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SHIFTING THE BURDEN: GENUINE DISPUTES AND EMPLOYMENT DISCRIMINATION STANDARDS OF PROOF

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I. INTRODUCTION

"The purpose of Title VII 'is to promote hiring on the basis of job qualifications, rather than on the basis of race [, gender, national origin, religion,] or color.'"[1] Supreme Court Justice Anthony Kennedy penned this quote in *Ricci v. DeStefano*, a 2009 decision granting summary judgment in a reverse discrimination case against the city of New Haven, Connecticut.[2] New Haven had refused to hire white firefighters based on a qualification test because too few minority firefighters would be hired as a result.[3] The City feared the racial disparity of the test's results, so it disregarded the test and hired a more diverse group.[4] That good-intentioned decision brought race into the hiring process, ending in liability at the United States Supreme Court.

Ricci is one of many cases proving that America's relationship with civil rights legislation has come full circle. What began as a congressional attempt to battle workplace discrimination—an insidious and evasive foe—has become a specter for all thinking employers. Title VII initially targeted discrimination against minorities and the disadvantaged. Today that same law balances employment decisions when conscientious employers overreact, as New Haven did in *Ricci*.[5]

Our society's struggle to find the boundary between discrimination and merit-based hiring falls largely beyond the scope of this article. But that tension, and the tension between the judiciary and Congress on how to best accomplish Title VII's purposes, deserves analysis. The meaning of Title VII has spiraled since Congress passed the Civil Rights Act of 1964. Courts interpreted and re-interpreted the Act; Congress reacted in 1972, 1978, and 1991; and recent cases demonstrate the judiciary's increased skepticism and confusion about proving discrimination.[6]

The heart of this confusion surrounds the way discrimination plaintiffs prove their case. Although it does not apply at trial, an obscure three-part

* Please refer to original version with footnotes for accurate page numbers

standard created in 1973 decides the majority of Title VII complaints.[7] The *McDonnell Douglas* standard involves three shifting burdens designed to balance the inherent difficulties of proving employment discrimination.[8]

The circuits are divided on *McDonnell Douglas* and its applicability at summary judgment. This division is due, in part, to recent amendments to Title VII about mixed-motive discriminations. A mixed-motive case has proof that illegal discrimination, as well as other legitimate reasons, motivated an employment decision.[9] The Sixth Circuit recently abandoned *McDonnell Douglas* for all mixed-motive discrimination cases.[10] The Fifth Circuit has modified *McDonnell Douglas*, adding a mixed-motive exception to the usual shifting burdens.[11] Some circuits exempt direct evidence from the *McDonnell Douglas* standard.[12] The Eleventh Circuit holds fast to *McDonnell Douglas* without exception.[13] Many circuits, however, have not addressed the split,[14] with some specifically refusing to do so.[15]

The Eighth Circuit charted its own course, applying *McDonnell Douglas* regardless of any mixed-motive proof.[16] The Eighth Circuit mitigates this standard with a unique definition for direct evidence of discrimination. Direct evidence, which can be strong circumstantial evidence, need not satisfy *McDonnell Douglas* in this Circuit.[17] Since adopting that approach, the Eighth Circuit, en banc, issued a split decision in *Torgerson v. City of Rochester*, with the deciding vote concurring and inviting a revision to the rule.[18]

Torgerson, another firefighter discrimination case, is the defining Eighth Circuit precedent on *McDonnell Douglas*, direct evidence, and the proof necessary to survive summary judgment.[19] That case highlights the problems with the Eighth Circuit's approach and the difference between Federal Rule of Civil Procedure 56 and discrimination summary judgments.[20] The tension between these standards, and the larger struggle within the circuits about *McDonnell Douglas*, showcases the uncertain road to recovery for discrimination plaintiffs.

This article proceeds in four parts. The first part tracks the tense development of Title VII and the *McDonnell Douglas* standard. The second summarizes the circuit splits about *McDonnell Douglas* and its effect on discrimination proof. Next, the article details *Torgerson v. City of Rochester*. Finally, the fourth part synthesizes the above and argues for a closer analysis of discrimination summary judgments. The law is in disarray, with disputed discrimination facts resolved improperly at summary judgment.

II. THE CIVIL RIGHTS ACT OF 1964 AND THE *MCDONNELL DOUGLAS* STANDARD

Title VII of the Civil Rights Act of 1964 codified the long-running civil rights battle in the workplace, giving disadvantaged employees a remedy in federal court.[21]

> It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin[.][22]

Since the Act's passage, the number of employees seeking Title VII's protection has steadily increased to an annual high of almost 100,000 charges of discrimination filed with the Equal Employment Opportunity Commission (EEOC) in 2011.[23] Filing a charge with the EEOC is the first step under Title VII.[24] Of those charges filed, only 15,141 took the next step and filed suit in federal court.[25] If the 2011 statistics hold true, then no more than 2.4% of those employment lawsuits will make it to trial.[26] The ones that do and the many that do not will generate only 214 appeals nationwide.[27]

The statistics say much about Title VII and its modern necessity. Almost 100,000 Americans believed in 2011 that they were fired, not hired, or not promoted because of illegal discrimination.[28] A little more than 15%, however, took the next step after receiving a right to sue letter and filed suit. The ones that did file found little favor in the United States District Courts.[29]

A. Early Amendments and *McDonnell Douglas*

Congress and the courts have sparred over Title VII for decades, soon after the 1964 Act. Despite the sparring, the *McDonnell Douglas* standard evolved unaltered by congressional amendment. The judiciary tends to limit the reach of Title VII.[30] Congress reacts by overruling Supreme Court decisions and by expanding Title VII.[31] All the while the *McDonnell Douglas* standard persists.

The Civil Rights Act was first amended by the Equal Employment Opportunity Act of 1972.[32] Those amendments expanded Title VII's coverage to public employers and increased the EEOC's enforcement powers.[33] These first amendments were encouraged by Congress's specific concerns about gender discrimination.[34]

Soon after these amendments, a unanimous Supreme Court handed down the seminal *McDonnell Douglas Corporation v. Green* decision.[35] In 1973, Title VII was tried to the bench and the burden of proof was uncertain.[36] Under the second step, the Supreme Court clarified in *McDonnell Douglas* that the plaintiff bears the initial burden of proving his prima facie case.[37] "The burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection."[38] On remand, the *McDonnell Douglas* plaintiff "must, as the Court of Appeals recognized, be afforded a fair opportunity to show that petitioner's stated reason for respondent's rejection was in fact pretext."[39] Pretext was the final step. The trial judge would later apply these three shifting burdens sitting as the finder

of fact.[40] *McDonnell Douglas* immediately became the heart of discrimination trials.

The Supreme Court overstepped Title VII's boundaries a few years later. The divided decision of *General Electric Company v. Gilbert* spurned an amendment to Title VII.[41] *Gilbert* held that an employer's exclusion of pregnancy-related coverage in an employee health plan did not violate Title VII.[42] Specifically, the Court found no showing that "the exclusion of pregnancy benefits is a mere 'pretex[t] designed to effect an invidious discrimination against the members of one sex or the other.'"[43] Congress disagreed in the Pregnancy Discrimination Act, endorsing the dissenting Justices' opinions and overruling *Gilbert*.[44] After two rounds of amendments there was little doubt that Title VII proscribed discrimination against women. But *McDonnell Douglas* was unaltered.

B. *Burdine* Sharpens *McDonnell Douglas*

The Supreme Court reexamined *McDonnell Douglas*'s shifting burdens and their ultimate utility in *Texas Department of Community Affairs v. Burdine*.[45] The Court of Appeals for the Fifth Circuit had vacated an employer's verdict because the employer failed to prove the second burden: "the existence of legitimate nondiscriminatory reasons for the employment action."[46] The Supreme Court reversed, noting that "[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."[47]

According to *Burdine*, *McDonnell Douglas*'s shifting burdens never shifted the ultimate burden of proof from the plaintiff.[48] Instead, the shifting burdens ameliorated the proof problems inherent in every discrimination case.[49]

> Usually, assessing the burden of production helps the judge determine whether the litigants have created an issue of fact to be decided by the jury. In a Title VII case, the allocation of burdens and the creation of a presumption by the establishment of a prima facie case is intended progressively to sharpen the inquiry into the elusive factual question of intentional discrimination.[50]

The first burden, the prima facie case, "eliminates the most common nondiscriminatory reasons for the plaintiff's rejection."[51] If the fact-finder believes the prima facie case and the employer offers no legitimate nondiscriminatory explanation, then the plaintiff wins.[52]

Of course, the employer may rebut the prima facie case by presenting a legitimate nondiscriminatory reason at the second step. "[T]he defendant must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection."[53] The reason for this second burden is "to frame the factual issue with sufficient clarity so that the plaintiff will

have a full and fair opportunity to demonstrate pretext."[54] The Supreme Court made clear that the plaintiff could show pretext "by persuading the court that a discriminatory reason more likely motivated" the employer's decision or by showing that the employer's stated reason was false.[55] Pretext remained the essential inquiry.

