Proving The ADEA Claim: The Impact OF St. Mary's Honor Center v. Hicks

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I. Introduction

In 1993, in *St. Mary's Honor Center v. Hicks,*[1] the United States Supreme Court revisited its landmark 1973 decision, *McDonnell Douglas Corp. v. Green.*[2] *McDonnell Douglas* established a tripartite burden-shifting analysis for proving intentional discrimination by the employer, that is, for proving disparate treatment, in those cases where no direct evidence of liability is available.[3] *Hicks* sought to clarify elements of that analysis.

The purpose of this article is to consider the impact of the *Hicks* clarification on the plaintiff's ability to prove disparate treatment in employment discrimination cases, in general, and age discrimination cases, in particular. To meet this objective, the article first provides an introductory overview of the scope and remedies available under the Age Discrimination in Employment Act of 1967 (ADEA) as amended.[4] The article proceeds to sketch the general framework for establishing intentional age discrimination and reviews the *McDonnell Douglas* analytical approach.

The article then outlines the facts serving as the basis for the *Hicks* decision, considers the substance of the decision, presents the general criticism of the decision, and analyzes the general response to *Hicks* by the lower courts, as evidenced in key post -*Hicks* case interpretations. From the consideration of the *Hicks* rationale and the analysis of the post-*Hicks* judicial response, a conclusion is then drawn as to the impact of *Hicks* on the ability to prove disparate

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1.113 S.Ct. 2742 (1993)[hereinafter *Hicks],*

[2] 411 U.S. 792 (1973.([hereinafter *McDonnell Douglas*].

[3] *See generally infra* notes 34-50 sind accompanying text.

4.Codified at 29 U.S.C. §§ 621-634 (1988 & Supp. IV 1992).

treatment both in the sense of employment discrimination cases generally, and in view of the particular nature of age discrimination claims.

I. THE FEDERAL PROHIBITION OF AGE DISCRIMINATION

The ADEA is the prime federal law designed to meet the problem of workplace age discrimination. It "broadly prohibits arbitrary discrimination in the workplace based on age."[5] The law makes it an unlawful employment practice for an employer that employs at least twenty employees:[6]

> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's age;
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age, or
> (3) to reduce the wage rate of any employee in order to comply with ... [the Act].[7]

The ADEA's protection is limited to those who fit within the Act's protected class.[8] The protected class includes those individuals who

5.Lorillard v. Pons, 434 U.S. 575, 577 (1978).

6 29 U.S.C. § 630(b) (1988). *See* Zimmerman v. North American Signal Co., 704 F.2d 347 (7th Cir. 1983).

7 29 U.S.C. § 623(a) (1988). The statute also prohibits discrimination against an individual because the individual opposed the use of one or more of the unlawful practices, or has filed a charge, testified, or otherwise participated in the investigation or processing of an ADEA claim. 29 U.S.C. § 623(d) (1988).

8.See, e.g., Crane v. Schneider, 635 F.Supp. 1430, 1434 (E.D.N.Y. 1986) (the ADEA is "plainly inapplicable" to one outside the protected class). Of course, some incidental benefit may flow to individuals younger than forty, as a result of a claim brought under the ADEA by an individual within the protected class. For example, an employer, acting on a preference for a work force made up of twenty-year olds, would cause injury to workers in their thirties, as well as older workers of the employer within the protected class. A successful action by a worker forty or older could provide an incidental benefit to those workers in their thirties to the extent that it affects the employer's actions in hiring twenty-year olds. *See also* Hamilton v. Caterpillar, Inc., 966 F.2d 1126 (7th Cir. 1992) (ADEA offers no remedy for reverse age discrimination).

are at least forty years of age.[9] While there are a number of exemptions to coverage and employer affirmative defenses under the ADEA which could defeat employer liability,[10] the Act provides the successful plaintiff with a number of potential remedies.

Specifically, the ADEA's age discrimination prohibition is enforced through remedies found in section 7(b) of the Act.[11] The remedies provided for in the Fair Labor Standards Act (FLSA)[12] are incorporated in section 7(b) of the ADEA. Under the provisions of the section, sums owing to the successful plaintiff are "deemed to be unpaid minimum wages or unpaid overtime compensation" for purposes of sections 16 and 17 of the FLSA.[13] Section 7(b) also supplies the court with "jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes [of the ADEA], including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation."[14]

The general approach of the ADEA is to make the plaintiff "whole," that is, to return the plaintiff "as nearly as possible to the economic situation he would have enjoyed but for the defendant's illegal conduct."[16] Examples of particular remedies available to the successful plaintiff, in addition to the typical equitable remedies such as court orders compelling employment, plaintiffs reinstatement, or

9 29 U.S.C. § 631(a) (1988 & Supp. IV 1992). A 1986 Amendment removed an age seventy cap on the protected class. Age Discrimination in Employment Amendments of 1986, Pub.L. 99-592, § 2(c)(1), 100 Stat. 3342. Prior to the effective date of the Amendment, mandatory retirement at age seventy was *generally* permissible. There were a few exceptions, for example, federal government employees for whom the cap had been expressly removed in 1978. *See* 29 U.S.C. § 631(b) (1988). Today, mandatory retirement is generally impermissible. *But see* Colby v. Graniteville Co., 635 F. Supp. 381 (S.D.N.Y. 1986) (compulsory retirement for sixty-five year old "bona fide executives" or "high policymakers" may be proper, under circumstances described in 29 U.S.C. §631(c) (1988)).

10 An analysis of these exemptions and employer defenses is beyond the scope of this paper. For a summary of these exemptions *see* Joseph M. Pellicciotti, *Exemptions and Employer Defenses Under the ADEA,* 20 PUB. PERSONNEL MGMT. 233, 240-51 (1991).

11.See 29 U.S.C. § 626(b) (1988).

12 29 U.S.C. §§ 211(b), 216(bMd), 217 (1988). *See* Lorillard v. Pons, 434 U.S. 575, 579 (1978). However, the remedial provisions of the ADEA and the FLSA are not identical. *See* Trans World Airlines, Inc. v. Thurston, 469 U.S. Ill, 125 (1985) (reviewing key differences in the ADEA and FLSA remedial requirements).

