburdened; The Supreme Court Has Made It Too Difficult to Prove Bias. The Congress Must Act*, NEWSDAY, July 1, 1993, at 54.

3. 113 S. Ct. 2742 (1993).

4. 42 U.S.C. § 2000e (1988 & Supp. V 1993). Section 703(a)(1) of Title VII of the Civil Rights Act of 1964 provides in relevant part: "It shall be an unlawful employment practice for an employer . . . to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . ." § 2000e-2(a)(1) (1988).

5. *See, e.g.*, Robert Belton, *The Unfinished Agenda of the Civil Rights Act of 1991*, 45 RUTGERS L. REV. 921 (1993); Ann C. McGinley, *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 B.C. L. REV. 203 (1993).

6. The purpose of the Civil Rights Act of 1991 was 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, [and] to clarify provisions regarding disparate impact actions . . . ." Pub. L. No. 102-166, 105 Stat. 1071, 1071 (1991).

individual disparate treatment cases,[7] where a plaintiff is required to prove that the defendant intentionally discriminated against her on an impermissible basis.[8] Part I provides an overview of the approach to proving disparate treatment through indirect evidence. Part II examines the divisive "pretext" question and its effect on proving intentional discrimination. Part III analyzes the majority and dissenting opinions in *St. Mary's*. Part IV evaluates the Court's rule regarding evidentiary burdens from a legal perspective and discusses the policy considerations encompassing the *St. Mary's* decision. Part V concludes that the Court's analysis provided the most reasonable method for thinking about evidentiary burdens in employment discrimination law.

I. PROOF OF INTENTIONAL DISCRIMINATION

In a Title VII disparate treatment case, a plaintiff attempts to prove that an adverse employment decision was based upon an impermissible motive. Employment discrimination cases proceeding under a disparate treatment theory require the plaintiff to prove that the employer intentionally discriminated on a prohibited basis, such as race, sex, or religion. Hence, the employer's state of mind becomes the key element in a Title VII disparate treatment case.

An impermissible motive may be proven in two ways. First, direct evidence of discriminatory intent may be offered by the plaintiff. This type of evidence is often termed "smoking gun" statements or admissions.[9] However, as employers become increasingly sophisticated about the law, such evidence is generally unavailable to the plaintiff. Employers are careful about what they say or document when taking adverse employment action and will seldom display prejudice blatantly.[10]

As an alternative to requiring direct evidence, the Supreme Court has designed a framework through which a plaintiff is able to present indirect evidence of discriminatory intent. In *McDonnell Douglas Corp. v. Green*,[11] a unanimous Supreme Court set forth a model by which a Title VII plaintiff may prove disparate treatment. *McDonnell Douglas* presented the order and

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7. The Supreme Court has distinguished two general types of Title VII cases: disparate treatment and disparate impact. Disparate treatment is the more easily understood type of discrimination: The employer simply treats some people less favorably than others because of their class. Disparate impact cases involve employment practices that are facially neutral in their treatment of different classes but nonetheless fall more harshly on one group than another and cannot be justified by business necessity. International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977).

8. Proof of discriminatory motive is critieal in alleging disparate treatment, whereas such proof is not required under disparate impact. *Id.*

9. An example of "smoking gun" evidence would be where an employer said to an employee: "I will never promote you because you are black." A presumption of illegal motive flows from this evidence; no further inference regarding illegal animus must be drawn. *See, e.g.*, Slack v. Havens, 522 F.2d 1091 (9th Cir. 1975).

10. *See, e.g.*, Thornbrough v. Columbus & G.R.R., 760 F.2d 633, 638 (5th Cir. 1985) (explaining that employers rarely include a notation in a personnel file stating that the employee was fired for a discriminatory reason).

11. 411 U.S. 792 (1973).

allocation of proof in a private, non-class action suit challenging employment discrimination and provided an organized way of looking at evidence. The Supreme Court refined the *McDonnell Douglas* framework in another unanimous decision, *Texas Department of Community Affairs v. Burdine*.[12] This *McDonnell-Burdine* model[13] allows the trier of fact[14] to infer intentional discrimination without any direct proof of discriminatory animus.[15] Since direct evidence of a discriminatory motive is hard to acquire,[16] this framework was designed principally to ease a plaintiff's evidentiary burden in employment discrimination cases.

A. The McDonnell-Burdine *Model*

McDonnell-Burdine sets forth a tripartite formula for allocating proof in disparate treatment cases under Title VII. In the first stage, the plaintiff must establish a prima facie case. This requires a showing of four elements: (1) that the plaintiff was within the protected class;[17] (2) that the plaintiff met applicable job qualifications; (3) that despite these qualifications, the plaintiff suffered adverse employment action; and (4) that the position remained open and the employer continued to seek applications from persons with similar qualifications.[18] Although *McDonnell Douglas* was a hiring case, this framework applies to discharge cases or any other type of adverse employment treatment.[19]

These prima facie elements are relatively easy to establish, particularly in discharge cases. For instance, a plaintiff could prove his prima facie case by showing that: he is black; he had been employed by the defendant and therefore was qualified for the position; he suffered adverse employment action; and the position remained open, and he was ultimately replaced by a non-minority employee. Proof of the prima facie factors gives rise to a

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12. 450 U.S. 248 (1981).

13. For purposes of clarity, the following framework will be referred to as the *McDonnell-Burdine* model. *See infra* part I.A.

14. Pursuant to the Civil Rights Act of 1991, either party may elect to have a jury to sit as the trier of fact. 42 U.S.C. § 1981a.(c) (Supp. V 1993). Before the 1991 Act, a jury was not available in Title VII cases.

15. A plaintiff is never required to present direct evidenee of intentional discrimination to prove a disparate treatment theory under Title VII. United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 714 n.3 (1983). *See also* International Bhd. of Teamsters v. United States, 431 U.S. 324, 358 n.44 (1977) (noting that the *McDonnell Douglas* formula does not require direct proof of discrimination).

The *McDonnell-Burdine* model has been adapted for use in resolving discrimination claims under other federal statutes. *See, e.g.*, Thornburgh v. Columbus & G.R.R., 760 F.2d 633, 638 n.4 (5th Cir. 1985) (applying the *McDonnell-Burdine* analysis to a claim brought under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621-634 (1988)).

16. *See supra* note 10 and accompanying text.

17. *See supra* note 4.

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

19. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 n.6 (1981) (noting that the facts required to establish a prima facie case will necessarily vary in Title VII cases). *See, e.g., infra* text accompanying notes 50-53 (applying the *McDonnell-Burdine* test to a discharge case).

rebuttable presumption of discrimination that entitles the plaintiff to prevail if the defendant remains silent.[20]

The presumption raised by the prima facie case is important for two reasons. First, it provides a plaintiff with the opportunity to uncover the facts.[21] Since most plaintiffs will not have access to evidence of motive or intent, if any exists, the prima facie case provides time within which to assess the soundness of a discrimination claim. Second, the prima facie case eliminates the most common, legitimate reasons for taking adverse employment action against an employee.[22]

Stage two offers the defendant an opportunity to rebut the presumption established by the prima facie case. At this second stage, the employer bears a burden of production[23]—in order to rebut the mandatory presumption, the employer must articulate "a legitimate, nondiscriminatory reason" for its action.[24] The defendant can easily meet this burden because it need not prove by a preponderance of the evidence that its proffered reason was the real reason for its action.[25] Rather, "the employer need only produce admissible evidence which would allow the trier of fact rationally to conclude that the employment decision had not been motivated by discriminatory animus."[26] The employer's burden at this stage does not change the fact that the ultimate burden of proving intentional discrimination remains at all times with the plaintiff.[27] Procedurally, however, the burdeu then reverts to the plaintiff for the final stage of the analysis. Because a plaintiff can easily establish a prima facie case and a defendant can easily articulate a legitimate, nondiscriminatory

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20. In *Burdine*, the Supreme Court stated:

> Establishment of the prima facie case in effect creates a presumption that the employer unlawfully discriminated against the employee. If the trier of fact believes the plaintiff's evidence, and if the employer is silent in the face of the presumption, the court must enter judgment for the plaintiff because no issue of fact remains in the case.

Burdine, 450 U.S. at 254.

21. *See* Green v. USX Corp., 843 F.2d 1511, 1527 (3d Cir. 1988) ("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.").

22. International Bhd. of Teamsters v. United States, 431 U.S. 324, 358 n.44 (1977). For example, the prima facie case eliminates employer defenses, such as that the employee was unqualified or there was no job opening.

