The Plaintiff's Burden in Title VII Disparate Treatment Cases: Discrimination Vel Non—St. Mary's Honor Center v. Hicks, 113 S. Ct. 2742 (1993)

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The Plaintiff's Burden in Title VII Disparate Treatment Cases: Discrimination Vel Non—St. Mary's Honor Center v. Hicks, 113 S. Ct. 2742 (1993)

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I. INTRODUCTION

St. Mary's Honor Center v. Hicks\(^1\) is the Supreme Court's most recent interpretation of the rules governing the allocation of the burden of proof in Title VII disparate treatment cases.\(^2\) In Hicks, the Court held that a plaintiff in a disparate treatment case is not entitled to judgment as a matter of law for disproving the defendant's proffered explanation for its alleged discriminatory conduct.\(^3\) Instead, the plaintiff must make the much different and greater showing that the defendant unlawfully discriminated.\(^4\) Hicks plainly establishes that the question of discrimination is not to be treated differently than other ultimate questions of fact in the federal courts.\(^5\)

Hicks marks a step forward in the Court's struggle to develop a coherent framework for allocating the burden of proof in disparate treatment cases in a manner that is fair to both plaintiffs and defendants.\(^6\) Prior Court decisions dealing with the burdens allocation problem were plagued with vague and ambiguous language, leading to major differences in interpretation among the courts of appeals.\(^7\) The

\(^1\) 113 S. Ct. 2742 (1993).
\(^2\) Disparate treatment is the most easily understood type of discrimination prohibited by Title VII. It refers to a claim that an employer is treating "some people less favorably than others because of their race, color, religion, sex, or national origin." International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977). Proof of discriminatory motive or intent is critical in these cases. However, under appropriate circumstances discriminatory motive can be inferred from the mere fact of differences in treatment. Id.
\(^3\) St. Mary's Honor Ctr. v. Hicks, 113 S. Ct. 2742, 2745 (1993).
\(^4\) Id.
\(^5\) Id. at 2756. In Hicks, the Court reaffirmed what it had said in United States Postal Services Board of Governors v. Aikens, 460 U.S. 711, 716 (1983):

[The question facing triers of fact in discrimination cases is both sensitive and difficult. The prohibitions against discrimination contained in the Civil Rights Act of 1964 reflect an important national policy. There will seldom be "eyewitness" testimony as to the employer's mental processes. But none of this 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.]

Id. (citations omitted).

\(^6\) Although Hicks only addresses the allocation of the burden of proof in Title VII cases, the decision is likely to have an impact on other types of cases as well. This is because the McDonnell Douglas framework has been adapted for use in resolving claims under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-34 (1988 & Supp. V 1993); the antidiscrimination provision of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1140 (1988); and the Civil Rights Act of 1866, 42 U.S.C. § 1981 (1988). See, e.g., Patterson v. McLean Credit Union, 491 U.S. 164, 186 (1989)(applying McDonnell Douglas to a discrimination claim under 42 U.S.C. § 1981.)

\(^7\) See infra text accompanying notes 15-43.
Hicks decision resolves these difficulties by adopting rules consistent with the general principles of civil litigation.8

This Note examines the Hicks decision and its likely effects on future Title VII disparate treatment claims. The Note begins with a brief review of the case law governing the burden of proof and then outlines the facts and procedural history of the Hicks case, including both the majority and dissenting opinions. The analysis of the majority is supported as the logical and necessary result of two antecedents: Federal Rule of Evidence 3019 and the Court's opinion in Texas Department of Community Affairs v. Burdine.10 The potential impact of the decision on Title VII disparate treatment litigation is also discussed.

The Note concludes that the Court's decision to predicate Title VII liability upon an actual finding of unlawful intentional discrimination was correct both as a matter of law and as a matter of policy. Hicks does increase the plaintiff's burden in disparate treatment cases.11

8. The Supreme Court has frequently stated its intention to subject civil rights litigation to the same procedural rules as all other civil litigation in the federal courts. See Martin v. Wilks, 490 U.S. 755, 769 (1989)(holding that under Federal Rules of Civil Procedure, white fire fighters who had failed to intervene in earlier employment discrimination proceeding in which consent decrees were entered could challenge employment decisions taken pursuant to those decrees); Wards Cove Packing Co. v. Atonio, 490 U.S. 642, (1989)(holding that civil rights litigation governed by the "usual method for allocating persuasion and production burdens in federal courts"); id. at 673 (Stevens, J., dissenting)("Ordinary principles of fairness require that Title VII actions be tried like 'any lawsuit.'); Price Waterhouse v. Hopkins, 490 U.S. 228, 253 (1989)(Brennan, J.)("Conventional rules of civil litigation generally apply in Title VII cases."); Patterson v. McLean Credit Union, 485 U.S. 617, 619 (1988)(per curiam)("We do not believe that the Court may recognize any such exception to the abiding rule that it treat all litigants equally: that is, that the claim of any litigant for special application of a rule to its case should not be influenced by the Court's view of the worthiness of the litigant in terms of extra legal criteria."); United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 716, 718 (1983). Although many of these cases were partially reversed by the Civil Rights Act of 1991, there was no evidence that Congress intended to exempt Title VII from the general rules and procedures applicable to civil litigation. See Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified as amended in scattered sections of 2 U.S.C., 16 U.S.C., 29 U.S.C., 42 U.S.C., and 50 U.S.C. (Supp. V. 1993)).
9. Fed. R. Evid. 301. The rule provides that