13.29 U.S.C. § 626(b) (1988).

14.*Id. See generally* Moskowitz v. Trustees of Purdue University, 5 F.3d 279, 284 (7th Cir. 1993).

15Anderson v. Phillips Petroleum Co., 861 F.2d 631, 637 (10th Cir. 1988).

promotion, include back pay,[16] front pay,[17] liquidated damages,[18] pre-judgment interest,[19] and court costs and attorney fees.[20]

A. The Framework For Establishing Intentional Age Discrimination

To establish an ADEA claim, the plaintiff alleging disparate treatment "must prove, with reasonable probability, that but for the age of the plaintiff, the adverse employment decision would not have been

[16] An award of back pay includes an amount which the plaintiff would have earned "in salary increases, bonuses, and promotions if the company had operated under a neutral policy with regard to age." Taylor v. Home Insurance Co., 777 F.2d 849, 857 (4th Cir. 1985). Back pay may also include the value of lost pension benefits and other fringe benefits lost. *See* Loeb v. Textron, Inc., 600 F.2d 1003, 1021 (1st Cir. 1979). Of course, the back pay award is also subject to a reduction to the extent that the plaintiff has failed to use reasonable diligence to *mitigate* damages. *See, e.g.,* Fansand v. PepsiCola Metro. Bottling Co., 865 F.2d 1461, 1468 (5th Cir. 1989); Conway v. Hercules, Inc., 831 F.Supp. 354, 359 (D.Del. 1993).

[17] Front pay provides monetary compensation designed to place the plaintiff in the position he or she would have attained had the unlawful age discrimination not occurred. It "refers to future lost earnings." Hansard v. Pepsi-Cola Metro. Bottling Co., 865 F.2d 1461, 1469 (5th Cir. 1989). Front pay is usually available only when the plaintiff establishes that reinstatement is not feasible. *Id. See also* EEOC v. Prudential Fed. Sav. & Loan Ass'n, 763 F.2d 1166, 1171-73 (10th Cir. 1985), *cert, denied,* 474 U.S. 946 (1985) (reinstatement is preferred over front pay); Partington v. Broyhill Furniture Industries, Inc., 999 F.2d 269, 273 (7th Cir. 1993) (front pay in lieu of reinstatement is proper where reinstatement is neither sought by employee nor offered by employer).

[18] Liquidated damages are available to the successful plaintiff only "in cases of willful violations" of the Act. 29 U.S.C. § 626(b) (1988). *See* Tolan v. Levi Strauss & Co., 867 F.2d 467, 471 (8th Cir. 1989). When the requisite willfulness is established, the plaintiff is then entitled "to a doubling of any back pay award" as liquidated damages. Uffelman v. Lone Star Steel Co., 863 F.2d 404, 409 (5th Cir. 1989). The ADEA qualifies liquidated damages by reference to the FLSA, specifically as an amount equal to the losses sustained in lost wages and other benefits. 29 U.S.C. §§ 216(b) & 626(b) (1988).

[19] *See, e.g.,* Hansard v. Pepsi-Cola Metro. Bottling Co., 865 F.2d 1461 (5th Cir. 1989). Most courts awarding prejudgment interest refuse to award such interest in cases where liquidated damages are also available. *See* Lindsey v. American Cast Iron Pipe Co., 810 F.2d 1094, 1102 (Vance, C.J., concurring in part and dissenting in part). *See also* Powers v. Grinnell Corp., 915 F.2d 34 (1st Cir. 1990); Bums v. Texas City Refining, Inc., 890 F.2d 747 (5th Cir.), *reh'g denied,* 896 F.2d 549 (1989); Equal Employment Opportunity Comm'n v. O'Grady, 857 F.2d 383 (7th Cir. 1988).

20.The authority for an award of court costs and attorney fees is found in section 16(b) of the FLSA. 29 U.S.C. § 216(b) (1988). Section 16(b) requires the court to award "a reasonable attorney's fee to be paid by the defendant, and costs of the action." *Id.*

made."[21] The plaintiff "must persuade the factfinder that age was a determining factor in the defendant employer's decision,"[22] for example, to discharge the plaintiff. Age need not be the employer's *sole* or *exclusive* consideration; it need only have made a *difference* in the decision.[23]

The employer's motivation is central to the analysis in a disparate treatment case. The Supreme Court discussed the role of employer motivation in *Hazen Paper Company v. Biggins,*[u] an ADEA case.

> The employer may have relied upon a formal, facially discriminatory policy requiring adverse treatment of employees with that trait ... Or the employer may have been motivated by the protected trait on an ad hoc, informal basis ... Whatever the employer's decisionmaking process, a disparate treatment claim cannot succeed unless the employee's protected trait actually played a role in that process and had a determinative influence on the outcome.[26]

The plaintiff may prove disparate treatment with either direct or circumstantial evidence.[26] Direct evidence exists when the employer admits that age was a determining factor in its decision, or the employer engages in an activity or applies a policy "discriminatory on its face."[27] When direct evidence is available, "problems of proof are no different than in other civil cases."[28] However, "direct evidence of discriminatory intent is often unavailable."[29] As the Supreme Court has stated, "[t]here will seldom be 'eyewitness' testimony as to the employer's mental processes."[30]

21.Mitchell v. Data General Corp., 12 F.3d 1310,1314 (4th Cir. 1993).

22.White v. Westinghouse Elec. Co., 862 F.2d 56, 59 (3d Cir. 1988). *See also* Mitchell v. Data General Corp., 12 F.3d 1310, 1314 (4th Cir. 1993); Hansard v. Pepsi-Cola Metropolitan Bottling Co., 865 F.2d 1461, 1465 (5th Cir. 1989); Tolan v. Levi Strauss Co., 867 F.2d 467, 469 (8th Cir. 1989).

23.Duffy v. Wheeling Pittsburgh Steel Corp., 738 F.2d 1393,1395 (3d Cir. 1984).

24.113 S.Ct. 1701,1710 (1993).

25.Id. at 1706.