23. The principal difference between a burden of persuasion and a burden of production is that the plaintiff, who is the party carrying the burden of persuasion, must convince the trier of fact by a preponderance of the evidence that her case of intentional employment discrimination is more likely than not true. A burden of production, on the other hand, which is carried by the defendant after the plaintiff proves the prima facie case, merely requires the presentation of evidence that, if true, would support a finding contrary to the prima facie presumption. *See* EDWARD W. CLEARLY, MCCORMICK ON EVIDENCE § 336, at 568-69 (4th ed. 1992).

24. *Burdine*, 450 U.S. at 254-55.

25. Significant criticism surrounds this "easy" burden, especially since an untrue reason or a false justification often suffices to rebut the presumption of discrimination established by the prima facie case. *See infra* notes 88-90 and accompanying text.

26. *Burdine*, 450 U.S. at 257.

27. *Id.* at 253.

reason for its employment decision, most disparate treatment cases are resolved at stage three, the pretext level of inquiry.[28]

During stage three of the *McDonnell-Burdine* formula, the plaintiff must be afforded a fair opportunity to show that the defendant's stated reason for the plaintiff's treatment was in fact a "pretext."[29] Here, the plaintiff has "an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination."[30]

The pretext question, which is the principal subject of this Note, arises from the distinction between "pretext" and "pretext for discrimination." As this Note explains, these two expressions embrace very different connotations and have been the subject of recent Supreme Court interpretation. The pretext question concerns the case where a plaintiff can only introduce prima facie and rebuttal evidence and is unable to present evidence supporting the assertion that the employer's real reason for the action was based upon discriminatory animus. Specifically, the question becomes whether the plaintiff can prevail with only such evidence.

B. Procedural Battleground

In response to a plaintiff's complaint of discrimination, which sets forth the prima facie elements of the *McDonnell-Burdine* formula, the employer frequently files a motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure.[31] Accordingly, the *McDonnell-Burdine* model often aids a court in looking at evidence and determining motions for summary judgment.

Accompanying a motion for summary judgment, the defendant will need to introduce admissible evidence that it made the employment decision at issue based on a legitimate, nondiscriminatory reason. The employer then asserts that there are no genuine issues of material fact, and that it is entitled to judgment as a matter of law. To withstand this motion for summary judgment, a plaintiff must respond with evidence that rebuts the employer's proffered

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28. Unless defendants are unable to produce any evidence of a legitimate reason for their behavior, disparate treatment cases are won or lost on the pretext issue. *See* BARBARA L. SCHLEI & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 1316-17 (1983); Catherine J. Lanctot, *The Defendant Lies and the Plaintiff Loses: The Fallacy of the "Pretext-Plus" Rule in Employment Discrimination*, 43 HASTINGS L.J. 57, 67 (1991).

29. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-04 (1973). The meaning of "pretext" has been a key question for the courts. *See infra* notes 33-48 and accompanying text; *see also* Visser v. Packer Eng'g Assocs., 924 F.2d 655, 657 (7th Cir. 1991) ("A pretext, in employment law, is a reason that the employer offers for the action claimed to be discriminatory and that the court disbelieves, allowing an inference that the employer is trying to conceal a discriminatory reason for his action."); Mister v. Illinois C.G.R., 832 F.2d 1427, 1435 (7th Cir. 1987) ("Pretext is a statement that does not describe the actual reasons for the decision."), *cert. denied*, 485 U.S. 1035 (1988).

30. *Burdine*, 450 U.S. at 253.

31. Summary judgment may be granted if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c).

reason.[32] The pretext question arises at this point in the litigation. The next Part of this Note particularly analyzes the evidentiary burden carried by a plaintiff in the third stage of the *McDonnell-Burdine* analysis.

II. PRETEXT IN DISPARATE TREATMENT CASES

Two main theories of approaching evidentiary burdens in employment discrimination cases have emerged in the courts. These theories, the "pretext-only" and "pretext-plus" rules,[33] govern judicial discretion in determining the necessary proof of a Title VII violation.

A. The "Pretext-Only" Rule

Under the pretext-only rule, the factfinder infers discriminatory intent if the plaintiff proves that the defendant's proffered reason for the adverse employment decision was false. The plaintiff need not offer any other direct or indirect evidence of discriminatory animus; the plaintiff must prove only that the employer lied about its motivations. When a plaintiff proves by a preponderance of the evidence that the defendant's reason was false, a plaintiff is entitled to an entry of judgment as a matter of law.[34] The rationale behind the pretext-only rule is that, if there were truly a lawful motive for the employment decision, the defendant would have offered it.[35] Hence, a court may logically infer from the employer's "lie" that a discriminatory purpose was being concealed.[36]

The pretext-only rule is the pro-plaintiff approach. Commentators have concluded that the majority of the courts of appeals have adhered to this

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32. For an example of how a court might handle a motion for summary judgment in a Title VII case, see *infra* part V.A.

33. The descriptive terms "pretext-only" and "pretext-plus" have been used by several federal courts and legal scholars. *See, e.g.*, St. Mary's Honor Center v. Hicks, 113 S. Ct. 2742, 2762 (1993); Valdez v. Church's Fried Chicken, 683 F. Supp. 596, 631 (W.D. Tex. 1988); Lanctot, *supra* note 28.

34. Lanctot, *supra* note 28, at 68.

35. The Supreme Court has realized:

> [M]ore often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting. Thus, when all legitimate reasons . . . have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, who we generally assume acts only with *some* reason, based his decision on an impermissible consideration . . . .

Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978) (emphasis in original).

36. As a matter of policy, however, this inference may be unfair to many employers. Nondiscriminatory reasons may hide behind the defendant's pretextual reason. For instance, one judge intimated:

> An employer motivated by ill-will, nepotism, or unpublicized financial problems in his termination of an employee is just as likely to use a pretextual explanation for his action as is an employer motivated by statutorily-prohibited discrimination. Employers may even resort to pretext for benign reasons, such as a desire to spare the feelings of a loyal employee whose competence has declined.

Chipollini v. Spencer Gifts, Inc., 814 F.2d 893, 903 (3d Cir.) (en banc) (Hunter, J., dissenting), *cert. dismissed*, 483 U.S. 1052 (1987); *see also infra* notes 45-47 and accompanying text.

approach.[37] Since some courts have wavered in their answers to the pretext question, however, the strength of the pretext-only approach remains unclear.[38] Nevertheless, a clear split certainly exists between, and sometimes even within, some courts of appeals.[39]

B. The "Pretext-Plus" Rule

The pretext-plus rule essentially requires a plaintiff to make a dual showing at the third stage of the *McDonnell-Burdine* model. A plaintiff must prove not only that the defendant's proffered reason was false, but must also demonstrate that the real reason for the defendant's actions was discriminatory animus.[40] Thus, in addition to meeting the requirements of the pretext-only rule, the plaintiff may be required to produce some additional evidence, beyond that necessary to support the prima facie case, in order to show that the reason concealed by the defendant was in fact intentional discrimination.[41] However, pretext-plus courts do not always require a plaintiff to

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37. In particular, the Courts of Appeals for the Second, Third, Fifth, Sixth, Eighth, Eleventh, and the District of Columbia Circuits have advanced the pretext-only approach. *See, e.g.*, Lopez v. Metropolitan Life Ins. Co., 930 F.2d 157, 161 (2d Cir.) (allowing pretext for discrimination to be proved by showing only that the articulated reasons were not the true reasons for the defendant's actions), *cert. denied*, 112 S. Ct. 228 (1991); Caban-Wheeler v. Elsea, 904 F.2d 1549, 1554 (11th Cir. 1990) (holding that pretext for discrimination may be proved by persuading the court that the proffered reason for the employment decision is not worthy of belief); MacDissi v. Valmont Indus., 856 F.2d 1054, 1059 (8th Cir. 1988) ("As a matter of common sense and federal law, an employer's submission of a discredited explanation . . . is itself evidence which may persuade the finder of fact that such unlawful discrimination actually occurred.") (footnote omitted); Tye v. Board of Educ. of Polaris Joint Vocational Sch. Dist., 811 F.2d 315, 319-20 (6th Cir.) ("Thus, the plaintiff may indirectly prove intentional discrimination by showing that the defendants' justifications are untrue and therefore must be a pretext."), *cert. denied*, 484 U.S. 924 (1987); Thornbrough v. Columbus & G.R.R., 760 F.2d 633, 639-40 (5th Cir. 1985) (adopting a "resurrection" theory so that in the absence of any truthful or known reasons for the defendant's actions, it is presumed that the defendant was motivated by discriminatory reasons); King v. Palmer, 778 F.2d 878, 881 (D.C. Cir. 1985) ("Having determined that [the plaintiff] had discredited the defendant's explanation, the trial court was required to grant [summary] judgment in [the plaintiff's] favor."); Duffy v. Wheeling Pittsburgh Steel Corp., 738 F.2d 1393, 1395-96 (3d Cir.) ("[A] showing that a proffered justification is pretextual is itself equivalent to a finding that the employer intentionally discriminated."), *cert. denied*, 469 U.S. 1087 (1984). For an extensive study of how the courts of appeals have decided the pretext question, see Lanctot, *supra* note 28, at 71-91.