In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.
Id.
11. The Court's decision in Hicks can be viewed as either an increase in the plaintiff's burden or a clarification of the law governing the plaintiff's burden, depending on one's view of the prior law. Since there is much uncertainty surrounding the
However, that increase is not inappropriate or unfair. The proper construction and operation of Rule 301 of the Federal Rules of Evidence mandate that the Title VII disparate treatment plaintiff carry the burden of convincing the factfinder that the defendant unlawfully discriminated.12 To allow the plaintiff to prevail upon a lesser showing would be contrary to established law and would ignore the Supreme Court's repeated admonition that the Title VII plaintiff at all times bears the "ultimate burden of persuasion."13

II. BACKGROUND

Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating against individuals on the basis of "race, color, religion, sex or national origin."14 Since the passage of the Act, courts have struggled to develop appropriate standards to evaluate claims of intentional employment discrimination. The Supreme Court first addressed the problem in McDonnell Douglas Corp. v. Green.15 In that case, the Court established a three-stage framework for allocating the burdens and order of proof in disparate treatment cases.

Under McDonnell Douglas, the plaintiff bears the initial burden of proving a prima facie case of discrimination. This may be done by showing that: (1) the plaintiff is a member of a protected group; (2) the plaintiff applied and was qualified for a job for which the employer was seeking applicants; (3) that despite the plaintiff's qualifications he was rejected; and (4) that after the plaintiff was rejected, the position remained open and employer continued to seek applicants from

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12. See infra text accompanying notes 89-111.
14. Section 703(a)(1) of the Civil Rights Act of 1964 provides that
[j]t shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discrimi
nate against any individual with respect to his compensation, terms, con-
ditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . .

persons with the plaintiff's qualifications. If the plaintiff succeeds in establishing a prima facie case, the burden shifts to the defendant in the second stage to "articulate a legitimate, nondiscriminatory reason" that explains its challenged conduct. Assuming that the defendant can meet this burden, the inquiry then proceeds to the third stage of the McDonnell Douglas framework. There the plaintiff must be given the opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were, in fact, a pretext for discrimination.

Although the Court's opinion in McDonnell Douglas constituted an important first step in developing a coherent framework for litigating disparate treatment cases, it left many important questions unanswered. One important question concerned the precise meaning of the prima facie case. The phrase "prima facie case" may be used to denote not only the establishment of a mandatory rebuttable presumption, but may also be used by courts to describe the plaintiff's burden of producing enough evidence to permit the trier of fact to infer the fact at issue. A major failing of the McDonnell Douglas opinion is that the Court failed to specify which meaning it meant to attach to the "prima facie case."

Another weakness in the opinion was the vague way in which the Court described the burden that shifts to the defendant upon proof of

16. Id. at 802. Although the elements of a prima facie case outlined in McDonnell Douglas referred to a hiring case, the Court did not establish an inflexible standard. The precise elements that must be proven to establish a prima facie case will necessarily vary depending on the nature of the case. For examples of how the McDonnell Douglas articulation of the plaintiff's case has been modified for other types of claims, see Spears v. Board of Educ., 843 F.2d 882 (6th Cir. 1988)(job assignment); Falcon v. General Tel. Co., 815 F.2d 317 (6th Cir. 1987)(promotion); Kent County Sheriff's Assn. v. County of Kent, 826 F.2d 1485 (6th Cir. 1987)(transfer); Feazell v. Tropicana Prod., Inc., 819 F.2d 1036 (11th Cir. 1987)(compensation); Johnson v. Legal Servs., 813 F.2d 893 (8th Cir. 1987)(discipline); Coston v. Plitt Theatres, Inc., 831 F.2d 1321 (7th Cir. 1987)(layoffs), cert. denied, 485 U.S. 1007, vacated on other grounds, 486 U.S. 1020 (1988); Nix v. WLCY Radio/Rahall Communication, 738 F.2d 1181 (11th Cir. 1984)(discharge).