[26] *See, e.g.,* Gaworski v. ITT Commercial Finance Corp., 17 F.3d 1104, 1108 (8th Cir. 1994); Mitchell v. Data General Corp., 12 F.3d 1310, 1314 (4th Cir. 1993); White v. Westinghouse Elec. Co., 862 F.2d 56, 59 (3d Cir. 1988).

[27] *See* Trans World Airlines, Inc. v. Thurston, 469 U.S. Ill, 121 (1985).

[28] White v. Westinghouse Elec. Co., 862 F.2d 56, 59 (3d Cir. 1988).

[29] *Id.*

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

When direct evidence is unavailable, the plaintiff must prove his or her case with circumstantial evidence. As noted previously,[31] when the ADEA disparate treatment case is grounded upon circumstantial evidence, a court applies the Title VII[32] *McDonnell Douglas* framework, that is, "the analytical framework of shifting burdens developed in *McDonnell Douglas Corp. v. Green* ..., and its progeny."[33]

B. THE MCDONNELL DOUGLAS ANALYTICAL FRAMEWORK

"To assure that the 'plaintiff [has] his day in court despite the unavailability of direct evidence,' "[34] the Supreme Court developed in *McDonnell Douglas Corporation v. Green*[36] "a method of proof that relies on presumptions and shifting burdens of production."[36] In *Texas v. Department of Community Affairs v. Bur dine,[31]* the Supreme Court summarized its *McDonnell Douglas* standard.

> First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant 'to articulate some legitimate, nondiscriminatory reason for the employee's rejection.' ... Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination ...[38]

[31]See *supra* text accompanying note 3.

[32]42 U.S.C. §§ 2000e-2000e-17 (1988 & Supp. IV 1992).

[33]Gaworski v. ITT Commercial Finance Corp., 17 F.3d 1104, 1108 (8th Cir. 1994) (cita tion omitted). Even though *McDonnell Douglas* was a Title VII action, the framework developed in the case "also applies under the ADEA." *Id.* at 1108 n.3. *See also* Kirschner v. Office of the Comptroller of New York, 973 F.2d 88, 91 (2d Cir. 1992) (ADEA claims are analyzed under the structure established for Title VII claims.); Bienkowski v. American Airlines, Inc., 851 F.2d 1503, 1504 (1988) (adopting the *McDonnell Douglas* scheme for use in ADEA cases); Fink v. Western Electric Co., 708 F.2d 909 (4th Cir. 1983) (adopting the *McDonnell Douglas* scheme for use in ADEA cases).

34.Trans World Airlines, Inc. v. Thurston, 469 U.S. Ill, 121 (1985) (citing Loeb v. Textron, Inc., 600 F.2d 1003, 1014 (1st Cir. 1979)).

35.411 U.S. 792 (1973).

[36]White v. Westinghouse Elee. Co., 862 F.2d 56, 59 (3d Cir. 1988) (citing Dillon v. Coles, 746 F.2d 998, 1003 (3d Cir. 1984)).

[37]450 U.S. 248 (1981)[hereinafter *Burdine],*

[38]Id. at 252-53 (citations omitted).

The existence of a *prima facie* case depends upon the facts in the particular case.[39] The burden, however, is not onerous for the plaintiff to meet.[40] For example, in the typical employment discharge case, the plaintiff can establish his or her *prima facie* case by showing that the plaintiff was (1) a member of a protected group, (2) discharged, (3) replaced with a person outside the protected group, and (4) qualified to do the job.[41] In a reduction-in-force case, where the plaintiff was *not* replaced, "a plaintiff alleging a discriminatory layoff need show only that he is a member of the protected class, and that he was laid off from a job for which he was qualified while others not in the protected class were treated more favorably."[42] Also, in a failure-to- hire or failure-to-promote case, the District of Columbia Circuit Court of Appeals has indicated that a *prima facie* case is established when the plaintiff shows that (1) he or she belongs to the protected group, (2) he or she was qualified for the position in question, (3) he or she was not hired or promoted, and (4) a person not of the protected group was selected.[43]

While variations exist as to the standard language and requirements among the circuits, and while variations exist depending upon the type of case,[44] in general, the existence of a *prima facie* case " 'means only that the plaintiff has produced enough evidence to shift

39.See, *e.g.,* Stanfield v. Answering Service, Inc., 867 F.2d 1290, 1293 (11th Cir. 1989).

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

41.Id. See also Hayman v. National Academy of Sciences, 23 F.3d 535, 537 (D.C. Cir. 1994); Herold v. Hajoca Corp., 864 F.2d 317 (4th Cir. 1988). In *Herold* the court observed:

> [1] n a reduction-in-force case, ..., a plaintiff must show four things to make out a prima facie case under ADEA: (1) that he is in the protected age group, (2) that he was discharged, (3) that at the time of the discharge, he was performing his job at a level that met his employer's legitimate expectations, and (4) that persons outside the protected age class were retained in the same position or that there was some other evidence that the employer did not treat age neutrally in deciding to dismiss the plaintiff.

Id. at 319.

42.White v. Westinghouse Elec., Co., 862 F.2d 56, 61 (3d Cir. 1988) (citing Massarsky v. General Motors Corp., 706 F.2d 111, 118, *cert, denied,* 464 U.S. 937 (1983)).

43.Cuddy v. Carmen, 762 F.2d 119, 122 (D.C.Cir. 1985).