The *Burdine* Court considered the proof problems facing discrimination plaintiffs and stood behind the burden-shifting framework.[56] The liberal discovery allowed by the Federal Rules and the plaintiff's access to the EEOC's investigation records afforded the employee sufficient information "to prove that a proffered explanation lacking a factual basis is a pretext."[57] *McDonnell Douglas*'s shifting burdens remained the standard for all Title VII bench trials.

C. *Price Waterhouse* and The Civil Rights Act of 1991

The next disagreement between the Supreme Court and Congress revolutionized Title VII. In the 1989 *Price Waterhouse v. Hopkins* decision, the accounting firm Price Waterhouse denied Hopkins partnership because of her gender and because she had an abrasive personality.[58] Evaluations chastising Hopkins for being "'macho'" and "'overcompensate[ing] for being a woman'" littered her employment file.[59] The official guidance to Hopkins about increasing her partnership prospects was to "'walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.'"[60] The district court and the court of appeals affirmed Price Waterhouse's liability, disagreeing only on the burden of proof for the employer's affirmative defense.[61]

Under the affirmative defense, an employer must prove that it would have made the same employment decision regardless of any discriminatory animus.[62] Although the court of appeals in *Price Waterhouse* applied a clear and convincing burden of proof, the Supreme Court reduced the burden of proof to a preponderance of the evidence standard.[63] The Court also reversed and remanded Price Waterhouse's liability.[64]

Within two years, Congress passed the Civil Rights Act of 1991 to abrogate *Price Waterhouse*.[65] The 1991 Amendment overhauled the method for proving discrimination and added a right to a jury trial.[66] Discrimination was now illegal if it "was a motivating factor for any employment practice, even though other factors also motivated the practice."[67] If illegal discrimination played any role in an employment decision, then the employer was liable under the new amendments.[68] The affirmative defense no longer absolved the employer of liability, but only limited the employee's remedies.[69] Liability expanded to include compensatory and punitive damages.[70] The facts about discrimination were now a matter for the jury.[71]

D. *Hicks* and *Reeves*

McDonnell Douglas survived the 1991 Amendments to some degree.[72] In 1993, the Supreme Court wrestled with *McDonnell Douglas* and its application to jury trials in *St. Mary's Honor Center v. Hicks.*[73]

> [T]he question facing triers of fact in discrimination cases is both sensitive and difficult. . . . There will seldom be 'eyewitness' testimony as to the employer's mental processes. But none of that means that trial courts or reviewing courts should treat discrimination differently from other ultimate questions of fact. Nor should they make their inquiry even more difficult by applying legal rules which were devised to govern "the basic allocation of burdens and order of presentation of proof," in deciding this ultimate question.[74]

The Supreme Court went on to reinstate the employer's verdict, holding that the plaintiff must do more than follow *McDonnell Douglas* and disprove the employer's explanation for its decision; the plaintiff must show that discrimination was a real motivation for the decision.[75]

In the 2000 *Reeves v. Sanderson Plumbing Products, Inc.* decision, the Supreme Court revisited *Hicks*, again holding that a plaintiff must do more than disprove an employer's legitimate nondiscriminatory reason to prevail.[76] Once the employer articulated its reason, "'the *McDonnell Douglas* framework—with its presumptions and burdens'—disappeared, and the sole remaining issue was 'discrimination *vel non*.'"[77] The *Reeves* plaintiff made its prima facie case and offered sufficient evidence to reject the employer's reason, so the court of appeals erred in granting the employer judgment as a matter of law on appeal.[78] The court of appeals had improperly failed to draw all factual inferences in the plaintiff's favor "substitut[ing] its judgment concerning the weight of the evidence for the jury's."[79]

E. *Desert Palace*

The 1991 Amendments added a new category of liability: decisions motivated in part by discrimination.[80] The courts have struggled with the type of proof required to prove mixed-motive discrimination. "Since the passage of the 1991 Act, the Courts of Appeals have divided over whether a plaintiff must prove by direct evidence that an impermissible consideration was a 'motivating factor' in an adverse employment action."[81] In addition to the standard of proof on mixed motive, the vitality of *Price Waterhouse* after the Civil Rights Act of 1991 was also unclear.

In 2003, the Supreme Court passed on the *Price Waterhouse* issue and clarified the mixed motive standard of proof in *Desert Palace, Inc. v. Costa*.[82] The Court held that circumstantial evidence of discrimination was enough to receive a mixed-motive jury instruction.[83] "Congress explicitly

defined the term 'demonstrates' in the 1991 Act . . . as to 'mee[t] the burdens of production and persuasion.'"[84]

Circumstantial evidence of discrimination is more than sufficient under Title VII after *Desert Palace*.[85]

> We have often acknowledged the utility of circumstantial evidence in discrimination cases. For instance, in *Reeves v. Sanderson Plumbing Products, Inc.*, we recognized that evidence that a defendant's explanation for an employment practice is "unworthy of credence" is "one form of *circumstantial evidence* that is probative of intentional discrimination."[86]

If an employee puts forward sufficient evidence—direct or circumstantial—that unlawful discrimination was a motivating factor in an employment decision, then the employee gets a mixed-motive jury instruction.[87]

This shift in the law was significant. Employers were now liable under Title VII if discrimination played a part in a decision. According to one study, juries instructed on mixed motive are statistically more likely to find discrimination under this new theory.[88] The plain language of the instruction shows why: "'If you find that the plaintiff's sex was a motivating factor in the defendant's treatment of the plaintiff, the plaintiff is entitled to your verdict, even if you find that the defendant's conduct was also motivated by a lawful reason.'"[89] The circuit courts later split over the affect of *Desert Palace* on *McDonnell Douglas* at summary judgment.[90] That split is discussed in more detail in Part II.

Since the Civil Rights Act of 1991, Congress has not reacted to Supreme Court interpretations of Title VII. The Act has been amended to include a new protected class.[91] Congress is considering other amendments,[92] including amending the Age Discrimination in Employment Act to counter a non-Title VII decision.[93] It appears, however, that the problems with Title VII at summary judgment will not be resolved by Congress.

III. THE CIRCUITS SPLIT: *REEVES*, *DESERT PALACE*, AND *MCDONNELL DOUGLAS*

In the wake of *Reeves* and *Desert Palace*, the circuits have split over the continued role of the *McDonnell Douglas* burden shifts. The once important tool for focusing discrimination proof was in doubt. When Congress passed the Civil Rights Act of 1991, it was no longer clear if the fact-finder, now a jury, should be instructed on *McDonnell Douglas*. It was also unclear if the *McDonnell Douglas* standard for summary judgments survived *Desert Palace*. The circuits remain divided on these questions.