There is some fairly recent precedent, however, in the Sixth and Eleventh Circuits for the pretext-plus rule. *See infra* note 44.

38. For example, compare the Sixth and Eleventh Circuit Court decisions in note 37 with those in note 44. Moreover, several authorities have revealed very different interpretations of how the courts of appeals are divided on the pretext question. *See, e.g.*, St. Mary's Honor Center v. Hicks, 113 S. Ct. 2742 (1993); Petitioner's Brief, *St. Mary's* (No. 92-602); Respondent's Brief, *St. Mary's* (No. 92-602); Brief for the United States and the Equal Employment Opportunity Commission, *St. Mary's* (No. 92-602); Lanctot, *supra* note 28. It can be safely said, however, that the Courts of Appeals for the Third, Fifth, and District of Columbia Circuits are steadfastly of the pretext-only persuasion. The First, Fourth, and Seventh Circuits, on the other hand, are clearly pretext-plus adherents. *See infra* note 44.

39. *Compare supra* note 37 *with infra* note 44 (describing which circuits adhere to pretext-only and pretext-plus doctrines).

40. Lanctot, *supra* note 28, at 70.

41. Some pretext-plus courts have required proof in addition to the evidence supporting the prima facie case and the showing that the defendant's reason is false. *See, e.g.*, Bienkowski v. American Airlines, 851 F.2d 1503, 1508 (5th Cir. 1988) ("Even if the trier of fact chose to believe an employee's assessment of his performance rather than the employer's, that choice alone would not lead to a

produce additional evidence.[42] Depending on the facts and circumstances of the case, a trier of fact is permitted to draw an inference of intentional discrimination based solely upon the original prima facie case plus the evidence of pretext. These courts do not command that additional evidence be presented. The Seventh Circuit best articulated this principle in *Shager v. Upjohn Co.*:

> If the only reason an employer offers for firing an employee is a lie, the inference that the real reason was a forbidden one . . . may be rationally drawn. This is the common sense behind the rule of [*McDonnell-Burdine*]. It is important to understand however that the inference is not compelled. The trier of fact must decide after a trial whether to draw the inference. The lie may be concealing a reason that is shameful or stupid but not proscribed, in which event there is no liability.[43]

This pretext-plus approach has been adopted by several of the federal courts of appeals.[44]

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conclusion that the employer's version is a pretext for age discrimination. More is required, such as 'direct' evidence of age discrimination, information about the ages of other employees in plaintiff's position, the treatment and evaluation of other employees, or the employer's variation from standard evaluation practices."); Lanctot, *supra* note 28, at 91-100.

This additional burden is not as onerous as it may appear. The foundation of a prima facie case requires relatively little proof and generally can be established with ease. *See supra* notes 17-20 and accompanying text. Although the plaintiff will usually present her strongest case when the prima facie evidence is introduced, any evidence above and beyond that required to support the prima facie case is considered "additional evidence."

42. Most pretext-plus courts do not require additional evidence in order to prove intentional discrimination. *See, e.g.*, Villanueva v. Wellesley College, 930 F.2d 124, 128 (1st Cir.) ("There is no absolute rule that a discrimination plaintiff *must* adduce evidence in addition to that comprising the prima facie case and the rebuttal of defendant's justification in order to prevail either at the summary judgment stage or at trial."), *cert. denied*, 112 S. Ct. 181 (1991) (emphasis in original).

43. 913 F.2d 398, 401 (7th Cir. 1990) (citation omitted). *See also infra* notes 70-71. As will be argued, this is precisely why pretext-plus appears to be a misnomer, and the more appropriate term ought to be the "pretext-perhaps" rule. *See infra* part IV.

44. Specifically, the Courts of Appeals for the First, Fourth, Sixth, Seventh, Tenth, and Eleventh Circuits have demonstrated support of the pretext-plus theory. *See, e.g.*, Equal Employment Opportunity Comm'n v. Flasher Co., 986 F.2d 1312, 1321 (10th Cir. 1992); Galbraith v. Northern Telecom, Inc., 944 F.2d 275, 282-83 (6th Cir. 1991) (finding that to require no further inquiry and to award judgment to the plaintiff upon a showing of the falsity of the defendant's proffered reason misapprehends the nature of the *McDonnell Douglas* doctrine), *cert. denied*, 112 S. Ct. 1497 (1992); Samuels v. Raytheon Corp., 934 F.2d 388, 392 (1st Cir. 1991) ("'Depending on the facts and circumstances of each case, the original prima facie case plus the evidence of pretext may suffice to raise an inference of discrimination, or additional evidence may be required. There is no absolute rule that a discrimination plaintiff must adduce evidence in addition to that comprising the prima facie case and the rebuttal of defendant's justification in order to prevail either at the summary judgment stage or at trial.'" (quoting *Villanueva*, 930 F.2d at 128)); Holder v. City of Raleigh, 867 F.2d 823, 827 (4th Cir. 1989) ("[A] finding that the defendants' proffered reasons may have been themselves pretextual [does not] prove plaintiff's case of racial discrimination."); Benzies v. Illinois Dep't of Mental Health and Developmental Disabilities, 810 F.2d 146, 148 (7th Cir.) ("A demonstration that the employer has offered a spurious explanation is strong evidence of discriminatory intent, but it does not compel such an inference as a matter of law. The judge could conclude after hearing all the evidence that neither discriminatory intent nor the employer's explanation accounts for the decision."), *cert. denied*, 483 U.S. 1006 (1987); Clark v. Huntsville City Bd. of Educ., 717 F.2d 525, 529 (11th Cir. 1983) (holding that a plaintiff will recover only when a defendant's articulated reason is pretext for accomplishing a racially discriminatory purpose). For an extensive study of how the courts of appeals have decided the pretext question, see Lanctot, *supra* note 28, at 71-91.

At least some support for the pretext-only rule exists in the Sixth and Eleventh Circuits. *See supra* note 37.

The principal justification for the pretext-plus theory is that it would be unfair to defendants for the factfinder to assume that the motive concealed by a false reason is discriminatory.[45] Employers sometimes cloak nondiscriminatory motivation with pretextual reasons. Hence, the pretextual lie may be concealing a reason that is shameful, ignorant, or embarrassing to the affected employee.[46] For instance, a black employee may be discharged because of alleged financial hardship when the real reason was that she had simply become senile or incompetent. Thus, where race or some other impermissible factor does not influence the adverse employment decision, unlawful discrimination cannot exist. In such a case, the employer may be seeking to spare the employee or her family feelings of embarrassment. Moreover, permitting a plaintiff to prevail by undercutting an employer's credibility could result in wholesale judicial review of diseretionary business judgment.[47] This type of review could punish employers for merely making mistakes.[48] A mistake does not amount to discrimination unless the "error" is shown to be a deliberate cover-up for discrimination. Pretext-plus courts have emphasized that the goal of Title VII was to prohibit intentional discrimination, not poor business judgments or mistakes. They have urged that a genuine discrimination cause of action arises only when an employer intentionally discriminates on an impermissible basis.

III. THE SUPREME COURT'S RESPONSE TO THE PRETEXT QUESTION: *ST. MARY'S HONOR CENTER V. HICKS*

Notwithstanding the significant split in the courts of appeals on the pretext question, the Supreme Court, surprisingly, had not considered the conflict prior to *St. Mary's Honor Center v. Hicks*.[49] This Part explores the Supreme Court's first full consideration of the pretext issue.

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45. *See* Lanctot, *supra* note 28, at 68; *see also supra* note 36.

46. *Shager*, 913 F.2d at 401.

47. *Id.* As one court explained:

> The reasonableness of the employer's reasons may of course be probative of whether they are pretexts. The more idiosyncratic or questionable the employer's reason, the easier it will be to expose a pretext, if indeed it is one. The jury must understand that its focus is to be on the employer's motivation, however, and not on its business judgment.