44.See *also, e.g.,* Crady v. Liberty Nat. Bank and Trust Co., 993 F.2d 132 (7th Cir. 1993) (materially adverse employment action); Wingfield v. United Technologies Corp., 678 F.Supp. 973 (D.Conn. 1988) (retirement plans); Ryman v. Office and Professional Employees Intern. Union Local No. 66, 628 F.Supp. 421 (E.D.Tex. 1985) (seniority systems).

the burden of production to the defendant.'"[45] The "establishment of the prima facie case in effect creates a presumption that the employer unlawfully discriminated against the employee."[46] As a result, the burden shifts to the defendant employer to dispel the adverse inference of, for example, age discrimination, by articulating some legitimate, nondiscriminatory reason for its action.[47]

The defendant meets its burden by raising "a genuine issue of fact as to whether it discriminated against the plaintiff."[48] In other words, the defendant "'must clearly set forth, through the introduction of admissible evidence,' reasons for its actions which, *if believed by the trier of fact,* would support a finding that unlawful discrimination was not the cause of the employment action."[49] For example, in a discharge case, the defendant might point to plaintiffs alleged substandard work performance. After the defendant articulates a legitimate, non-discriminatory reason, the plaintiff bears the ultimate burden of demonstrating, by a preponderance of the evidence, that the reason given by the employer is really just a pretext, and that intentional discrimination was the real reason for the employer's action.[50]

II. THE HICKS CASE: THE COURT REVISITS MCDONNELL DOUGLAS

A. FACTUAL BACKGROUND AND LOWER COURT ACTION

Melvin Hicks (Hicks), the African American male respondent in *St. Mary's Honor Center v. Hicks*[51] had been demoted and ultimately fired by the petitioner, St. Mary's Honor Center (St. Mary's). St.

45.Ridenour v. Lawson Co., 791 F.2d 52, 55 (6th Cir. 1986) (citing Halsell v. Kimberly-Clark Corp., 683 F.2d 285 (8th Cir. 1982), *cert, denied,* 459 U.S. 1205 (1983)). Some courts have held that a plaintiff may establish a prima facie case of age discrimination with statistics alone, that is, by using statistical analysis to show "the requisite inference of age discrimination under a disparate treatment analysis." Arnold v. U.S. Postal Service, 863 F.2d 994, 999 (D.C. Cir. 1988). *See also* Earley v. Champion Intern. Corp., 907 F.2d 1077 (11th Cir. 1990); Trumbull v. Health Care and Retirement Corp., 756 F.Supp. 532 (M.D.Fla. 1991), *affd,* 949 F.2d 1162 (1991).

46 *Burdine,* 450 U.S. at 254 (1981).

47 Duffy v. Wheeling Pittsburgh Steel Corp., 738 F.2d 1393, 1395 (3d Cir. 1984).

48.Stanfield v. Answering Service, Inc., 867 F.2d 1290, 1294 (11th Cir. 1989).

49 *Hicks,* 113 S.Ct. at 2747 (1993) (quoting *Bardine,* 450 U.S. at 254).

50 *See, e.g.,* Uffelman v. Lone Star Steel Co., 863 F.2d 404, 407 (5th Cir. 1989).

51 113 S.Ct. 2742(1993).

Mary's had demoted Hicks for alleged rules violations and had fired him for threatening his supervisor during an argument at work. Hicks brought an action in district court for violation of Title VII of the Civil Rights Act of 1964,[52] claiming racial discrimination.

At the bench trial, St. Mary's introduced the two reasons for its employment actions: "the severity [of Hicks' conduct] and the accumulation of [workplace rules] violations by plaintiff."[53] However, the district court found that the reasons given were not the true reasons for the demotion and discharge. The trial court came to this conclusion upon determining that (1) Hicks was the only employee to be disciplined for the rules violations, (2) even more serious violations in the workplace had been disregarded by the employer, and (3) the confrontation between Hicks and his supervisor had been manufactured to provoke Hicks.[54] Nevertheless, the court concluded that judgment could not be entered on Hicks' behalf as he had not carried his burden of establishing race as the determining factor in the employment actions.[55]

The Court of Appeals reversed the trial court.[56] The court determined that, upon the establishment of the employer's reasons for the employment actions as false, Hicks was entitled to judgment as a matter of law.[57] The Supreme Court thereupon granted certiorari.[58]

B. THE SUPREME COURT'S RATIONALE

The Supreme Court, with Justice Scalia writing for the majority,[59] focused upon the *McDonnell Douglas* framework. There had been no challenge made by St. Mary's to the trial court's finding that Hicks had established a *prima facie* case.[60] Therefore, the Court's inquiry proceeded to the second stage of the *McDonnell Douglas* analysis.

52 42 U.S.C. §§ 2000e-2000e-17 (1988 & Supp. IV 1992).

53.Hicks v. St. Mary's Honor Center, 756 F.Supp. 1244,1250 (W.D.Mo. 1991).

54.Id. at 1250-51.

55.d. at 1252. The district court's conclusion that the plaintiff had not carried his burden of proving that race was the determining factor in the employment actions was based on several facts, including that two African Americans had sat on Hicks' disciplinary review board; African American subordinates who had committed rule violations had not been disciplined by St. Mary's; and the number of African Americans employed by St. Mary's remained constant. *Id.*

56 Hicks v. St. Mary's Honor Center, 970 F.2d 487 (8th Cir. 1992).

57.*Id.* at 492.

58.Hicks v. St. Mary's Honor Center, 113 S.Ct. 954 (1993).

59 Justice Scalia was joined in the majority by Justices O'Connor, Kennedy, Thomas, and Chief Justice Rhenquist. *Hicks,* 113 S.Ct. at 2745.

60 *Id.* at 2746.

The existence of the *prima facie* case, the Court stated, raised "a 'presumption' that the employer 'unlawfully discriminated against the employee.'"[61] This presumption, the Court continued, "places upon the defendant the burden of producing an explanation to rebut the *prima facie* case—i.e., the burden of 'producing evidence' that the adverse employment actions were taken 'for a legitimate, nondiscrim- inatory reason.' "[62]

As noted previously,[63]to meet this burden the defendant "'must clearly set forth, through the introduction of admissible evidence,' reasons for its actions which, *if believed by the trier of fact,* would support a finding that unlawful discrimination was not the cause of the employment action."[64] However, the Court made it clear "that although the *McDonnell Douglas* 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.' "[65] This approach, the Court stated, simply operates "like all presumptions, as described in Rule 301 of the Federal Rules of Evidence ..."[66]