A. *McDonnell Douglas* and the Jury

Before the *Reeves* decision, courts were already skeptical about instructing a jury on *McDonnell Douglas*.[94] The Eighth Circuit said it best in a non-Title VII case before the 1991 amendments:

> *McDonnell-Douglas* was not a jury case and its ritual is not well suited as a detailed instruction to the jury. "[T]o read its technical aspects to the jury . . . will add little to the juror's understanding of the case and, even worse, may lead jurors to abandon their own judgment and to seize upon poorly understood legalisms to decide the ultimate question of discrimination."[95]

Courts now universally accept that *McDonnell Douglas* is not a matter for the jury.[96] This is especially true in light of *Reeves*, which leaves no debate that the ultimate issue is discrimination, not shifting burdens.[97]

The circuits disagree, however, on whether juries should also be instructed on the last part of *McDonnell Douglas*, the pretext stage, as one method of proving discrimination. The Third Circuit mandates a pretext jury instruction because that is the final step at summary judgment.[98] "It is difficult to understand what end is served by reversing the grant of summary judgment for the employer on the ground that the jury is entitled to infer discrimination from pretext . . . if the jurors are never informed that they may do so."[99] The Fifth and Tenth Circuits have adopted this line of reasoning, reading the *Reeves* case to require a pretext jury instruction.[100]

The First, Seventh, Eighth, Ninth, and Eleventh Circuits disagree, requiring no pretext jury instruction.[101] Seventh Circuit Judge Easterbrook summarized this approach pre-*Reeves*:

> [A] judge need not deliver instructions describing all valid legal principles. Especially not when the principle in question describes a permissible, but not an obligatory, inference. Many an inference is permissible. Rather than describing each, the judge may and usually should leave the subject to the argument of counsel.[102]

Instead of instructing the jury on pretext, lawyers in these circuits argue the facts about pretext to the jury. As for *Reeves*, it "did not address in any way the necessity of a particular jury instruction," so these courts found it inapplicable.[103]

The shift from bench trials to jury trials created this confusion. Before the 1991 Amendments, *McDonnell Douglas* was the order of proof at trial.[104] Now it disappears, as *Hicks* and *Reeves* held, into the ultimate question of discrimination before the jury.[105] The jurisdictions that instruct juries on pretext do so in addition to instructions on discrimination in general. In the other jurisdictions, any error from a pretext jury instruction is harmless if that instruction accurately describes the law.[106] All of the circuits agree,

however, that juries should not walk through *McDonnell Douglas*'s shifting burdens.[107]

B. *McDonnell Douglas* at Summary Judgment

The creation of a new category of liability in the 1991 Act—mixed-motive discrimination—and *Desert Palace*'s expansion of proof for this category called *McDonnell Douglas* into question. If circumstantial evidence can prove that discrimination was a motivating factor in a discrimination case, even amidst legitimate motivations, then why bother with *McDonnell Douglas* at summary judgment? The 1991 Amendments made mixed-motive discrimination illegal.[108] *Desert Palace* took the law further, clarifying that both direct and circumstantial evidence was sufficient to prove mixed-motive discrimination.[109] *McDonnell Douglas* survived these developments, but the circuits diverged on the degree of its survival.[110] Most circuits have responded to *Desert Palace* with exceptions or modifications to *McDonnell Douglas* at summary judgment.[111] Only one circuit holds fast to the shifting burdens despite any evidence of multiple motivations.[112]

1. *Single Motive Versus Mixed Motive*

In *White v. Baxter Healthcare Corp.*, the Sixth Circuit abandoned the *McDonnell Douglas* framework for mixed-motive cases while retaining it for single-motive cases.[113] White, an African-American sales representative, had stellar performance reviews at Baxter Healthcare Corporation ("Baxter").[114] Despite White's superior qualifications, Baxter hired a white candidate for a managerial position.[115] During his interview for that position, White discussed the lack of diversity at Baxter.[116] White's next performance review was not entirely positive, and White had evidence that his evaluating supervisor had previously made several racially discriminatory statements.[117]

The Sixth Circuit analyzed White's failure to promote claim under the traditional *McDonnell Douglas* standard.[118] "White has presented his failure to promote claim as a single-motive discrimination claim brought pursuant only to 42 U.S.C. § 2000e-2(a)(1)."[119] This statute forbids employment decisions made "because of" an individual's protected class.[120] The Sixth Circuit found that White's superior qualifications and the diversity discussion in the interview had created a genuine dispute on pretext.[121] White did not offer evidence of multiple reasons for Baxter's failure to promote decision, so the Sixth Circuit applied the usual *McDonnell Douglas* standard here.[122]

White argued that his unfavorable performance review, however, was motivated in part by his supervisor's discriminatory animus.[123] According to the Sixth Circuit, that meant White's second claim fell under 42 U.S.C. § 2000e-2(m).[124] The Civil Rights Act of 1991 added that provision to over-

rule *Price Waterhouse* and expand liability under Title VII.[125] That section states that "[e]xcept as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that [a protected classification] was a motivating factor for any employment practice, even though other factors also motivated the practice."[126] After surveying the various circuit approaches, the Sixth Circuit abandoned *McDonnell Douglas* for mixed-motive summary judgments.[127] It relied heavily on the plain language of 42 U.S.C. § 2000e-2(m) and *Desert Palace*.[128] "In order to reach a jury [on mixed motive], the plaintiff is not required to eliminate or rebut all the possible legitimate motivations of the defendant as long as the plaintiff can demonstrate that [unlawful discrimination] factored into the defendant's decision . . . ."[129]

This new standard meant that few mixed-motive cases in the Sixth Circuit would be decided at summary judgment.[130] White's claim was no exception. The evidence that his supervisor harbored a racial animus and that his supervisor misapplied the evaluation criteria to White created a genuine dispute for trial.[131]

Judge Tymkovich of the Tenth Circuit criticized the single versus mixed motive distinction in a recent article.[132] "Nothing in the text of the Civil Rights Act of 1991, however, indicates that Congress intended courts to maintain this [single motive versus mixed motive] dichotomy."[133] Other scholars are more enthusiastic about the Sixth Circuit's approach.[134]

2. *Modified* McDonnell Douglas*: Pretext or Mixed Motive*

The Fifth Circuit handled the Amendments and *Desert Palace* by modifying the third stage of *McDonnell Douglas* to include a mixed-motive inquiry.[135] Instead of creating a genuine dispute at the third stage about the employer's legitimate nondiscriminatory reason as a pretext for discrimination, plaintiffs may also show "that the defendant's reason, while true, is only one of the reasons for its conduct, and another 'motivating factor' is the plaintiff's protected characteristic."[136] This approach preserves the benefits of *McDonnell Douglas* while modifying the doctrine to address the holding of *Desert Palace*.

Some scholarship criticizes the Fifth Circuit approach for unnecessarily retaining the prima facie step and the employer's legitimate nondiscriminatory reason. "The first two steps of McDonnell Douglas's burden-shifting become duplicative [in mixed-motive cases]."[137] That same scholarship also found that almost all of the decisions citing the Fifth Circuit's *Rachid* case affirmed summary judgments, suggesting that the modified approach did not widen the courthouse door for discrimination plaintiffs.[138]

3. McDonnell Douglas *or Evidence of Discrimination*

Three circuits give plaintiffs the choice between *McDonnell Douglas* and mixed motive at summary judgment. In the Fourth Circuit, a plaintiff can survive summary judgment by producing direct or indirect evidence of discrimination, even amidst other legitimate motives, or by following *McDonnell Douglas*.[139] The D.C. Circuit seems to agree, allowing plaintiffs to prove a mixed-motive case through either *McDonnell Douglas* or through direct or indirect evidence of discrimination.[140] The Ninth Circuit similarly allows plaintiffs two avenues when responding to summary judgment: direct and indirect evidence or the *McDonnell Douglas* standard.[141]

Judge Tymkovich agreed with these circuits[142] and stated that "[s]uch an approach implicitly eliminates the relevancy of the *McDonnell Douglas* analysis in Title VII cases because most (if not all) plaintiffs would prefer to pursue their case under the less onerous and more statutorily anchored mixed motive framework."[143] In these circuits, plaintiffs choose their summary judgment standards.