Loeb v. Textron, Inc., 600 F.2d 1003, 1012 n.6 (1st Cir. 1979). Pretext-plus courts have emphasized:

> [I]t is not the function of a fact-finder to second-guess business decisions or to question a corporation's means to achieve a legitimate goal. . . . Evidence that an employer made a poor business judgment in discharging an employee generally is insufficient to establish a genuine issue of fact as to the credibility of the employer's reasons.

Dister v. Continental Group, 859 F.2d 1108, 1116 (2d Cir. 1988) (citations omitted).

48. *See* Lanctot, *supra* note 28, at 122-28.

49. 113 S. Ct. 2742 (1993). The Supreme Court has twice granted certiorari to consider the evidentiary standard in the pretext stage. Both cases were age discrimination cases brought under the ADEA, and in both instances, the cases were dismissed by the Court.

The Court first granted certiorari in Chipollini v. Spencer Gifts, Inc., 814 F.2d 893 (3d Cir.), *cert. dismissed*, 483 U.S. 1052 (1987). It ultimately dismissed the writ pursuant to agreement of the parties. The dismissal occurred before any briefing or oral argument. The Court did, however, have the opportunity to hear argument in Brieck v. Harbison-Walker Refactories, 624 F. Supp. 363 (W.D. Pa. 1985), *opinion amended upon denial of reconsideration*, 705 F. Supp. 269 (W.D. Pa. 1986), *aff'd in part and rev'd and remanded in part*, 47 Fair Empl. Prac. Cas. (BNA) 1527 (3d Cir. 1987), *cert. dismissed*, 488 U.S. 226 (1988). The Court did not proceed far in its investigation of the pretext issue because it

A. Background and Procedural History

St. Mary's Honor Center ("defendant"), a halfway honse, employed Melvin Hicks ("plaintiff"), a black correctional officer and later a shift commander. After being demoted and ultimately discharged, Hicks filed suit, alleging that these actions were taken because of his race in violation of § 703(a)(1) of Title VII of the Civil Rights Act of 1964.[50]

The District Court for the Eastern District of Missouri, acting as the trier of fact in a full bench trial, held for St. Mary's.[51] The court made several findings of law and fact. First, it found that Hicks had established a prima facie case of racial discrimination. Under the *McDonnell-Burdine* framework, Hicks proved that: (1) he was black and thus a member of a protected class; (2) he met the applicable job qualifications of a shift commander because at the time of his termination and up to the point of the alleged discrimination, he had served as shift commander for approximately four years, had maintained a satisfactory employment record, had been consistently rated as competent by his supervisors, and had not been disciplined for misconduct or a dereliction of duty; (3) he suffered adverse employment action when he was demoted from shift commander to correctional officer and ultimately terminated; and (4) after his demotion the shift commander position remained open and was filled by a white male.[52]

Second, the court found that St. Mary's had rebutted that presumption by introducing evidence of two legitimate, nondiscriminatory reasons for its actions. Specifically, St. Mary's asserted that Hicks was demoted and discharged because he committed an unacceptable number of severe violations. These violations included inadequate supervision of the employees on his shift which led to breaches of security.[53]

Third, the court believed that St. Mary's reasons were pretextual. Therefore, Hicks had shown that, although he had committed several violations of St. Mary's rules, he was treated more harshly than his co-workers who committed equally or more severe violations.[54] Hicks essentially proved that the defendant's reasons for his discharge were pretextual and false since, if he had truly been terminated because of the number and severity of his violations, other guards should have been dismissed before him. Nonetheless, adhering to what has been termed the pretext-plus rule, the court held that Hicks failed to carry his ultimate burden of proving that the adverse actions were racially motivated.

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50. Hicks also alleged that Steve Long, a superintendent at St. Mary's, violated the Civil Rights Act of 1871, 42 U.S.C. § 1983, by demoting him because of his race. The district court disposed of the § 1983 claim under the same analysis as the plaintiff's Title VII claim because the elements of the plaintiff's discrimination claim against Long were the same as those which he had to prove against St. Mary's under Title VII. Hicks v. St. Mary's Honor Center, 756 F. Supp. 1244, 1253 (E.D. Mo. 1991). For purposes of this Note, Hicks' § 1983 claim will not be discussed.

51. *Hicks*, 756 F. Supp. at 1252.

52. *Id.* at 1249-50.

53. *Id.* at 1250.

54. *Id.* at 1251.

The Court of Appeals for the Eighth Circuit reversed and remanded, holding that the district court erred in its analysis.[55] Specifically, the Eighth Circuit set aside the lower court's opinion on the ground that no additional evidence of racial motivation was needed. Once Hicks had proved that both of the defendant's proffered reasons for the adverse employment actions were pretextual, he was entitled to a judgment as a matter of law.[56]

B. Supreme Court Opinion

The Supreme Court granted certiorari to determine whether the trier of fact's rejection of the employer's asserted reasons for its actions mandated a finding for the plaintiff as a matter of law.[57] St. Mary's did not challenge the district court's finding that Hicks satisfied the minimal requirements for establishing a prima facie case at stage one of the *McDonnell-Burdine* formula. Similarly, Hicks did not challenge the district court's finding that St. Mary's sustained its stage two burden of production by articulating two legitimate, nondiscriminatory reasons for its actions.[58] Finally, a review of the parties' and amici briefs does not indicate that St. Mary's challenged the district court's finding and the court of appeals' affirmation that Hicks proved that the reasons proffered by St. Mary's were pretextual.[59] Hence, the key legal question under review was whether Hicks, having proved only pretext, was entitled to a judgment.

1. Majority

The Supreme Court[60] began its analysis by affirming the *McDonnell-Burdine* framework, noting that the "'[e]stablishment of the prima facie case in effect creates a presumption that the employer unlawfully discriminated against the employee.'"[61] The Court observed that this presumption "places upon the defendant the burden of producing an explanation to rebut the prima facie case—[that is], the burden of 'producing evidence' that the adverse employment actions were taken 'for a legitimate, nondiscriminatory

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55. Hicks v. St. Mary's Honor Center, 970 F.2d 487, 493 (8th Cir. 1991).

56. *Id.*

57. St. Mary's Honor Center v. Hicks, 113 S. Ct. 2742, 2746 (1993). Although the Supreme Court does not use the term "pretext-only" and only once mentions the term "pretext-plus," these expressions will be utilized as defined in Part II of this Note in order to better explain the Court's analysis. Ultimately, as I offer, the best term to define the Court's decision is the "pretext-perhaps" rule. This term better describes the ability to infer or not to infer intentional discrimination simply from a showing of prima facie evidence and pretext. *See infra* part IV.

58. *St. Mary's*, 113 S. Ct. at 1247.

59. Petitioners' Brief, *St. Mary's* (No. 92-602); Respondent's Brief, *St. Mary's* (No. 92-602); Brief for the United States and the Equal Employment Opportunity Commission, *St. Mary's* (No. 92-602).

60. Justice Scalia delivered the opinion of the Court, in which Chief Justice Rehnquist and Justices O'Connor, Kennedy, and Thomas joined. Justice Souter filed a dissenting opinion, in which Justices White, Blackmun, and Stevens joined.

61. *St. Mary's*, 113 S. Ct. at 2747 (alteration in original) (quoting Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981)).

reason.'"[62] Most importantly, the Court emphasized that, although the *McDonnell-Burdine* presumption shifts the burden of production to the defendant, "'[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.'"[63]

The Court had granted certiorari only to consider the pretext question. Hence, the Court's review centered upon stage three of the *McDonnell-Burdine* analysis. "'If the defendant carries this burden of production, the presumption raised by the prima facie case is rebutted.'"[64] The plaintiff then has a "'full and fair opportunity to demonstrate' . . . 'that the proffered reason was not the true reason for the employment decision' . . . ."[65]

The Court turned next to the factfinder's role. The ultimate question for the Court was whether Hicks had proven that St. Mary's intentionally discriminated against him because of his race.[66] "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."[67]

The Court emphasized twice that the plaintiff must show "*both* that the reason was false, *and* that discrimination was the real reason."[68] "It is not enough . . . to *dis*believe the employer; the factfinder must *believe* the plaintiff's explanation of intentional discrimination."[69] As the Court explained: "Thus, rejection of the defendant's proffered reasons, will *permit* the trier of fact to infer the ultimate fact of intentional discrimination . . . ."[70] However, the factfinder is not compelled by law to infer discrimination.[71]

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

63. *Id.* (alteration in original) (quoting *Burdine*, 450 U.S. at 255). This presumption operates like all presumptions described in Rule 301 of the Federal Rules of Evidence:

> In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.