St. Mary's had introduced two legitimate, nondiscriminatory reasons for the employer's actions.[67] Upon doing this, the Court stated, "the shifted burden of production became irrelevant ..."[68] "The presumption, having fulfilled its role of forcing the defendant to come forward with some response, simply drops out of the picture,"[69] the Court concluded. Thereupon, the Court pointed out that the plaintiff "has 'the full and fair opportunity to demonstrate,' through presentation of his own case and through cross-examination of the defendant's witnesses, 'that the proffered reason was not the true reason for the employment decision,' and that race [in the case of Hicks] was."[70] The *ultimate question* for the trier of fact remains whether or not the plaintiff can establish that the defendant intentionally discriminated against him, and, as to Hicks, this meant intentionally discriminated against him because of his race.[71]

[61] *Id.* at 2747 (quoting *Bur dine,* 450 U.S. at 254).
[62] *Id.* (quoting *Burdine,* 450 U.S. at 254).
[63] *See supra* note 49 and accompanying text.
[64] *Hicks,* 113 S.Ct. at 2747 (quoting *Burdine,* 450 U.S. at 254).
[65] *Id.* (quoting *Burdine,* 450 U.S. at 253).
[66] Id.
[67] *See supra* text accompanying note 53.
[68] *Hicks,* 113 S.Ct. at 2747. The Court further added that "the *McDonnell Douglas* framework—with its presumptions and burdens—is no longer relevant when the employer rebuts the presumption of discrimination." *Id.* at 2749.
[69] *Id.*
[70] *Id.* at 2747 (quoting *Burdine,* 450 U.S. at 256).
[71] *Id.* at 2749.

The Court considered the approach which had been used by the Court of Appeals, stating that:

> [T]he 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 a prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will permit the trier of fact to infer the ultimate fact of intentional discrimination, and the Court of Appeals was correct when it noted that, upon such rejection, '[n]o additional proof of discrimination is *required,'* ... But the Court of Appeals' holding that rejection of the defendant's proffered reasons *compels* judgment for the plaintiff disregards the fundamental principle of Rule 301 [of the Federal Rules of Evidence] that a presumption does not shift the burden of proof, and ignores our repeated admonition that the ... plaintiff at all times bears the 'ultimate burden of persuasion.'[72].

III. THE RESPONSE TO HICKS

A. THE DISSENT BY JUSTICE SOUTER

The *Hicks* opinion produced a vehement dissent by Justice Souter,[73] who proclaimed that the majority had abandoned "two decades of stable law."[74] He predicted dire consequences resulting from the decision.

> ... [u]nder the majority's scheme, a victim of discrimination lacking direct evidence will now be saddled with the tremendous disadvantage of having to confront, not the defined task of proving the employer's stated reasons to be false, but the amorphous requirement of disproving all possible nondiscriminatory reasons that a factfinder might find lurking in the record.[75]

[72] *Id.* at 2749 (citations and footnote omitted).
[73] Justice Souter was joined in the dissent by Justices White, Blackmun, and Stevens. *Id.* at 2754.
[74] *Id.* at 2756 (Souter, J., dissenting).
[75] *Id.* at 2762.

Justice Souter also attacked the consistency of the majority opinion. He scoured the majority opinion for evidence of internal inconsistency.

> But other language in the Court's opinion supports a more extreme conclusion, that proof of the falsity of the employer's articulated reasons will not be sufficient to sustain judgment for the plaintiff. For example, the Court twice states that the plaintiff must show '*both* that the reason was false, *and* that discrimination was the real reason.' ... In addition, in summing up its reading of our earlier cases, the Court states '[i]t is not enough ... to disbelieve the employer.'[76]

B. Other Negative Reaction

The *Hicks* opinion also quickly produced other negative reaction. For example, one commentator framed the nature of the negative reaction well by lamenting:

> [T]his *(Hicks)* construction of the *McDonnell Douglas- Burdine* framework makes it possible for employers to defend successfully against a discrimination claim simply by lying, and it permits factfinders to conclude that the employer took the action at issue for reasons other than those specifically articulated at trial. Because direct evidence of discrimination, in the rare instances that it does exist, is difficult to obtain, the Court's decision will effectively deny remedy to many plaintiffs not fortunate enough to 'catch their bosses in the act.'[77]

Predicting "grave hardships"[78] for plaintiffs, the commentator urged Congress to act "to reverse the *Hicks* evisceration of the very principles"[79] of civil rights law. An attempt has been made in Congress to do as was suggested. Senator Howard Metzenbaum, Labor Subcommittee Chairman, and Representative Major Owens, House Education and Labor Select Education and Civil Rights

[76] *Id.*.
77. *The Supreme Court, 1992 Term-Leading Cases,* 107 HARV. L. REV. 322, 343 (1993).
78. *Id.* at 347.
[79] *Id.* at 351.

Subcommittee Chairman, introduced legislation on November 22, 1993 to overturn the *Hicks* decision.[80] The legislation is pending.

IV. THE IMPACT OF HICKS

A. THE PRETEXT ONLY AND PRETEXT PLUS DISTINCTION

Prior to *Hicks,* "confusion reigned among the circuit courts as to whether the plaintiff could prove employment discrimination simply by showing that the defendant's [articulated] reasons [for the employment action] were not credible."[81] Some circuits had followed the so-called *pretext only* approach which allowed for judgment as a matter of law if the plaintiff could show that the employer's articulated reason for the employment action was not believable.[82] Other circuits followed a *pretext plus* approach which had refused to mandate recovery on plaintiffs behalf merely for disproving the employer's articulated reason for the employment action. In these circuits, plaintiff was required to show additionally that the real reason for the employer's action was intentional discrimination.[83] Although Justice Souter had raised an alarm over the majority's departure from "settled precedent,"[84] it was an attempt to settle the conflict among the circuits which prompted the Court to take the case in the