4. *Traditional* McDonnell Douglas

The Eleventh Circuit refuses to modify *McDonnell Douglas*. "[T]he fact that the Court did not even mention *McDonnell Douglas* in *Desert Palace* makes us even more reluctant to believe that *Desert Palace* should be understood to overrule that seminal precedent."[144] The Eleventh Circuit went on to apply the traditional *McDonnell Douglas* standard on summary judgment.[145] Many other circuits have not addressed the split,[146] with some specifically refusing to do so.[147]

The Eighth Circuit appears to follow the traditional *McDonnell Douglas* camp.[148] On closer inspection, however, the Eighth Circuit incorporates the mixed-motive issue in its summary judgment framework. "[T]he issue is whether the plaintiff has sufficient evidence that unlawful discrimination was *a* motivating factor . . . ."[149] To answer this question, plaintiffs can produce both direct and indirect evidence of discrimination.[150]

Direct evidence in the Eighth Circuit is evidence, direct or circumstantial, linking the challenged employment decision to an illegal motivation.[151] Without evidence that "clearly points" to an illegal motive, plaintiffs are left with the *McDonnell Douglas* standard.[152] The Eighth Circuit recently revisited that holding en banc.[153]

IV. *TORGERSON V. CITY OF ROCHESTER*, THE EIGHTH CIRCUIT'S TAKE ON TITLE VII

David Torgerson, a Native American, and Jami Mundell, a white female, applied with the City of Rochester, Minnesota for open firefighter

positions.[154] Torgerson and Mundell passed the City's three-phase qualification process, only to fail at the final interview for the same open position.[155] The qualification phase ranked forty-eight candidates based on physical fitness, aptitude, and a panel interview with members of the City's firefighter commission.[156] Torgerson and Mundell were not among the highest ranked persons for the open positions, but the City certified them for final interviews due to a federal Staffing for Adequate Fire and Emergency Response (SAFER) grant.[157] The grant funded three of the available positions and required the City to fill those positions with women and minorities "'to the extent possible.'"[158] To comply with the grant, the City's Human Resources Director recommended interviewing Torgerson and Mundell due to the "minimal differences in the total points between candidates."[159]

The City needed seven new firefighters.[160] It considered groups of three candidates for each position based on the qualification scores.[161] The City interviewed the three highest-ranked candidates for the first vacancy.[162] After filling that vacancy, the two remaining candidates were eligible for the second vacancy, as was the fourth highest-ranked candidate, and so on, until all seven vacancies were filled.[163] The City added Torgerson and Mundell to the seventh vacancy's interview, alongside the two remaining candidates from prior interviews and the ninth-highest ranked candidate.[164]

The Fire Chief conducted the final interviews. He did not consider Torgerson and Mundell using the same criteria as the three regular candidates.[165] Instead, he looked for "some quality or attribute [the person brought] that didn't come out in the test that [they could] say, wow, this is a strong candidate regardless of their test scores."[166] The three other white male candidates were interviewed only for a "red flag. Something that show[ed] up. It could [have been] a gut-level feeling . . . that might [have given] us a clue that there [was] a concern about a candidate."[167] After the interviews, the Chief made a combined recommendation against Torgerson and Mundell "because they did not 'demonstrate[ ] themselves to be equally or better qualified'" than the other candidates.[168] The City's firefighter Commission adopted these recommendations, choosing not to hire either Torgerson or Mundell.[169]

A member of the City Council eventually investigated the hirings because the Commission recommended a convicted felon for one of the firefighter positions.[170] The investigator questioned two members of the City's firefighter commission and the Fire Chief.[171] The first Commissioner did not know about the SAFER grant's minority and female hiring restrictions and told the investigator that "'had [the Commissioner] known, [he] would have recommended that the City not take the grant.'"[172] This Commissioner was not present for the final vote, and he did not conduct either Torgerson's or Mundell's panel interviews.[173] The second Commissioner defended the Commission's decision to the investigator, explaining that "'[the convicted felon] was a big guy and [ ] he'd make a good firefighter.'"[174] This Commis-

sioner was involved in the final vote.[175] When the investigator mentioned to the Fire Chief that the SAFER grant risked potential discrimination lawsuits, the Fire Chief responded that he found Torgerson and Mundell "unfit" during their interviews.[176] The Fire Chief later explained in a deposition that Torgerson and Mundell were qualified because they made the qualified candidate list.[177] Qualified and fitness meant different things, however, to the Fire Chief.[178] Torgerson and Mundell sued the City for national origin and gender discrimination.[179]

A. The District Court Grants Summary Judgment

The United States District Court for the District of Minnesota granted the City summary judgment on Torgerson and Mundell's claims under Title VII and the Minnesota Human Rights Act.[180] The district court found that the first Commissioner's statement that the City should not have taken the SAFER grant and the second Commissioner's statement that the felon was qualified because he was a big guy were not direct evidence of discrimination.[181] Direct evidence can be plain, like a decision-maker stating, we are not hiring you because you are a woman.[182] A decision-maker might state in an exit interview, for example, that the terminated employee needs to dress more femininely if she wants a promotion.[183] The harder cases have discriminatory statements by a decision-maker that are only circumstantially linked to the employment decision or only evidence that the decision-maker holds a discriminatory bias in general.[184] The distinction between direct and indirect evidence makes a difference in the Eighth Circuit: direct evidence requires a trial while indirect evidence must first pass through *McDonnell Douglas*'s shifting burdens.[185]

On the first Commissioner's statement, the district court found no direct evidence. "Testimony that [the first Commissioner] recommended against taking a grant that 'stipulated' the City hire women and minorities, regardless of relative qualifications, is not evidence of discriminatory animus. At most, it is evidence of concern that the Commissioners have the discretion to hire the best-qualified firefighters."[186] The district court also found no connection between this statement and Torgerson and Mundell. The first Commissioner did not participate in either plaintiff's panel interview, and that Commissioner was not present when the Commission certified the final list of firefighters.[187]

The Court found the second Commissioner's statement similarly lacking. That statement was a defense of the Commission's decision to recommend a convicted felon, was "devoid of reference to women," and was, therefore, not evidence of discrimination.[188] The second Commissioner voted to certify the final list of firefighters, but he also "moved and voted to expand the certification to include the protected group candidates" for the

final interviews.[189] Weighing this evidence, the district court found no direct evidence of discrimination.

The district court then applied the three-part *McDonnell Douglas* burden-shifting test to Torgerson and Mundell's indirect evidence of discrimination. The first step requires a plaintiff to prove a prima facie case of discrimination. The elements of this requirement are that (1) the plaintiff is a member of a protected class who (2) met the employer's (or potential employer's) legitimate job expectations when the plaintiff (3) suffered an adverse employment action, and (4) similarly situated persons outside the protected class did not suffer the same fate.[190] The district court assumed that Torgerson and Mundell met this burden.[191]

At the second step, the burden shifts to the employer to articulate a legitimate nondiscriminatory reason for its actions.[192] The City's two nondiscriminatory reasons for failing to hire the plaintiffs were that Torgerson and Mundell ranked lower on the qualification scores and that the Fire Chief's interview confirmed their low rankings.[193]

Once an employer articulates its reasons for the employment decision, the plaintiff resumes its burden, which now requires a showing of a genuine dispute about the employer's reasons as a pretext for discrimination.[194] According to the district court in *Torgerson*, "Plaintiffs must both discredit the City's reason for not hiring them and show that circumstances permit drawing the reasonable inference that the real reasons they were not hired were that Mundell is female and Torgerson's national origin is Native American."[195] The ultimate question becomes, is the proof of pretext—and ultimately discrimination—stronger than the employer's reason for its decision?[196]

The district court found no genuine disputes on pretext. The panel interviews, although subjective, sufficiently "established scoring criteria" and "predetermined questions" to guard against problems in the interviews.[197] Although the Fire Chief interviewed Torgerson and Mundell using different criteria than the other candidates, the court found that Torgerson and Mundell were not similarly situated to the other applicants with higher qualification scores.[198] The Fire Chief's distinction between the plaintiffs' qualifications and fitness was also insufficient to show pretext "[g]iven the context of [his] statement and the absence of evidence suggesting that [the Fire Chief] found Plaintiffs unfit based on their protected group status."[199] All of this proof fell against the City's qualification scores, entitling the City to summary judgment.[200]

B. An Eighth Circuit Panel Reverses

A divided three-judge panel reversed the district court. Circuit Judge Lavenski Smith authored the majority opinion, with Circuit Judge Diana Murphy in agreement.[201] Circuit Judge William Benton dissented.[202] The

majority opinion recited a now overruled line of cases, which state "that 'summary judgment should be used sparingly in the context of employment discrimination and/or retaliation cases where direct evidence of intent is often difficult or impossible to obtain.'"[203] The majority also recited the rule that "summary judgment should not be granted in 'close' cases" because that might invade the jury's duty to find facts.[204]