FED. R. EVID. 301.

64. *St. Mary's*, 113 S. Ct. at 2747 (quoting *Burdine*, 450 U.S. at 255).

65. *Id.* (quoting *Burdine*, 450 U.S. at 256).

66. *Id.* at 2749.

67. *Id.* (emphasis added).

68. *Id.* at 2749 n.4, 2752 (emphasis in original).

69. *Id.* at 2754 (emphasis in original).

70. *Id.* at 2749 (emphasis in original) (footnote omitted). The Court confirmed that the court of appeals was correct when it noted that, upon rejection of the defendant's proffered reasons, "'[n]o additional proof of discrimination is *required*.'" *Id.* (alteration and emphasis in original) (quoting Hicks v. St. Mary's Honor Center, 970 F.2d 487, 493 (8th Cir. 1991). However, the court of appeals improperly held that such rejection compels judgment for the plaintiff. In doing so, the court of appeals disregarded the fundamental principle of Rule 301 that a presumption does not shift the burden of proof and ignored the Supreme Court's repeated admonition that the plaintiff bears the ultimate burden of persuasion at all times in Title VII cases. *Id.*

71. Judge Campbell of the Court of Appeals for the First Circuit has described the rationale behind the majority rule:

> Even assuming the original prima facie case plus the evidence of pretext suffices to raise a reasonable inference of discrimination, this does not automatically entitle the plaintiff to

Since the court of appeals had applied a pretext-only standard, requiring Hicks to prevail as a matter of law, the Supreme Court reversed the judgment and remanded the case.

2. Dissent

The dissent vehemently attacked both the majority's reasoning and result. Like the court of appeals, the dissenting justices adhered to a pretext-only analysis, arguing that the plaintiff should to prevail upon proving that the defendant's asserted reason is pretext.[72]

While the dissent affirmed the importance of the traditional *McDonnell-Burdine* paradigm, the split in the Court centered around the appropriate interpretation of the paradigm. The dissent disagreed with the majority over an important function of stage two—where the defendant has the burden of articulating a legitimate, nondiscriminatory reason for its actions. The dissent asserted that this burden also served the purpose of confining the scope of the factual issues to be resolved by the factfinder.[73] Essentially, the dissent argued that the defendant's proffered reasons bind the employer as well as the plaintiff, narrowing the factual inquiry to the question of pretext.[74] Believing that the only question remaining in the case was whether the employer's reason was false,[75] the dissent concluded that if "the plaintiff carries his burden of showing 'pretext,' the court 'must order a prompt and appropriate remedy.'"[76]

Support for the dissent's position was based on the theory that the plaintiff's burden—proving that the proffered reason was not the true reason for the employment decision—"'merges with the ultimate burden of persuading the court that [the plaintiff] has been the victim of intentional discrimination.'"[77] The plaintiff may succeed in proving this pretext "'*either* directly by persuading the court that a discriminatory reason more likely motivated the employer *or* indirectly by showing that the employer's proffered explanation is unworthy of credence.'"[78] This "either/or" distinction was a

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judgment. Provided a contrary inference (of nondiscrimination) might also reasonably be drawn from the evidence, such a showing only creates an issue of material fact for trial and, if discrimination is subsequently found, will support that finding.

Samuels v. Raytheon Corp., 934 F.2d 388, 392 (1st Cir. 1991).

72. *St. Mary's*, 113 S. Ct. at 2760-61 (Souter, J., dissenting).

73. *Id.* at 2759.

74. *Id.*

75. "[T]he plaintiff satisfies his burden simply by proving that the employer's explanation does not deserve credence." *Id.* at 2761. The majority, on the other hand, stated that further inquiry is wide open, not limited at all by the seope of the employer's proffered explanation. *St. Mary's*, 113 S. Ct. at 2751-53.

76. *St. Mary's* 113 S. Ct. at 2759 (Souter, J., dissenting) (quoting McDonnell Douglas Corp. v. Green, 411 U.S. 792, 807 (1973)).

77. *Id.* at 2760 (alteration in original) (quoting Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981)). The dissent bolstered its position by reasoning that this was the meaning behind *Burdine's* guidance that "'the factual inquiry proceeds to a new level of specificity.'" *Id.* at 2759 (quoting *Burdine*, 450 U.S. at 255).

78. *St. Mary's*, 113 S. Ct. at 2760 (Souter, J., dissenting) (emphasis added) (quoting *Burdine*, 450 U.S. at 256). *See also* United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 716 (1983) (quoting the same language from *Burdine*); *id.* at 717-18 (Blackmun, J. concurring) (quoting *Burdine*

pivotal point of dispute between the majority and the dissent. Admitting that the words say that the falsity of a defendant's explanation alone is enough to compel judgment for the plaintiff, the majority explained away the language by classifying it as pure dicta.[79] The contrast in *St. Mary's* language is subtle. To better understand the conflict, the specific language of *Burdine*, upon which both the majority and the dissent relied, must be considered.

Once the *Burdine* Court found that a defendant carried its burden of production in the second stage, "the factual inquiry proceeds to a new level of specificity" in the third stage.[80] The Court apparently meant that the defendant's legitimate, nondiscriminatory reason serves "to frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext."[81] The dissent in *St. Mary's* contended that the "new level of specificity" indicated that the only factual issue remaining in the case was whether the employer's reason was false.[82] The dissent's interpretation discounted the possibility that an employer may lie about its reason for the challenged employment action and still prevail if the plaintiff is unable to ultimately prove intentional discrimination.[83] The majority's view, on the other hand, was as follows:

> "[P]retext" means "pretext for discrimination," [so that] the sentence ["to frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext"] must be understood as addressing the form rather than the substance of the defendant's production burden: The requirement that the employer "clearly set forth" its reasons . . . gives the plaintiff a "full and fair" rebuttal opportunity.[84]

The majority's method of proving "'pretext for discrimination' changes *Burdine's* 'either . . . or' into a 'both . . . and': '[A] reason cannot be proved to be "a pretext for discrimination" unless it is shown *both* that reason was false, *and* that the discrimination was the real reason.'"[85] However, the factfinder may infer intentional discrimination from the prima facie evidence if the employer's reason is proven to be false and if the real reason is believed, based on a preponderance of the evidence, to be discriminatory.[86]

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and stating "the *McDonnell Douglas* framework requires that a plaintiff prevail when at the third stage of a Title VII trial he demonstrates that the legitimate, nondiscriminatory reason given by the employer is in fact not the true reason for the employment decision.").

79. *St. Mary's*, 113 S. Ct. at 2752-53.

80. *Burdine*, 450 U.S. at 255.

81. *Id.* at 255-56.

82. *St. Mary's*, 113 S. Ct. at 2759-61 (Souter, J., dissenting).

83. *See id.* at 2762-63.

84. *St. Mary's*, 113 S. Ct. at 2752 (citation omitted) (quoting *Burdine*, 450 U.S. at 255).

85. *Id.* at 2760 n.7 (Souter, J., dissenting) (emphasis added) (quoting Justice Scalia's majority opinion, 113 S. Ct. at 2752).

86. *St. Mary's*, 113 S. Ct. at 2752. As the Supreme Court explicitly stated, it is possible that "the factfinder's disbelief of the reasons put forward by the defendant . . . may, together with the elements of the prima facie case, suffice to show intentional discrimination." *Id.* at 2749; *see also supra* notes 67-71 and accompanying text.

IV. PRETEXT-PERHAPS ANALYSIS

This Note employs the descriptive term "pretext-perhaps" to illustrate the rule articulated in *St. Mary's* because it better reflects the ability of the trier of fact to infer intentional discrimination solely from the prima facie evidence and proof of pretext *or* to require additional proof of intentional discrimination. Pretext-plus, the rule that some commentators believe the Supreme Court adopted, incorrectly suggests that additional proof is necessary for the trier of fact to find a violation of Title VII. For purposes of this Note, pretext-perhaps will refer to the rule articulated in the *St. Mary's* decision.

Despite the dissent's emphatic criticisms, the pretext-perhaps rule is the technically correct, analytical tool for use in Title VII individual disparate treatment cases. This Part explains why the majority technically answered the pretext question correctly and then explores whether *St. Mary's* was the socially suitable answer to the pretext question.