80. S. 1776, 103d Cong., 1st Sess. (1993); H.R. 3680, 103d Cong., 1st Sess. (1993). *See generally* Daily Lab. Rep. (BNA) No. 235, dl9 (Dec. 9, 1993).
81. Bodenheimer v. PPG Industries, Inc., 5 F.3d 955, 957 (5th Cir. 1993).
82. See, *e.g.,* Hicks v. St. Mary's Honor Center, 970 F.2d 487, 492-93 (8th Cir. 1992); Tye v. Board of Ed. of Polaris Joint Vocational School Dist., 811 F.2d 315, 320 (6th Cir 1987), *rev'd,* 484 U.S. 924 (1987). For a detailed review of the pre-Hicks pretext only and pretext plus circuits, *see* Catherine J. Lactot, *The Defendant Lies and the Plaintiff Loses: The Fallacy of the 'Pretext-Plus' Rule in Employment Discrimination Cases,* 43 HASTINGS L.J. 57, 71-91 (1991).
[83] *See, e.g.,* Equal Employment Opportunity Commission v. Flasher Co., 986 F.2d 1312, 1321 (10th Cir. 1992); Samuels v. Raytheon Corp., 934 F.2d 388, 392 (1st Cir. 1991); Holder v. City of Raleigh, 867 F.2d 823, 827-28 (4th Cir. 1989). The Seventh Circuit flirted with a pretext plus approach in Aungst v. Westinghouse Elec. Corp., 937 F.2d 1216, 1220-21 (7th Cir. 1991). However, the court then disavowed the approach. Oxman v. WLS-TV, 12 F.3d 652, 657 (7th Cir. 1993). *See generally* Anderson v. Baxter Healthcare Corp., 13 F.3d 1120, 1123 (7th Cir. 1994) ("The 'pretext-plus' courts require more than a simple showing that the employers' [sic] proffered reasons are false. They require *both* a showing that the employer's reasons are false and direct evidence that the employer's real reasons were discriminatory.").

84. *Hicks,* 113 S.C. at 2756 (Souter, J., dissenting).

first place.[85] To use the language of the Fifth Circuit Court of Appeals, the Court in *Hicks* did "put the issue to bed."[86]

B. The Court's "Permissive Inference"

Hicks clearly rejects the pretext only approach. To do otherwise, the Court reasoned, would be to run afoul of the understanding of the nature of presumptions, as described in Rule 301 of the Federal Rules of Evidence.[87] In other words, under general evidence law, the plaintiff must retain the burden of proving disparate treatment; a presumption does not shift the burden of proof.[88] Additionally, to do otherwise, the Court stated, would ignore the Court's "repeated admonition that the ... plaintiff at all times bears the ultimate burden of persuasion"[89] in employment discrimination cases.

After *Hicks,* it is clear that the trier of fact is required to make a finding of intentional discrimination. The Court stated, "[E]ven though (as we say here) rejection of the defendant's proffered reasons is enough at law to *sustain* a finding of discrimination, *there must be a finding of discrimination."*[90] On the other hand, *Hicks* does not require the plaintiff, as Justice Souter feared, to disprove "all possible nondiscriminatory reasons that a factfinder might find lurking in the record."[91] Instead, a *permissive inference*[92] is created, that is, the

[85]*Id.* at 2750 (the "divergence" among the circuit courts is "precisely what prompted us to take this case.").

86.Bodenheimer v. PPG Industries, Inc., 5 F.3d 955, 957 (5th Cir. 1993).

[87]*Hicks,* 113 S.Ct. at 2747.

[88] "[A] presumption ... does not shift ... 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.

[89]*Hicks,* 113 S. Ct. at 2749.

90.Id. at 2749 n.4. *See also* Meeks v. Computer Associates Intl., 15 F.3d 1013, 1020 (11th Cir. 1994) ("As *Hicks* makes clear, the trier of fact *must* make a finding of intentional discrimination.").

[91] *Hicks,* 113 S.Ct. at 2762 (Souter, J., dissenting).

[92]The term permissive inference was used by James R. Neely, Jr., Equal Employment Opportunity Commission (EEOC) Deputy General Counsel in an Aug. 3, 1994 memorandum to all EEOC Regional Attorneys, drawing a comparison with the pretext only mandatory inference approach. James R. Neely, Jr., Deputy General Counsel of the EEOC, *Preliminary Guidance on the Implications of the Supreme Court's Decision in St. Mary's Honor Center v. Hicks* (Aug. 3, 1993), *in* 8 Fair Empl. Prac. Man. (BNA) at § 405:7151.

trier of fact *may* specifically draw an inference of intentional discrimination solely from the evidence of pretext.[93]

It is true, as Justice Souter states, that the majority decision in *Hicks* includes what some persons could reasonably view as language containing material, internal inconsistencies.[94] There is language in Parts III and IV of the majority decision that could support an approach requiring additional evidence of disparate treatment beyond the trier of facts' rejection of the employer's proffered reasons for the employment action.[95] However, the language which could be read to support this extreme approach is *dicta.* Parts III and IV of the decision were expressly written to support the Court's holding by responding to the specific criticisms of Justice Souter.[96] The majority decision is structured such that the *holding* of the Court is placed in Part II of the decision. The language from the majority decision and cited by Justice Souter in his dissent as evidence of an extreme approach on the part of the Court does not appear in Part II. On the contrary, the Court in Part II of the decision makes the clear statement that the trier of fact *may* specifically draw an inference of intentional discrimination solely from the evidence of pretext.[97]

Additionally, Justice Scalia was careful to explain in a note to the majority decision that the language in Parts III and IV which could support an extreme approach is, in fact, not inconsistent with the Court's holding and was designed to merely emphasize the need for a specific *finding* of intentional discrimination, a finding that could come about, of course, through the application of the permissive inference.

> Contrary to the dissent's confusion providing analysis, there is nothing whatsoever inconsistent between this statement [establishing the permissive inference approach] and our later statements that (1) the plaintiff must show *'both* that the reason was false, *and* that discrimination was the real reason,' ... and (2) 'it is not enough ... to disbelieve the employer,' ... Even though (as we say here) rejection of the defendant's proffered reasons is enough at law to *sustain* a

[93] *Hicks,* 113 S.Ct. at 2749 ("Thus, rejection of the defendant's proffered reasons will permit the trier of fact to infer the ultimate fact of intentional discrimination, and the Court of Appeals was correct when it noted that, upon such rejection, '[n]o additional proof of discrimination is *required*,'...").

[94]*See* text accompanying note 76.

[95]*Hicks,* 113 S.Ct. at 2762 (Souter, J., dissenting).

[96]*Id.* at 2751.