The majority found that Torgerson and Mundell showed a prima facie case because the truly objective portion of the qualification phase tied Torgerson with one of the hired candidates and ahead of another and placed Mundell within three-tenths of a point of one hired candidate.[205] The majority excised the panel interview scores from the qualification rankings. At the pretext stage, the majority "conclud[ed] that deciding the efficacy of Rochester's steps to ensure nondiscriminatory evaluation [during the panel interviews] is, on the facts in this record, better reserved for the jury."[206] The subjectivity of the panel interview and the Fire Chief interview also favored a jury trial.[207] Instead of adopting the Fire Chief's explanation for his "fitness" versus "qualified" distinction, the majority reserved that job to the jury.[208] The Court did not reach a direct evidence analysis.[209]

The dissent disagreed, finding insufficient evidence to genuinely dispute the City's score-based reason as a pretext for discrimination.[210] The fact that Torgerson and Mundell scored lower than the hired candidates meant that they were not as qualified for the positions as the hired candidates.[211] The subjectivity of the interviews, the Fire Chief's fitness statement, the Fire Chief's different criteria for Torgerson and Mundell, and both Commissioners' challenged statements should not have overcome the objectivity of the City's scores.[212]

C. The Eighth Circuit En Banc Vacates and Affirms

The Eighth Circuit granted rehearing en banc and vacated the panel opinion.[213] Five judges, with Circuit Judge Benton writing, voted to affirm the district court.[214] Circuit Judge Steven Colloton concurred in the opinion of the Court.[215] Five judges, with Circuit Judge Smith writing, dissented in part.[216]

The entirety of the en banc Court agreed that there is no discrimination exception to the summary judgment standard.[217] "There is no 'discrimination case exception' to the application of summary judgment, which is a useful pretrial tool to determine whether any case, including one alleging discrimination, merits a trial."[218] The *Torgerson* court overruled a host of opinions with that old language.[219] The supposed discrimination exception cautioned against granting summary judgment because proof of discriminatory motivation is difficult to find. Although this standard seems consistent with the purpose of *McDonnell Douglas* and the difficult proof in discrimination cases, it is no longer the law in the Eighth Circuit.[220] According to the

majority, the Eighth Circuit does "not 'treat discrimination differently from other ultimate questions of fact.'"[221] The majority reasserted the district court's analysis with added citations.[222] The two Commissioners' statements were not direct evidence of discrimination, and the Fire Chief's fitness comment was not sufficient proof of pretext.[223] Torgerson and Mundell met their prima facie cases, but they could not show pretext.[224] The majority refigured the qualification scores without the panel interviews, concluding that Torgerson and Mundell were not objectively ranked anywhere near the other candidates.[225] According to the majority, Torgerson and Mundell had "[a]t best . . . 'relatively similar qualifications' to some hired candidates."[226]

1. *The Deciding Concurrence*

Judge Colloton cast the deciding vote in *Torgerson*. He concurred "on the understanding that the [majority] opinion merely takes as a given the circuit precedent of *Griffith v. City of Des Moines*."[227] Colloton then made clear that *Desert Palace* may justify reconsidering *Griffith* en banc, stating that "[w]hether the en banc court should adhere to *Griffith* and its inquiry into whether a plaintiff has presented 'direct evidence' of discrimination in Title VII summary-judgment cases after the Supreme Court's decision in *Desert Palace, Inc. v. Costa* is not presented for decision."[228] After considering the record as a whole, Judge Colloton found insufficient evidence from which a jury could find unlawful discrimination.[229]

2. *The Dissent*

The dissent agreed that there is no discrimination case exception to summary judgment, although that language has persisted for a generation.[230] "That said, we should *never* forget that, '[a]t the summary judgment stage, the court should *not weigh the evidence, make credibility determinations, or attempt to determine the truth of the matter*.'"[231] True to Federal Rule of Civil Procedure 56, after drawing all inferences in the nonmoving party's favor, summary judgment is inappropriate if there are genuine disputes of material fact.[232]

According to the dissent, the *McDonnell Douglas* shifting burdens of proof "are designed to assure that the 'plaintiff [has] his day in court despite the unavailability of direct evidence.'"[233] Three pieces of evidence struck the dissenters as genuine disputes on pretext. First, the first Commissioner's statements about never accepting the SAFER grant are susceptible to multiple meanings.[234] "Delving into [the first Commissioner's] thought processes and explaining away his comment so as to avoid any inference of discriminatory animus is inappropriate and in direct conflict with the summary judgment standard."[235] That Commissioner, moreover, voted to certify the

final qualifications list, signed two-thirds of the recommendation forms, and appeared very involved in the hiring process.[236]

The second Commissioner's statement about hiring a felon because he was a "big guy" was also evidence of pretext.[237] That comment "*on its face*, references *gender*," so a jury could believe that comment is discriminatory and related to the hiring process.[238] Finally, the Fire Chief's statement that Torgerson and Mundell were unfit "*during a discussion of the SAFER grant and protected-group candidates*," even though the Chief admits Torgerson and Mundell were qualified, could establish a discriminatory animus.[239] The dissent further provided that "[a] jury—not this court—should determine the meaning and credibility" of this proof.[240]

V. CONCLUSION

The statistics tell a hard tale: discrimination cases usually fail at summary judgment.[241] Too often courts get lost in the shifting burdens and believe the employer's legitimate nondiscriminatory reasons. Summary judgments require a degree of judicial discernment, but not so much as to override other reasonable inferences from the proof. This practical reality of discrimination law violates the plain language of Federal Rule 56 and the summary judgment standard.[242]

The *Torgerson* dissent is right.[243] The *Torgerson* majority explained and excused evidence of discrimination, making credibility determinations and choosing which inferences to believe.[244] There was direct evidence of discrimination in *Torgerson*. Two of the decision-makers made statements connecting unlawful discrimination to their hiring decisions. The first Commissioner said he would have told the City not to take the SAFER grant if the Commissioner had known that it required a preference for minorities. The second Commissioner said he recommended a convicted felon because he was a "big guy." The Fire Chief also called Torgerson and Mundell "unfit" while discussing the SAFER grant. It was undisputed that Torgerson and Mundell were qualified for the firefighter position. All three of these persons, the two Commissioners and the Fire Chief, were involved in the hiring process, with two voting on the final list of hired candidates.[245]

The evidence in *Torgerson* should also satisfy *McDonnell Douglas*.[246] Torgerson and Mundell were members of a protected class, were otherwise qualified for the open position, and were not hired while another non-protected person of similar qualifications got the job. The City's two legitimate, nondiscriminatory reasons were the qualification test—with its two interview phases—and the results from the Fire Chief's interviews. However, it was undisputed that the Fire Chief interviewed Torgerson and Mundell using different criteria than those used in the other candidates' interviews.[247] These separate criteria stemmed directly from Torgerson's national origin and Mundell's gender. Furthermore, the only reason Torgerson and Mundell

were interviewed by the Fire Chief at all was the SAFER grant.[248] So, the Chief looked for evidence that Torgerson and Mundell were equally or better qualified than the other candidates.

This evidence, and the direct evidence of discrimination, created a genuine dispute on pretext. Regardless of Torgerson's and Mundell's objective ranking before the two interviews, those interviews were subjective and ultimately determined who got the job. A jury should have decided these facts. Unfortunately, the cases are full of similar examples. Judges should not substitute their judgment for the jury's in discrimination cases.[249] The contrary reality nullifies the 1991 Amendments' right to a jury trial.

There is also no meaningful difference between mixed motive and single motive. This issue plagues the circuits, contributing to the split on *McDonnell Douglas* at summary judgment.[250] "It is increasingly hard to believe that in a multi-cultural society forty-five years after Title VII, numerous employers base a business decision exclusively on whether an employee simply belongs to a protected class."[251] If a court examines a legitimate nondiscriminatory reason against evidence of pretext, that analysis necessarily implicates the plain language of 42 U.S.C. § 2000e-2(m).[252] Despite the qualification scores in *Torgerson*, there was also evidence that gender and national origin motivated the final phases of the hiring process.[253] Thus, the employer's reason can be legitimate but illegal if other motivations joined in the decision.[254]

McDonnell Douglas remains the rule, and it persists in most circuits. The standard has practical applications: it hones the proof for trial, elicits the employer's reason for the employment decision, and grants employees some latitude in proving their case.[255] However, the circuits are split about instructing the jury on pretext, further complicating *McDonnell Douglas*'s role.[256] Against the 1991 Amendments and *Desert Palace*, the continued utility of *McDonnell Douglas* is unclear. Pretext and mixed motive seem interrelated, with the two theories mixed together in some form in almost all of the circuits' summary judgment standards.[257] The plain language of 42 U.S.C. § 2000e-2(m) requires nothing less.[258] Congress added an additional definition for an unlawful employment practice in § 2000e-2(m)—decisions motivated in part by discrimination—not a separate standard of proof.[259] The Eighth Circuit is poised to reconsider its position on the standard in an appropriate case.