A. Legal Analysis

Legally, the Supreme Court decided *St. Mary's* correctly. Rule 301 of the Federal Rules of Evidence clearly mandates that the burden of persuasion does not shift to the defendant when rebutting a presumption.[87] "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."[88]

The majority's approach for allowing a defendant to rebut the presumption raised by the prima facie case with a false reason complies with the Federal Rules of Evidence. Rule 301 reflects what scholars describe as the "bursting-bubble" theory of presumptions.[89] Under this theory, the truth of a defendant's evidence is irrelevant to whether its burden had been met in stage

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87. For the full text of Rule 301, see *supra* note 63. The Advisory Committee's note is also highly relevant:

> Presumptions governed by [Rule 301] are given the effect of placing upon the opposing party the burden of establishing the nonexistence of the presumed fact, once the party invoking the presumption establishes the basic facts giving rise to it. The same considerations of fairness, policy, and probability which dictate the allocation of the burden of the various elements of a case as between the prima facie case of a plaintiff and affirmative defenses also underlie the creation of presumptions. These considerations are not satisfied by giving a lesser effect to presumptions.

FED. R. EVID. 301 advisory committee's note.

88. *St. Mary's*, 113 S. Ct. at 2748 (emphasis in original). The only question for the trier of fact is whether an issue of fact remains to be determined. *Id.* Thus, a defendant does have the burden to "introduce evidence which, *taken as true*, would *permit* the conclusion that there was a nondiscriminatory reason for the adverse action." *Id.* (emphasis in original). Of course, the failure to present such evidence requires a verdict for the plaintiff. *Id.* at 2748 n.3.

89. *See* Hugh J. Beard, Jr., *Title VII and Rule 301: An Analysis of the* Watson *and* Antonio *Decisions*, 23 AKRON L. REV. 105, 116-26 (1989).

two. "It is immaterial that neither judge nor jury believes the testimony."[90] Under the "bursting-bubble" theory, courts merely apply a test of "sufficiency and not credibility." An employer can therefore successfully rebut a presumption by asserting a "lie" so long as it is "legitimate" and "nondiscriminatory."

Courts have advanced two other reasons for retaining the presumption of discrimination after the plaintiff has proved the falsity of the defendant's proffered reason: the "resurrection" theory and the "nonrebuttal" theory. Under the resurrection theory "the presumption of discrimination . . . disappears upon articulation of a legitimate, nondiscriminatory reason, [but is resurrected] if the plaintiff later proves that reason to be untrue."[91] Similarly, the nonrebuttal theory "treats a presumption rebutted by a lie as if it had never been rebutted at all."[92] Essentially, the resurrection and nonrebuttal theories move the inquiry back to stage two of the *McDonnell-Burdine* paradigm—the employer once again has the intermediate burden of articulating a legitimate, nondiscriminatory reason for the adverse employment decision. Several federal courts have adopted a presumption scheme having a resurrecting[93] or nonrebuttal[94] effect.

The resurrection and nonrebuttal theories follow a logical approach: why allow a defendant to satisfy its burden of production with an untrue reason for its conduct? The strongest argument advanced for these schemes has been that an employer that unsuccessfully offers a false reason is placed in a better legal position than an employer that remained silent and offered no reason at all for its conduct.[95] Procedurally, a defendant that does not articulate a

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90. 1 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE ¶ 300[01], at 300-03 (1990) (citing EDMUND W. MORGAN, BASIC PROBLEMS OF EVIDENCE 34-36 (1962)). The critical distinction at issue in the second stage of *McDonnell-Burdine* is whether the evidence is credible—that is, capable of being believed. This, of course, is a question for the court, not the jury. Evidence may be credible yet may be found by the trier of fact to be untruthful because the testimony was not ultimately believed. This description may be confusing because other scholars have described this distinction as a test of "sufficiency and not credibility." Miguel A. Méndez, *Presumptions of Discriminatory Motive in Title VII Disparate Treatment Cases*, 32 STAN. L. REV. 1129, 1145 n.91 (1980). Despite this terminology, the basis of the question for the court is the same—whether a defendant's evidence could reasonably allow a jury to find the non-existence of a presumed fact.

91. Lanctot, *supra* note 28, at 107.

92. *Id.* at 109.

93. *See, e.g.*, Thornbrough v. Columbus & G.R.R., 760 F.2d 633, 639-40 (5th Cir. 1985) ("By disproving the reasons offered by the employer to rebut the plaintiff's prima facie case, the plaintiff reercates the situation that obtained when the prima facie case was initially established: in the absence of any known reasons for the employer's decision, [the court will] presume that the employer was motivated by discriminatory reasons."); Valdez v. Chureh's Fried Chicken, Inc., 683 F. Supp. 596, 633 (W.D. Tex. 1988) ("[I]t is appropriate to resurrect the presumption of discrimination after plaintiff has shown pretext.").

94. *See* Lanctot, *supra* note 28, at 109-10 n.189. Dister v. Continental Group, Inc., 859 F.2d 1108 (2d Cir. 1988), advanced a nonrebuttal scheme. The court held that "when the employer's nondiscriminatory reason is shown to be unworthy of belief, and could not therefore have been the real cause, the employer has in substance failed to articulate a valid explanation for discharging an employee and, moreover, has placed its credibility into question." *Id.* at 1113.

95. The Court of Appeals for the Eighth Circuit argued:

> Because all of defendants' proffered reasons were discredited, defendants were in a position of having offered no legitimate reason for their actions. In other words, defendants were in no better position than if they had . . . unlawfully discriminated against plaintiff on the basis of his race.

legitimate, nondiscriminatory reason for its employment action will lose in light of the prima facie presumption of intentional discrimination; however, a defendant that articulates any legitimate, nondiscriminatory reason, whether or not truthful, satisfies its burden in *McDonnell-Burdine's* second stage. Hence, an employer that remains silent in the second stage, presumably because it does not have a legitimate, nondiscriminatory reason for its action, will be found liable for employment discrimination, but an employer that offers any reason for its action will keep the case alive and the ultimate burden of persuasion will fall on the plaintiff.

Although allowing a defendant to lie as a means of rebutting the presumption of discrimination sounds inappropriate,[96] other procedural rules also place a lying defendant in a better position than a truthful defendant who simply remains silent. For example, a defendant that fails to answer a complaint, rather than providing a deceitful response, will suffer a default judgment,[97] whereas a defendant who answers untruthfully may ultimately prevail at trial. Undoubtedly, the fact that deception serves defendants in other areas of the law offers little justification for allowing it to function this way in individual disparate treatment cases. Nevertheless, the Federal Rules of Evidence prohibit any model which would revive or save the plaintiff's presumption after the defendant has articulated any legitimate, nondiscriminatory reason. Any evidentiary construction contrary to the "bursting-bubble" theory would violate Rule 301 because a burden greater than that of producing evidence would be placed upon the defendant.[98] The Supreme Court reaffirmed the principle that, once the defendant has met its burden of production, any legal presumption of intentional discrimination has been rebutted.[99]

B. Policy Considerations

This Note has revealed scholarly and judicial discord with the pretext-perhaps rule, largely in its legal interpretation. This Part, however, examines *St. Mary's* from a policy perspective. First, the expected effects of the decision are considered and assessed. Second, as governmental branches other

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> A prima facie case under *McDonnell Douglas* raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors.

Hicks v. St. Mary's Honor Center, 970 F.2d 487, 492-93 (8th Cir. 1992) (citing Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978)). This argument essentially adopts either a pretext-only resurrection or nonrebuttal theory.

96. Legal strategy that places the defendant in a superior position at trial because of a lie may pose an ethical problem for the attorney. An attorney may not knowingly assist a fraudulent act by the client or offer false evidence into court. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3(a)(2), (4) (1994). Moreover, an attorney who manufactures or facilitates the lie may be susceptible to sanctions under Rule 11 of the Federal Rules of Civil Procedure.

97. FED. R. CIV. P. 55(a).

98. *See supra* notes 87-88 and accompanying text.

99. *St. Mary's*, 113 S. Ct. at 2747-48.

than the courts become involved with the issue of Title VII evidentiary burdens, considerations aside from legal intricacies are necessarily implicated.

1. Ramifications of the *St. Mary's* Decision

Overall, the practical impact of *St. Mary's* on employment discrimination jurisprudence will be limited. The Supreme Court's decision will only affect about one-half of the circuits. The other one-half of the circuits already adhere to the pretext-plus approach and will continue to answer the pretext question in accordance with the Court's approach.[100] Nonetheless, *St. Mary's* will affect the practice of Title VII law.