97.Id. at 2749.

finding of discrimination, *there must be a finding of discrimi-nation.***

The Seventh Circuit, in the age discrimination case *Anderson v. Baxter Healthcare Corporation*handled the issue well. The court stated that:

> [I]n rejecting application of this language [in Parts III and IV of *Hicks* supporting an approach requiring additional evidence of disparate treatment beyond the trier of facts' rejection of the employer's proffered reasons for the employment action], we are mindful of the Supreme Court's admonishment that it is 'generally undesirable, where holdings of the Court are not in issue to dissect the sentences of the United States Reports as though they were the United States Code.'[100]

C. THE POST-HICKS DECISIONS OF THE LOWER COURTS

Post-*Hicks* circuit courts have generally looked quite favorably upon a reading of *Hicks* which establishes the availability of the permissive inference to support a finding of intentional discrimination.[101] The Second Circuit Court of Appeals, in the age discrimination case *DeMarco v. Holy Cross High School,[102]* offers a succinct statement of the dominant post-*Hicks* lower court cogitation: "Proof that the employer has provided a false reason for its action permits the finder of fact to determine that the defendant's actions were motivated by an improper discriminatory intent, but does not compel such a finding." [103] The Equal Employment Opportunity Commission (EEOC) has also taken the same position as most circuit courts, stating that *Hicks* "does not, as a matter of law, require

[98]*Id.* at 2749 n.4.

99.13 F.3d 1120 (7th Cir. 1994).

[100]*Id.* at 1124 (quoting *Hicks,* 113 S.Ct. at 2751).

[101] See Gaworski v. ITT Commercial Finance Corp., 17 F.3d 1104 (8th Cir. 1994); Meeks v. Computer Associates Inti, 15 F.3d 1013 (11th Cir. 1994); United States v. McMillon, 14 F.3d 948 (4th Cir. 1994); Cone v. Longmont United Hosp. Ass'n, 14 F.3d 526, 530 (10th Cir. 1994); Anderson v. Baxter Healthcare Corp., 13 F.3d 1120 (7th Cir. 1994); Barhart v. Pickrel, Shaeffer & Ebeling Co., 12 F.3d 1382, 1390 (6th Cir. 1993); Washington v. Garrett, 10 F.3d 1421 (9th Cir. 1993); DeMarco v. Holy Cross High School, 4 F.3d 166 (2d Cir. 1993). *But see* Bodenheimer v. PPG Industries, Inc., 5 F.3d 955, 959 n.87 (5th Cir. 1993) ("... *St. Mary's* requires more of the plaintiff than simply negating the employer's defense.").

[102] 4 F.3d 166 (2d Cir. 1993).

[103]*Id.* at 170.

a plaintiff to produce additional evidence of intent to discriminate where the employer's explanation for its actions is found not to be credible ..."[1M]

An excellent example of the application of the permissive inference approach in the ADEA context is found in the Eighth Circuit's *Gaworski v. ITT Commercial Finance Corp.[106]* In *Gaworski,* the plaintiff, age fifty-five, had been terminated as part of the employer's reduction in force. The employee responded with the ADEA action. The evidence in *Gaworski* supported a finding that the plaintiffs position "was filled by a younger employee rather than eliminated after Gaworski [the plaintiff] was laid off."[106] The plaintiffs replacement was given the plaintiffs former office, "substantially all of Gaworski's former duties," and a similar job description and title.[107]

The employer in *Gaworski* had articulated a number of specific reasons for replacing the plaintiff. It complained that the plaintiff (1) "lacked a substantive understanding of credit analysis," even though evidence established that the plaintiff had served on a credit analysis review committee; (2) should have managed more, even though the person replacing the plaintiff had little or no supervisory experience; and (3) lacked sufficient computer skills, even though such skills were not mentioned in the new person's job description, and the employer had never considered teaching the plaintiff about the workings of computer systems.[108]

The court reiterated the basic principle in age discrimination law that " 'the ADEA is not intended to be used as a means of reviewing the propriety of a business decision.'"[109] However, the court pointed out that the "materially conflicting evidence in this case, raises a question of fact as to the *believability,* not the propriety, of ITT's [the employer's] purported reasons for discharging Gaworski."[110] The court found the evidence sufficient "to allow a reasonable jury to conclude that ITT's proffered non-discriminatory reasons were unworthy of credence."[111] The court stated that the ultimate question of disparate treatment must be left to the trier of fact, and that

104.See *EEOC Policy Guide of April 12, 1994, in* 8 Fair Empl. Prac. Man. (BNA) at § 405:7177.

[105]17 F.3d 1104 (8th Cir. 1994).

[106]Jd. at 1109.

107.Id.

108.Id. at 1109-10.

[109]*Id.* at 1110 (quoting Jorgenson v. Modem Woodmen of America, 761 F.2d 502, 505 (8th Cir. 1985)).

110.Id. at

111.*Id.*

in the instant case the trier of fact "could reasonably have accepted or rejected the defendant's proffered explanations." [112] The court stated, "*Hicks* established that additional *proof* of discrimination is not required."[113] The court found that the jury could infer that age discrimination had occurred.[114] The court concluded that "[T]he jury's finding that ITT intentionally discriminated against Gaworski on the basis of age was within its purview as the finder of fact."[116]

V. CONCLUSION

The highly agitated reaction to *Hicks* presented by Justice Souter in his dissent and by others[116] is largely misplaced. It is true that the decision has made it more difficult for plaintiffs to prevail *in some circuits.* Those circuits that had applied the pretext only approach can no longer do so. To that extent, *Hicks* can be fairly criticized for retarding plaintiffs ability to successfully litigate his or her rights, since, in the former pretext only circuits, judgment for the plaintiff will now no longer be automatic when the plaintiff shows that the employer's articulated reasons for the employment action are not credible.

On the other hand, the *Hicks* decision has created an improved situation for plaintiffs in the former pretext plus circuits, where, for example in summary judgment proceedings, "district courts were requiring [the plaintiff to present] evidence sufficient to create an issue of fact on the 'plus' part of the required showing."[117] As to summary judgments, the plaintiff should generally be able to successfully resist the employer's summary judgment motion

> ... by demonstrating a genuine issue of fact as to pretext. Since a finder of fact *may* find discrimination based solely on pretext, evidence sufficient to create an issue of fact on that issue is, necessarily, evidence sufficient to create an issue of

[112] *Id.*

113.Id.