Discrimination law is in disarray. The confusion about the 1991 Amendments and *Desert Palace* needs resolution. Congress and the courts have struggled over the meaning and proof required by Title VII for decades.[260] The Supreme Court tends to limit Title VII, while Congress favors its expansion. Until one of these institutions clarifies the summary judgment standard, *McDonnell Douglas* will remain the largest vehicle for disposing of discrimination cases nationwide. The tension between a merit-based deci-

sion and discrimination shall continue with obscurity, shifting its burden of uncertainty onto employers and employees alike.

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1. Ricci v. DeStefano, 557 U.S. 557, 582 (2009) (quoting Griggs v. Duke Power Co., 401 U.S. 424, 434 (1971)). This quote is altered to include Title VII's other protected classes. 42 U.S.C. § 2000e-2(a)(1).

2. 557 U.S. at 585–86.

3. *Id*. at 562.

4. *Id.* at 587–88.

5. *See generally id.*

6. *See infra* Parts I & II.

7. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 798 (1973).

8. *Id*. at 802–04.

9. White v. Baxter Healthcare Corp., 533 F.3d 381, 396 (6th Cir. 2008).

10. *Id.* at 400. After *White*, Sixth Circuit plaintiffs must genuinely dispute whether they suffered an adverse employment action driven in part by race as a motivating factor. *Id.* at 402–04.

11. Machinchick v. PB Power, Inc., 398 F.3d 345, 352 (5th Cir. 2005); Rachid v. Jack in the Box, Inc., 376 F.3d 305, 312 (5th Cir. 2004).

12. *See* Diamond v. Colonial Life & Accident Ins. Co., 416 F.3d 310, 318 (4th Cir. 2005); McGinest v. GTE Serv. Corp., 360 F.3d 1103, 1122 (9th Cir. 2004); Fogg v. Gonzales, 492 F.3d 447, 451 (D.C. Cir. 2007).

13. *See* Cooper v. Southern Co., 390 F.3d 695, 725 n.17 (11th Cir. 2004).

14. The Second and Seventh Circuits are silent on this circuit split. *See White*, 533 F.3d at 399.

15. *See e.g.*, Houser v. Carpenter Tech. Corp., 216 F. App'x 263, 265 (3d Cir. 2007); Furaus v. Citadel Comm. Corp., 168 F. App'x 257, 260 (10th Cir. 2006); Rodriguez v. Sears Roebuck De P.R., Inc., 432 F.3d 379, 380–81 (1st Cir. 2005).

16. Griffith v. City of Des Moines, 387 F.3d 733, 735 (8th Cir. 2004).

17. *Id.*

18. Torgerson v. City of Rochester, 643 F.3d 1031 (8th Cir. 2011), *cert. denied* 132 S. Ct. 513 (2011).

19. *Id*.

20. *Id*.

21. Before the Act, Civil Rights enactments were relegated to the Executive Branch. President Roosevelt issued an anti-employment discrimination executive order for government workers. Exec. Order No. 8802, 6 Fed. Reg. 3109 (June 25, 1941). President Kennedy took the Order further in 1961, requiring affirmative action to implement the executive order's mandates. Exec. Order No. 10925, 26 Fed. Reg. 1977 (Mar. 8, 1961).

22. 42 U.S.C. § 2000e-2(a)(1) (2006).

23. *Charge Statistics*, *FY 1997 through FY 2011*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, http://eeoc.gov/eeoc/statistics/enforcement/charges.cfm (last visited Oct. 14, 2012). The charge-filing process is the first step to seeking any redress under Title VII.

24. 42 U.S.C. § 2000e-5(b).

25. *2011 Annual Report of the Director: Judicial Business of the United States Courts*, ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 129 (2012), http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2011/JudicialBusiness2011.pdf.

26. *Id*. at 151.

27. *Id.* at 65.

28. *Charge Statistics*, *supra* note 23. That number of people filed a charge of discrimination with the EEOC. A charge, the first step under Title VII, is a complaint under oath stating that unlawful discrimination was the reason for an adverse employment decision. 42 U.S.C. § 2000e-5(b); Hall v. St. John Missionary Baptist Church, No. 4:08-CV-645-WRW, 2010 WL 703163, at *1 (E.D. Ark. Feb. 23, 2010).

29. Christopher J. Emden, Note, *Subverting Rule 56?* McDonnell Douglas, White v. Baxter Healthcare Corp.*, and the Mess of Summary Judgment in Mixed-Motive Cases*, 1 WM. & MARY BUS. L. REV. 139, 150 & n.81 (2010). It is difficult, of course, to look behind the statistics and state with certainty that all of the cases not making it to trial were due to summary judgments in favor of the employer. These dismissals no doubt include an unknown number of settlements and perhaps even a few favorable summary judgments towards employees.

30. *See infra* Part II.C.

31. *See infra* Part II.C.

32. Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e-e17.

33. Cary Franklin, *Inventing the "Traditional Concept" of Sex Discrimination*, 125 HARV. L. REV. 1307, 1346–47 (2012).

34. *Id.* at 1347 n.213; *see also* Megan E. Wooster, Note, *Sexual Harassment Law—The Jury Is Wrong as a Matter of Law,* 32 U. ARK. LITTLE ROCK L. REV. 215, 222 (2010).

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

36. Landsgraf v. USI Film Prods., 511 U.S. 244, 252–53 (1994) (applying prior law).

37. *McDonnell Douglas*, 411 U.S. at 802.

38. *Id.* at 802–03.

39. *Id.* at 804.

40. Green v. McDonnell Douglas Corp., 390 F. Supp. 501, 503 (E.D. Mo. 1975), *aff'd*, 528 F.2d 1102 (8th Cir. 1976).

41. General Elec. Co. v. Gilbert, 429 U.S. 125 (1976), *superseded by statute*, Pregnancy Discrimination Act of 1978 § 1, Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified as amended at 42 U.S.C. § 2000e(k)), *as recognized in* Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 89 (1983).

42. *Id.* at 133–35.

43. *Id.* at 136 (alteration in original).

44. Mary Wiseman, Note, *Employment Discrimination—Title VII's Limited Preemptive Effect Allows State Laws Mandating Pregnancy Leave and Reinstatement,* California Federal Savings and Loan Association v. Guerra, 107 S. Ct. 683 (1987), 9 U. ARK. LITTLE ROCK L.J. 669, 674–75 (1987).

45. 450 U.S. 248 (1981).

46. *Id.* at 252.

47. *Id.* at 253.

48. *Id*. at 258.

49. *Id*.

50. *Id.* at 255 n.8.

51. *Burdine*, 450 U.S. at 254.

52. *Id.*

53. *Id.* at 255.

54. *Id.* at 255–56.

55. *Id.* at 256.

56. *Id.* at 258.

57. *Burdine,* 450 U.S. at 258.

58. 490 U.S. 228, 234–37 (1989), *superseded by statute*, Civil Rights Act of 1991 § 107, Pub. L. No. 102-166 (1991) (codified as amended in 42 U.S.C. § 1981a (2006)), *as recognized in* Landgraf v. USI Film Prods., 511 U.S. 244 (1994).

59. *Id.* at 235.

60. *Id.*

61. *Id*. at 237.

62. 42 U.S.C. § 2000e-2(a)(1) (2006).

63. *Price Waterhouse*, 490 U.S. at 254–55.

64. *Id.*

65. *See* Jan W. Sturner, Comment, *Preemployment Medical Exams Under the ADA: Conditional Job Offers and the Application of the Mixed-Motive Framework*, 50 ARK. L. REV. 449, 467 n.51 (1997).

66. Civil Rights Act of 1991 § 102(4)(c), Pub. L. No. 102-166 (1991) (codified as amended at 42 U.S.C. § 1981(a)).

67. 42 U.S.C. § 2000e-2(m).

68. *Id.*

69. 42 U.S.C. § 2000e-5(g)(2)(B).