Arguably, the Supreme Court's decision undermines the effectiveness of the *McDonnell-Burdine* formula as a tool for deterring discrimination. In stage two, a defendant may rebut the presumption of intentional discrimination with virtually any reason.[101] The dissent was therefore quite correct in its concern that employers will proffer lies rather than remain silent and subject themselves to liability.[102] This means that the parties will pass through the *McDonnell-Burdine* stages with relative ease and reach the ultimate question of whether the plaintiff can prove by a preponderance of the evidence that the defendant discriminated against the plaintiff on an impermissible basis. Hence, the Court arguably voided the purpose of *McDonnell-Burdine* by making it a relatively ineffective tool for uncovering discrimination.

The only apparent remaining benefit behind the *McDonnell-Burdine* framework is that it allows a plaintiff alleging discrimination to withstand an employer's motion to dismiss, thereby giving the plaintiff an adequate opportunity to uncover discriminatory intent through discovery. Since the prima facie case may be established with relative ease, thus giving rise to a presumption of discrimination, an employer will not be able to win on a motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). Thus, the *McDonnell-Burdine* design will still afford plaintiffs a significant benefit not otherwise available in normal civil trials.

The *St. Mary's* dissent suggested two likely practical consequences of the Court's decision. First, pretrial discovery will become more extensive (assuming the plaintiff can afford it), and the parties will have to explore a wider set of facts in order to find additional evidence of discriminatory intent.[103] Second, this scheme will consequently result in longer trials, further contributing to the already great expense and delay of litigation.[104] Neither of these two results is probable, however, since attorneys will generally do their best to discover all evidence of discrimination. They will not simply stop their investigation as soon as they have accumulated enough evidence to prove the plaintiff's prima facie case and that the defendant's

100. *See supra* notes 37, 44 and accompanying text.
101. *See supra* notes 23-28 and accompanying text.
102. *St Mary's*, 113 S. Ct. at 2762-63 (Souter, J., dissenting).
103. *Id.*
104. *Id.*

proffered explanation is untrue. Even in a pretext-only jurisdiction, plaintiffs would not restrict their discovery efforts because they may not yet know what the employer will articulate as its legitimate, nondiscriminatory explanation. Hence, it is far too premature for plaintiffs to search exclusively for evidence of pretext. Based on this analysis, trials will not become longer but will remain about the same duration because a deeper search for additional evidence will not occur. Moreover, even if the dissent correctly predicted that pretrial discovery will become more extensive, the duration of litigation will not necessarily increase. Arguably, a more thorough discovery process will shorten or completely eliminate trials.

Another probable consequence of *St. Mary's*, though not argued by the dissent, is that the decision may reduce the number of Title VII cases filed.[105] By adopting a stricter standard for proving intentional discrimination, some pretext-plus courts have explicitly stated their motivation to reduce the number of Title VII employment discrimination claims.[106] Arguably, although a plaintiff may be able to show pretext for discrimination from just the prima facie and rebuttal evidence under the "pretext-perhaps" approach,[107] more circumstantial evidence may be required in order for the trier of fact to infer intentional discrimination. This heightened standard could deter both potential plaintiffs and attorneys from pursuing a Title VII claim because of the inevitable increase in the costs of gathering additional circumstantial evidence of a discriminatory motive. Those plaintiffs unable to obtain supplementary evidence may elect not to proceed with their discrimination claim because of a greater chance of losing. This, of course, risks undermining Title VII's purpose of eliminating impermissible discrimination. On the other hand, however, any more difficult standard of proof would have at least one advantageous result: A more arduous burden would serve the employer's interest of eliminating frivolous lawsuits. In addition, it would promote the societal interest of freeing up court dockets so that more meritorious claims can be heard.

2. Governmental Response

Several branches of the federal government have become involved with the pretext question. The Equal Employment Opportunity Commission ("EEOC") and the Department of Justice—the two agencies primarily responsible for the enforcement of Title VII—are considering the costs and benefits of a legislative reversal of the *St. Mary's* decision.[108] Moreover, two United

105. Professor Lanctot argues that some pretext-plus opinions have been motivated by a desire to reduce the number of employment discrimination cases tried in the federal courts. Lanctot, *supra* note 28, at 69.

106. *See, e.g.*, Palucki v. Sears, Roebuck & Co., 879 F.2d 1568, 1572 (7th Cir. 1989) ("The workload crisis of the Federal courts . . . [has] led the courts to take a critical look at efforts to withstand defendants' motions for summary judgment."); *see also* Lanctot, *supra* note 28, at 69-71.

107. *See* discussion *supra* part IV.A.

108. The EEOC has urged Congress to pass legislation to overturn the Supreme Court's ruling. *EEOC Urges Congress to Overturn U.S. Supreme Court's Hicks Decision*, 31 GOV'T EMPLOYEE REL. REP. (BNA) No. 1535, at 1331 (Oct. 11, 1993).

States Congressmen have submitted bills proposing to overturn the Court's ruling.

Senator Howard H. Metzenbaum (D-OH) introduced the "Civil Rights Standards Restoration Act" on November 28, 1993.[109] The Bill provides in relevant part:

> (a) STANDARDS.—In a case or proceeding brought under Federal law in which a complaining party meets its burden of proving a prima facie case of unlawful intentional discrimination and the respondent meets its burden of clearly and specifically articulating a legitimate, nondiscriminatory explanation for the conduct at issue through the introduction of admissible evidence, unlawful intentional discrimination shall be established where the complaining party persuades a trier of fact, by a preponderance of the evidence, that—
>
> (1) a discriminatory reason more likely motivated the respondent; or
>
> (2) the respondent's proffered explanation is unworthy of credence.[110]

The Civil Rights Restoration Act would codify a pretext-only scheme as the law in Title VII individual disparate treatment cases by allowing a plaintiff to win by proving that the employer's proffered justification was merely a pretext, rather than a pretext for discrimination. Essentially, the *St. Mary's* dissent's "either/or" interpretation would be adopted. Congress is certainly entitled to adopt this formula; Rule 301 of the Federal Rules of Evidence allows modifications concerning presumptions.[111]

Similarly, Representative David S. Mann (D-OH) submitted proposed legislation to Congress on July 28, 1993, seeking to reverse *St. Mary's*. The bill was labeled the "Employment Discrimination Evidentiary Amendment of 1993."[112] The Bill reads in pertinent part:

> (1) An unlawful employment practice based on disparate treatment is established if—
>
> (A) the complaining party proves by a preponderance of the evidence a prima facie case that the respondent engaged in such practice; and
>
> (B) either—
>
> (i) the respondent fails to produce any evidence to rebut such case; or
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> (ii)(I) the respondent articulates, and produces evidence of, one or more legitimate, nondiscriminatory reasons for the conduct alleged to be the unlawful employment practice; and

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The Department of Justice is also considering the pretext question. United States Attorney General Janet Reno has stated that the Department "has been working to analyze the majority opinion, evaluate its impact, and determine whether a legislative response is appropriate and feasible." *Id.* at 1332.

109. S. 1776, 103d Cong., 1st Sess. § 1 (1993). The Bill, which was referred to the Senate Labor and Human Resources Committee, died with only four Democratic cosponsors when the Senate adjourned on October 8, 1994.

110. S. 1776, § 4.

111. *See supra* note 63.

112. H.R. 2787, 103d Cong., 1st Sess. § 1 (1993). The Bill, which had 27 cosponsors, all of whom were Democrats, was referred to the Committee on Education and Labor. Like its Senate counterpart, the Bill died in committee.

> (II) the complaining party demonstrates that each of such reasons is not true, but a pretext for discrimination that is the unlawful employment praetiee.
>
> (2) Paragraph (1) shall not be construed to specify the only means by which an unlawful employment practice based on disparate treatment may be establishcd.[113]

Although Representative Mann sought to overturn the *St. Mary's* decision, his proposal would actually adopt the majority opinion. Under section (1)(B)(ii)(II), the Bill would allow a plaintiff to prove intentional discrimination by a showing that the defendant's proffered reasons for its employment action were "not true, but a pretext for discrimination that is the unlawful employment practice."[114] By requiring proof of "pretext for discrimination," a Title VII plaintiff must prove that the motivation for the employment action was impermissible—that the employer intentionally discriminated against the plaintiff.[115] In response to concerns that the legislation may have this effect, Representative Mann's office has drafted language which would clarify the proposed amendment.[116] However, no action was taken during the 1994 Session.[117]

Even though the Supreme Court reached the legally correct result in answering the pretext question, bills seeking to reverse the *St. Mary's* decision may offer the legislative branch, and perhaps the executive branch if the legislation passes, an opportunity to review the issue of pretext. The final Part of this Note considers the ultimate question of what *should* be the answer to the pretext issue: Is the pretext-perhaps rule, as articulated by the Supreme Court, the proper evidentiary burden for Title VII complainants, or should legislation be adopted which codifies the pretext-only position?