114.Id.

115.Id.

116See *supra* notes 73-80 and accompanying

117. Neely, *supra* note 92, at § 405:7154.

> fact on the ultimate question of discrimination, and should be enough to get... [the plaintiff] to a jury.[118]

Additionally, "the scope of permissible discovery now appears to be much wider [after *Hicks];* much more information will be relevant to persuading the jury to draw the permitted inference, which would not have been relevant to the mere showing of pretext."[119] "At the least, *Hicks* increases the relevance 'of materials evidencing other employment actions by the employer, and, in many cases'—where the employer explicitly attempts to paint a broad, favorable picture of itself—they [the materials] may now be very important."[120]

In view of the general acceptance by post-*Hicks* circuit courts of the permissive inference reading, it is clear that juries *may* draw from a finding that the employer's proffered reasons are unworthy of credence the inference that the defendant's actions were motivated by an improper discriminatory intent. Therefore, it is inaccurate to state absolutely, as Justice Souter did in his dissent, that, after *Hicks,* the plaintiff "will now be saddled with the tremendous disadvantage of having to confront, not the defined task of proving the employer's stated reasons to be false, but the amorphous requirement of disproving all possible nondiscriminatory reasons that a factfinder might find lurking in the record."[121]

As a practical matter, plaintiffs "should present whatever additional evidence of discrimination that may exist since the trier of fact is not *required* to find for plaintiff just because plaintiff shows the prima facie case and that the proffered reasons are false."[122] There is always the chance that jurors will *sniff* from the record other possible

[118] *Id. See also* Cone v. Logmont United Hosp. Ass'n, 14 F.3d 526, 530 (10th Cir. 1994) ("To defeat a summary judgment motion, ... [plaintiff] would have to simply point to evidence establishing a reasonable inference that the employer's proffered explanation is unworthy of credence."); Griffith v. Mt. Carmel Medical Center, 842 F.Supp. 1358, 1359 (D.Kan. 1994) ("Plaintiffs evidence can be described as minimal at best. A jury could, nonetheless, based on this evidence, disbelieve Unisys's [sic] [the employer's] articulated reason for its employment decision and believe the plaintiffs allegations of intentional discrimination ... Unisys's motion for summary judgment must accordingly be denied."). *But see* LeBlanc v. Great American Ins. Co., 6 F.3d 836, 843 (1st Cir. 1993); Bodenheimer v. PPG Industries, Inc., 5 F.3d 955, 959 n.87 (5th Cir. 1993) ("... *St. Mary's* requires more of the plaintiff than simply negating the employer's defense.").

119.Neely, *supra* note 92, at § 405:7154.

120.Id.

121.*Hicks,* 113 S.Ct. at 2762 (Souter, J., dissenting).

122.Anderson v. Baxter Healthcare Corp., 13 F.3d 1120,1124 (7th Cir. 1994).

reasons for the employer's action, and jurors might *speculate* what was the true reason for an employer's actions.[123] However, inferring disparate treatment from the finding that the employer's proffered reasons are unworthy of credence is a reasonable conclusion for jurors to draw. They are likely to do so. As the Seventh Circuit Court of Appeals stated in *Benzies v. Illinois Department of Mental Health & Development,*[124] "(a) demonstration that the employer has offered a spurious explanation is strong evidence of discriminatory intent ..."[126]

It may generally be assumed that employers do not act arbitrarily, but, instead, act with some reason when they make an employment decision, for example, to hire, to terminate, or to promote. Therefore, when an employer in an employment discrimination case has the opportunity to articulate the reasons for an action, and the jury eliminates the articulated reasons as the true reasons for the employer's actions, the trier of fact will probably conclude that "it is more likely than not the employer, who we generally assume acts only with *some* reason, based his decision on an impermissible consideration" such as age.[126]

On balance, plaintiffs need not despair over *Hicks.* Obviously, plaintiffs would have been better served if the Court had adopted *pretext only* as the guiding principle in the application of *McDonnell Douglas.* Still, *Hicks* forges a relatively narrow position.[127] The position forged by the Court is designed to settle conflict among the various circuits, preserve the consistency of the rules of evidence, and, nevertheless, *allow* the trier of fact to infer that intentional discrimination had occurred. The result is middle-ground policy.

Hicks may offer particularly little solace to employers in age discrimination cases. ADEA cases have been called "the most dangerous type of discrimination case(s) to take to trial."[128] Evidence supports the view that juries "have been extremely sympathetic to older, long-term employees."[129] Additionally, it is clear from age discrimination cases such as *Gaworski v. ITT Commercial Finance*

[123] Neely, *supra* note 92, at § 405:7156.

124 810 F.2d 146 (7th Cir. 1987).

125.Id. at 148.

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

[127] *See* Bately v. Stone, 24 F.3d 1330, 1334 (11th Cir. 1994) *("Hicks* modified slightly ... [the] disparate treatment framework.").

[128] Kevin W. Betz & Courtney R. Tobin, *Age Discrimination Update, in* Civil Rights: Employment Discrimination And New Developments 72 (1994) (Indiana Continuing Legal Education Forum).

[129]*Id.* at 1-4 (discussing the nature and significance of extremely large jury verdicts in ADEA cases).

Corporation[130] that in ADEA cases judges appear to be willing to allow jurors to infer the required intentional discrimination.[131] As the court stated in *Gaworski:*

> [T]hus, if (1) the elements of a prima facie case are present, and (2) there exists sufficient evidence for a reasonable jury to reject the defendant's proffered reasons for its actions, then the evidence is sufficient to allow the jury to determine whether intentional discrimination has occurred, and we are without power to reverse the jury's finding.[132]

[130]17 F.3d 1104 (8th Cir. 1994).

[131] See *supra* notes 105-15 and accompanying text.

[132]17 F.3d at 1109 (8th Cir. 1994).