70. 42 U.S.C. § 1981a.

71. 42 U.S.C. § 1981a(c).

72. *See infra* Part II.

73. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993).

74. *Id.* at 524 (citation omitted) (quoting United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 716 (1983)).

75. *Id.* at 508–09, 518–25.

76. 530 U.S. 133, 146–47 (2000).

77. *Id.* at 142–43 (quoting St. Mary's Honor Center v. Hicks, 509 U.S. 502, 113 (1993) and U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 714 (1983)).

78. *Id.* at 149–54.

79. *Id.* at 153.

80. 42 U.S.C. § 2000e-2(m) (2006).

81. Desert Palace, Inc. v. Costa, 539 U.S. 90, 95 (2003).

82. *Id.* at 94.

83. *Id.* at 101–02.

84. *Id.* at 99 (alteration in original) (citing 42 U.S.C. § 2000e(m)).

85. *Id.* at 99–100.

86. *Id.* at 99–100 (citation omitted).

87. *Desert Palace*, 539 U.S. at 101–02.

88. David Sherwyn & Michael Heisel, *The Gross Beast of Burden of Proof: Experimental Evidence on How the Burden of Proof Influences Employment Discrimination Case Outcomes,* 42 ARIZ. ST. L.J. 901, 934–35 (2010).

89. *Desert Palace*, 539 U.S. at 96 (quoting Costa v. Desert Palace, Inc., 299 F.3d 838, 858 (9th Cir. 2002)).

90. *See infra* Part II.

91. 42 U.S.C. § 2000ff (2006).

92. Congress has also proposed a sexual orientation and gender identity protected classification. Recent Proposed Legislation, *Employment Discrimination—Congress Considers Bill to Prohibit Employment Discrimination on the Basis of Sexual Orientation and Gender Identity—Employment Nondiscrimination Act of 2009, H.R. 3017, 111th Cong. (2009)*, 123 HARV. L. REV. 1803 (2010).

93. Although many different areas of the law incorporate the reasoning of Title VII, the Supreme Court declared in 2009 that age discrimination does not follow the 1991 amendments to the Civil Rights Act. Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 173–74 (2009).

To succeed at trial, an age discrimination plaintiff must prove that age was the "but for" cause of his adverse employment action. *Id.* at 176. That spurned the Protecting Older Workers from Discrimination Act, which did not leave the House of Representatives. H.R. 3721, 111th Cong. (1st Sess. 2009), *available at* http://www.govtrack.us/congress/bills/111/hr3721.

94. *See*, *e.g.*, Grebin v. Sioux Falls Indep. Sch. Dist. No. 49-5, 779 F.2d 18 (8th Cir. 1985), *abrogated by* Foster v. Univ. of Ark., 938 F.2d 111 (8th Cir. 1991).

95. *Id*. at 20–21 (quoting Loeb v. Textron, 600 F.2d 1003, 1016 (1st Cir. 1979) (alterations in original) (discussing *McDonnell Douglas* jury instructions in an age discrimination, non-Title VII case).

96. *E.g.*, Barnes v. City of Cincinnati, 401 F.3d 729, 739–40 (6th Cir. 2005); Gehring v. Case Corp., 43 F.3d 340, 343 (7th Cir. 1994). A plain reading of *Hicks* and *Reeves* supports this conclusion. The ultimate issue is whether discrimination motivated an employment decision, not whether the plaintiff or the defendant satisfied one of the *McDonnell Douglas* burdens.

97. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 142–43 (2000).

98. Smith v. Borough of Wilkinsburg, 147 F.3d 272, 280 (3rd Cir. 1998).

99. *Id*. (citation omitted). The Second Circuit also reached this same conclusion before the 2000 *Reeves* decision. Cabrera v. Jakabovitz, 24 F.3d 372, 382 (2d Cir. 1994).

100. Townsend v. Lumbermens Mut. Cas. Co., 294 F.3d 1232, 1241 (10th Cir. 2002); Ratliff v. City of Gainesville, Tex., 256 F.3d 355, 360–61 (5th Cir. 2001).

101. *See* Browning v. United States, 567 F.3d 1038, 1041–42 & n.2 (9th Cir. 2009); Conroy v. Abraham Chevrolet-Tampa, Inc., 375 F.3d 1228, 1232–33 & n.5 (11th Cir. 2004); Moore v. Robertson Fire Prot. Dist., 249 F.3d 786, 789–90 (8th Cir. 2001); Fite v. Digital Equip. Corp., 232 F.3d 3, 7 (1st Cir. 2000). The Seventh Circuit opinion pre-dates the *Reeves* decision. *Gehring*, 43 F.3d at 343.

102. *Gehring*, 43 F.3d at 343 (citing to United States v. Sblendorio, 830 F.2d 1382, 1391 (7th Cir. 1987)).

103. *Conroy*, 375 F.3d at 1233.

104. *See*, *e.g.*, Grebin v. Sioux Falls Indep. Sch. Dist. No. 49-5, 779 F.2d 18 (8th Cir. 1985), *abrogated by* Foster v. Univ. of Ark., 938 F.2d 111 (8th Cir. 1991).

105. *See supra* Part I.E.

106. *E.g.*, *Moore*, 249 F.3d at 790 n.9.

107. *E.g.*, Barnes v. City of Cincinnati, 401 F.3d 729, 739–40 (6th Cir. 2005); *Gehring*, 43 F.3d at 343.

108. 42 U.S.C. § 2000e-2 (2006).

109. Desert Palace, Inc. v. Costa, 539 U.S. 90, 101-02 (2003).

110. *See supra* Part I.E.

111. *See supra* Part II.A.

112. Smith v. Borough of Wilkinsburg, 147 F.3d 272, 280 (3rd Cir. 1998).

113. White v. Baxter Healthcare Corp., 533 F.3d 381 (6th Cir. 2008), *cert. denied* 129 S. Ct. 2380 (2009).

114. *Id.* at 385–87.

115. *Id.* at 387.

116. *Id.*

117. *Id.* at 385–89.

118. *Id*. at 391.

119. *White*, 533 F.3d. at 390 n.4.

120. 42 U.S.C. § 2000e-2(a)(1) (2006).

121. *White*, 533 F.3d at 394.

122. *Id.* at 395.

123. *Id.*

124. *Id.*

125. Civil Rights Act of 1991 § 107, Pub. L. No. 102-166 (codified as amended in 42 U.S.C. § 1981a), *as recognized in* Landgraf v. USI Film Prods., 511 U.S. 244 (1994).

126. 42 U.S.C. § 2000e-2(m).

127. *White*, 533 F.3d at 400.

128. *Id.*

129. *Id.* at 401.

130. *Id.* at 402.

131. *Id.* at 406.

132. The Honorable Timothy J. Tymkovich, *The Problem with Pretext*, 85 DENV. U. L. REV. 503, 522 (2008).

133. *Id.*

134. *See, e.g.*, Sarah Keates, Note, *Surviving Summary Judgment in Mixed Motive Cases—*White v. Baxter Healthcare Corp., 78 U. CIN. L. REV. 785, 797–98 (2009).

135. Rachid v. Jack In The Box Inc., 376 F.3d 305 (5th Cir. 2004) (applying that standard to the Age Discrimination in Employment Act).

136. *Id.* at 312 (quoting Rishel v. Nationwide Mut. Ins. Co., 297 F. Supp. 2d 854, 865 (M.D.N.C. 2003)).

137. Thomas F. Kondro, Comment, *Mixed Motives and Motivating Factors: Choosing a Realistic Summary Judgment Framework for § 2000e-2(m) of Title VII*, 54 ST. LOUIS U. L.J. 1439, 1448 (2010).

138. *Id.* at 1449.

139. Diamond v. Colonial Life & Accident Ins. Co., 416 F.3d 310, 318 (4th Cir. 2005).

140. Fogg v. Gonzales, 492 F.3d 447, 451 & n.* (D.C. Cir. 2007).

141. *Id.*; McGinest v. GTE Serv. Corp., 360 F.3d 1103, 1122 (9th Cir. 2004).

142. Tymkovich, *supra* note 132, at 529.

143. *Id.*

144. Cooper v. S. Co., 390 F.3d 695, 725 n.17 (11th Cir. 2004), *overruled on other grounds*, Ash v. Tyson Foods, Inc., 546 U.S. 454, 457 (2006).