V. ANSWERING THE PRETEXT QUESTION

The pretext-perhaps rule is superior to other court-created formulas as a means of looking at evidence in individual disparate treatment cases. First, the pretext-perhaps rule strikes a fair balance between the burdens of proof carried by the plaintiff and the employer. Second, previous criticisms by pretext-only advocates are eliminated.

The pretext-perhaps design represents the fairest and most feasible solution to the pretext question. Rationally, a plaintiff should not win a claim for intentional discrimination without showing that the reason for the adverse employment action was, in fact, intentional discrimination. A Title VII plaintiff should have to do more than cast doubt on the employer's rationale.

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113. H.R. 2787, § 2.

114. *Id.*

115. *See supra* text accompanying text notes 68-69.

116. Telephone Interview with Valarie Greene, U. S. Representative Mann's Legislative Director (Jan. 21, 1994).

117. Telephone Interview with Valarie Greene, U. S. Representative Mann's Legislative Director (Sept. 15, 1994).

A court or jury should not unfairly assume that the motive concealed by an untrue reason is discriminatory.[118]

Unlike a few pretext-plus courts, most pretext-perhaps courts do not require additional evidence to prove intentional discrimination.[119] Under the pretext-perhaps rule, the trier of fact may infer pretext for discrimination by merely establishing a prima facie case and proving the falsity of the employer's proffered reason; the rule does not require "plus" evidence.[120] This standard refutes two arguments advanced by pretext-only critics: (1) that lack of additional evidence will result in summary judgment in favor of the defendant; and (2) that plaintiffs will be hard-pressed to generate additional evidence that will satisfy their burden. For purposes of thinking about these arguments, consider the following hypothetical:

> Greg is a black male bank teller. He has worked at Indiana Bank for just over two years and has received "good" performance ratings with two annual raises. Unexpectedly, Cindy, the bank manager, fires Greg for having a poor attitude about work. As a particular example of this poor attitude, Cindy claims that an important client complained to her about Greg's rude behavior toward him. Soon after, Cindy hires Mark, a white male, to replace Greg as a bank teller.
>
> Consequently, Greg brings a Title VII case, alleging raee discrimination against the bank. Indiana Bank responds by filing a motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, asserting that there is no genuine issue of material fact, and that the bank is entitled to judgment as a matter of law. In support of its motion, Indiana Bank presents Cindy's affidavit, which states that the bank had a legitimate, nondiscriminatory reason for firing Greg—poor work demeanor as evidenced by his rudeness to an important client. Greg then responds by filing two affidavits. Greg's own affidavit sets forth his race, his annual raises, and his "good" performance record at the bank. The other affidavit, from the client to whom Greg was allegedly rude, affirms that Greg was completely pleasant to him on the day in question and that the client never complained about Greg's behavior. Despite these two affidavits, however, Greg could not present any other evidence showing that the bank fired him because of his race or that the bank had a history of discriminatory treatment towards minorities.

The evidence in this hypothetical can be examined under the *McDonnell-Burdine* paradigm. First, Greg can establish his prima facie case by showing that: (1) he is black and thus a member of a protected class; (2) he is qualified for the bank teller position; (3) he suffered adverse employment treatment despite his qualifications; and (4) the position remained open and was ultimately filled by a white male. Second, Greg's showing would raise a presumption of discrimination, and the burden would then shift to Indiana Bank to articulate a legitimate, nondiscriminatory reason for the employment

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118. *See supra* notes 36, 45-48 and accompanying text.

119. *See supra* notes 41-43 and accompanying text. Generally, pretext-plus courts have adhered to the Supreme Court's pretext-perhaps rationale that discrimination may be inferred from the prima facie evidence and false reason evidence. *See, e.g., supra* note 71 and accompanying text.

120. In *St. Mary's*, the Supreme Court explicitly announced that additional evidence of discriminatory animus was not necessary. *St. Mary's*, 113 S. Ct. 2742, 2749 (1993).

decision. The bank's reason for the discharge would be that Greg had a poor attitude, as evidenced by the fact that he was rude to a client. Third, under *St. Mary's*, the burden would shift to Greg to prove that the bank's reason for the discharge was pretext, and that the real reason was discrimination.

A. Withstanding Summary Judgment

One advantage of the pretext-perhaps theory over a pretext-plus theory, which *requires* additional evidence,[121] is that the employer will not prevail on a motion for summary judgment. Arguably, under a pretext-plus analysis, a defendant's motion for summary judgment will be granted in cases where the plaintiff has shown only that the defendant's explanation may be refutable but the plaintiff has no additional evidence to prove that the false explanation conceals discriminatory animus. Under a pretext-perhaps analysis, summary judgment is not appropriate because a factual issue has been raised—whether the plaintiff's rebuttal proof coupled with prima facie evidence demonstrates pretext for discrimination. Appropriately, Title VII plaintiffs will have their day in court.

In the context of the above hypothetical, the immediate question is whether a judge should grant summary judgment in favor of Indiana Bank. Summary judgment should be denied if Greg has been able to raise an issue of fact as to the veracity of the bank's reason for his discharge.[122] Greg's good performance record at the bank and evidence of his pleasant behavior toward the important client cast doubt upon the reasons that Indiana Bank asserted for firing Greg. Thus, since Greg can certainly raise an issue of fact as to the truth of the defendant's reasons for his discharge, summary judgment in favor of Indiana Bank should be denied.

B. Gathering "Plus" Proof of Discrimination

Pretext-only courts have attacked the pretext-plus rule because of the asserted difficulty of obtaining "plus" evidence of discriminatory intent.[123] Indeed, under the pretext-perhaps rule, such additional evidence may be required to prove pretext for discrimination. However, it is hard to imagine a scenario where a jury would not infer intentional discrimination after being persuaded by a preponderance of the evidence that the defendant lied about her proffered reason.

The larger question presented in the hypothetical is whether Greg ought to win his lawsuit—should the trier of fact infer intentional discrimination from the facts presented. This question is more difficult and obviously requires considerably more detail, which is beyond the scope of this Note. Yet, based

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121. *See supra* notes 40-41 and accompanying text.

122. *See supra* note 31 and text accompanying notes 31-32.

123. Lanctot, *supra* note 28, at 71-81. *See, e.g.*, Chipollini v. Spencer Gifts, Inc., 814 F.2d 893, 899 (3d cir.) (en bane) (emphasizing that direct proof is often unavailable or difficult to find), *cert. dismissed*, 483 U.S. 1052 (1987).

on the facts given, it may realistically be concluded that a jury hearing a "wealthy" bank lie about its reason for firing Greg would infer that the bank's actions were racially motivated.

CONCLUSION

The Supreme Court of the United States has at least temporarily resolved the pretext question. A review of Title VII case law and the rules concerning presumptions demonstrate that the Court reached the legally correct answer. In order to prevail in individual disparate treatment cases, plaintiffs must show that discrimination was the reason for the adverse employment action. A showing of mere pretext will not suffice.

Recent governmental action indicates, however, that the pretext question may not yet be settled. The EEOC and the Department of Justice are currently reflecting on what the proper evidentiary burdens ought to be in Title VII individual disparate treatment cases. More importantly, two bills intended to overturn the *St. Mary's* decision were introduced into Congress during the past legislative session and will likely resurface in one form or another during the next term.

The pretext question is indeed polemic. The Supreme Court narrowly answered the issue in a narrow 5-4 decision, and the courts of appeals had been evenly divided in their determinations. Nevertheless, the Court's pretext-perhaps rule revealed the proper evidentiary burden in employment discrimination law. It presented the most balanced approach to deciding Title VII claims by not unfairly assuming that an employer's employment action was discriminatory while alleviating civil rights activists' concerns about needing "plus" proof of discrimination and the difficulty of surviving the summary judgment stage. Critics of the *St. Mary's* decision should think deeply about the balanced approach offered by the pretext-perhaps rule rather than hastily attacking the Court's stance on civil rights issues.