145. *Id.* at 725–26.

146. The Second and Seventh Circuits are silent on this circuit split. *See* White v. Baxter Healthcare Corp., 533 F.3d 381, 399 (6th Cir. 2008).

147. Houser v. Carpenter Tech. Corp., 216 F. App'x 263, 265 (3d Cir. 2007); Furaus v. Citadel Commc'ns Corp., 168 F. App'x 257, 260 (10th Cir. 2006); Rodriguez v. Sears Roebuck De P.R., Inc., 432 F.3d 379, 380–81 (1st Cir. 2005).

148. Griffith v. City of Des Moines, 387 F.3d 733, 735 (8th Cir. 2004).

149. *Id.* (emphasis added).

150. *Id.* at 736.

151. *Id.*

152. *Id.*

153. Torgerson v. City of Rochester, 643 F.3d 1031 (8th Cir. 2011) (en banc), *cert. denied* 132 S. Ct. 513 (2011).

154. Torgerson v. City of Rochester, No. 07-1968, 2008 WL 5244761 (D. Minn. Dec. 15, 2008), *aff'd in part, rev'd in part*, 605 F.3d 584 (8th Cir. 2010), *aff'd on reh'g*, 643 F.3d 1031 (8th Cir. 2011) (en banc), *cert. denied*, 132 S. Ct. 513 (2011).

155. *Id.* at *1–3.

156. *Id.* at *1–2.

157. *Id.* at *3.

158. *Id.* (referring to the requirements set forth by the SAFER grant).

159. *Id.*

160. *Torgerson,* 2008 WL 5244761, at *3.

161. *Id.*

162. *Id.*

163. *Id.*
164. *Id.*
165. *Id.*
166. *Torgerson*, 2008 WL 5244761, at *3.
167. *Id.* (first alteration in original).
168. *Id.* at *4 (alteration in original).
169. *Id.* at *5.
170. *Id.*
171. *Id.* at *7.
172. *Torgerson*, 2008 WL 5244761, at *7.
173. *Id.* at *5.
174. *Id.* at *8 (second alteration in original).
175. *Id.* at *7–8.
176. *Id.* at *11.
177. *Id.*
178. *Torgerson*, 2008 WL 5244761, at *11.
179. *Id.* at *1.
180. *Id.* at *13. The district court also dismissed Torgerson's § 1981 national origin discrimination claim. *Id.* at *5–6.
181. *Id.* at *7–8.
182. *E.g.*, Gunn v. Langston, No. 3:10-CV-35-DPM, 2011 WL 3667759, at *3–4 (E.D. Ark. Aug. 22, 2011) ("[T]he [decision-maker] brought it up when I was terminated. . . . [H]e stated, quote, was that I had took it upon myself to notify the Arkansas state police about the sexual harassment and I got too many people involved.").
183. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 234–37 (1989), *superseded by statute*, Civil Rights Act of 1991 § 107, Pub. L. No. 102-166 (codified as amended in 42 U.S.C. § 1981a), *as recognized in* Landgraf v. USI Film Prods., 511 U.S. 244 (1994).
184. *See, e.g.*, Twymon v. Wells Fargo & Co., 462 F.3d 925, 934 (8th Cir. 2006).
185. Griffith v. City of Des Moines, 387 F.3d 733, 736 (8th Cir. 2004).
186. *Torgerson*, 2008 WL 5244761, at *7.
187. *Id.*
188. *Id.* at *8.
189. *Id.*
190. Hill v. St. Louis Univ., 123 F.3d 1114, 1119 (8th Cir. 1997).
191. *Torgerson*, 2008 WL 5244761, at *8.
192. *Hill*, 123 F.3d at 1119.
193. *Torgerson*, 2008 WL 5244761, at *8.
194. *Hill*, 123 F.3d at 1119.
195. *Torgerson*, 2008 WL 5244761, at *8 (citing Johnson v. AT&T Corp., 422 F.3d 756 (8th Cir. 2005)).
196. Reeves v. Sanderson Plumbing Prods., 530 U.S. 133, 142–43 (2000).
197. *Torgerson*, 2008 WL 5244761, at *9.
198. *Id.*
199. *Id.* at *11.
200. *Id.* at *13.
201. Torgerson v. City of Rochester, 605 F.3d 584, 587 (8th Cir. 2010).
202. *Id.* at 600 (Benton, J., dissenting).
203. *Id.* at 593 (quoting Wallace v DTG Operations, Inc., 442 F.3d 1112, 1117 (8th Cir. 2006).
204. *Id.* at 594.
205. *Id.* at 596.
206. *Id.* at 598.

207. *Torgerson*, 605 F.3d at 598.
208. *Id.* at 599.
209. *Id.*
210. *Id.* at 600 (Benton, J., concurring in part and dissenting in part).
211. *Id.* at 601.
212. *Id.* at 602–04.
213. Torgerson v. City of Rochester, 643 F.3d 1031 (8th Cir. 2011) (en banc), *cert. denied*, 132 S. Ct. 513 (2011).
214. *Id.* at 1053–54.
215. *Id.* at 1053–54 (Colloton, J., concurring).
216. *Id.* at 1054 (Smith, J., concurring in part and dissenting in part).
217. *Id.* at 1043.
218. *Id.* (quoting Fercello v. County of Ramsey, 612 F.3d 1069, 1077 (8th Cir. 2010)).
219. *Torgerson*, 643 F.3d at 1058–60.
220. *Id.* at 1043.
221. *Id.* (quoting Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 148 (2000)).
222. *Id.* at 1044–52.
223. *Id.* at 1053–54.
224. *Id.* at 1047, 1052.
225. *Torgerson*, 643 F.3d at 1047–48 & n.8.
226. *Id.* at 1049.
227. *Id.* at 1053 (Colloton, J., concurring) (citation omitted).
228. *Id.* (citation omitted).
229. *Id.* at 1054.
230. *Id.* (Smith, J., concurring in part and dissenting in part).
231. *Torgerson*, 643 F.3d at 1054 (quoting Quick v. Donaldson Co., 90 F.3d 1372, 1376–77 (8th Cir. 1996) (alteration in original)).
232. FED. R. CIV. P. 56; *Torgerson*, 643 F.3d at 1054 (quoting *Quick*, 90 F.3d at 1376–77).
233. *Torgerson*, 643 F.3d at 1054 (quoting Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121 (1985)).
234. *Id.* at 1056.
235. *Id.*
236. *Id.* at 1056 n.10.
237. *Id.* at 1057.
238. *Id.* at 1058 (Smith, J., concurring in part and dissenting in part).
239. *Torgerson*, 643 F.3d at 1057.
240. *Id.*
241. *See supra* Part I.
242. *See supra* Part III.C.2. "The Court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). "In determining whether a plaintiff has met its burden with respect to pretext in a summary judgment motion, a district court is prohibited from making a credibility judgment or a factual finding from conflicting evidence." Yates v. Rexton, Inc., 267 F.3d 793, 800 (8th Cir. 2001).
243. Recent scholarship also agrees with this dissent. *See* Allison Berman, *Proof of Discrimination at Summary Judgment: The Eighth Circuit's Focus on Categories of Evidence in* Torgerson v. City of Rochester, 53 B.C. L. REV. E-SUPPLEMENT 1, 11–14 (2012).
244. *See supra* Part III.C.2.
245. *See supra* Part III.
246. *Compare supra* Part 1.A., 1.B.
247. *See supra* Part III.A.

248. *See supra* Part III.A., II.A.

249. *See supra* Part I. For example, in *Reeves* the Supreme Court reversed because the court of appeals had improperly failed to draw all factual inferences in the Plaintiff's favor, "substitut[ing] its judgment concerning the weight of the evidence for the jury's." Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 153 (2000).

250. *See supra* Part II.

251. Sherwyn & Heisel, *supra* note 88, at 921; *see also* Tymkovich, *supra* note 132, at 529.

252. *See supra* Part I.D.

253. *See supra* Part III.B.

254. *See supra* Part I.D.

255. *See supra* Part I.A & I.B.

256. *See supra* Part II.A.

257. *See supra* Part II.B.

258. 42 U.S.C. § 2000e-2(m).

259. *See supra* Part I.D.

260. *See supra* Part I.