18. Id. at 804.

19. Id. at 804-05.


21. The difference is important and legally significant. If a prima facie case creates an inference of discrimination, and the defendant does not articulate a legitimate nondiscriminatory reason, then a court could, but would not be required to, find in favor of the plaintiff. In contrast, if a prima facie case creates a presumption, a court under the same circumstances would be required to find for the plaintiff. 9 John H. Wigmore, Evidence § 2494 (3d ed. 1940).
a prima facie case by the plaintiff. 22 The Court described the defendant's burden as one of "articulating some legitimate, nondiscriminatory reason for the employee's rejection." 23 Adoption of the "articulate" standard resulted in much confusion in the lower courts. Some courts emphasized the Court's choice of the word "articulate" and imposed upon the defendant only the burden of producing evidence of a legitimate, nondiscriminatory reason. 24 Other courts held that assigning such a minimal burden to the defendant was meaningless and therefore shifted the burden of persuasion onto the defendant to prove that its challenged conduct was the result of a legitimate nondiscriminatory reason. 25

The Supreme Court addressed the burdens allocation problem again in Furnco Construction Corp. v. Waters. 26 In Furnco, the Court affirmed the circuit court's ruling that the plaintiffs had established a prima facie case under McDonnell Douglas, but then struggled to explain the exact burden that shifted to the defendant:

When the prima facie case is understood in light of the opinion in McDonnell Douglas, it is apparent that the burden which shifts to the employer is merely that of proving that he based his employment decision on a legitimate consideration, and not an illegitimate one . . . . To dispel the adverse inference from a prima facie [case] under McDonnell Douglas, the employer need only "articulate some legitimate nondiscriminatory reason." 27

The Furnco opinion did not resolve the conflict among the lower courts. In fact, if anything, the Furnco opinion added to the confusion below by using both "articulate" and "prove" in the same paragraph to describe the defendant's burden. 28

Some of the confusion surrounding the burdens allocation problem was finally cleared up in the Court's opinion in Texas Department of Community Affairs v. Burdine. 29 In Burdine, the Court held that the plaintiff's establishment of a prima facie case raises a rebuttable presumption that the defendant intentionally discriminated against the plaintiff. 30 Thus, once the plaintiff proves a prima facie case, a pre-

22. Belton, supra note 20, at 1237.
27. Id. at 577-78 (emphasis added)(citation omitted).
28. Id.
30. The Court added the additional requirement that the prima facie case be proved by a preponderance of the evidence. Id. at 253-54.
sumption of discrimination arises which, if not rebutted by the defendant, requires the court to enter judgment for the plaintiff. The defendant may rebut the presumption "by producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason." The defendant is not required to persuade the court that it was actually motivated by the proffered reasons: "[i]t is sufficient that the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff." After Burdine, it was beyond dispute that only a production burden shifted to the defendant upon the plaintiff's proof of a prima facie case.

The Court in Burdine also discussed the "pretext" or third stage of the McDonnell Douglas framework. The "pretext" stage takes place after the defendant has met its burden of articulating a legitimate, nondiscriminatory reason for the challenged action and has thus successfully rebutted the presumption of discrimination created by the plaintiff's prima facie case. At this point the presumption, having been rebutted, drops from the case and the plaintiff is given "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."

Unfortunately, the lower courts interpreting Burdine reached differing conclusions concerning the meaning of "pretext for discrimination" and how it may be proven. The majority of the courts of appeals interpreted "pretext for discrimination" as pretext in the generic sense, meaning any fabricated explanation for an action. Accordingly, those courts have held that a plaintiff may prove pretext, and thus prove intentional discrimination, by demonstrating that the reasons offered by the defendant for its challenged employment action are

31. Id. at 254.
32. Id. at 254-55. The defendant must set forth the reasons for its actions through the introduction of legally sufficient evidence. An articulation not admitted into evidence will not be sufficient. The defendant cannot discharge its burden through an answer to a complaint or an argument by counsel. The defendant's explanation of a legitimate, nondiscriminatory reason must be clear and reasonably specific. Id.
33. Id. at 253-54.
34. Id. at 253 (quoting McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804 (1973)).
untrue. Under this "pretext-only" rule, the plaintiff need not present any other direct or indirect evidence of discriminatory animus, because the court can infer that the defendant intentionally discriminated based upon the defendant's lack of veracity concerning its true motivations.

In contrast to the approach taken by these courts, a substantial minority of the courts of appeals adopted what has been termed the "pretext-plus" rule. These courts reject the notion that a plaintiff can prevail in a disparate treatment case merely by proving the defendant's articulated reasons to be false. They interpret Burdine's "pretext for discrimination" more narrowly to mean a particular type of pretext or fabricated explanation: one designed to hide the fact that the defendant unlawfully discriminated. Consequently, courts that adhere to the "pretext-plus" rule require plaintiffs to produce some additional evidence beyond that necessary to prove the prima facie case and the defendant's lack of veracity in order to win.


37. For a further discussion of the "pretext-plus" rule, see id. at 81-100.

38. See, e.g., Spencer v. General Elec. Co., 894 F.2d 651, 659 (4th Cir. 1990)("If the presumption is rebutted, the burden of production returns to the plaintiff to show that the defendant's proffered nondiscriminatory reasons are pretextual and that the employment decision was based on a sexually-discriminatory criterion."); Friedel v. City of Madison, 832 F.2d 965, 975 (7th Cir. 1987)("[Plaintiffs must allege and support not only pretext, but also the [defendant's] actions were pretext for discrimination based on a prohibited characteristic . . ."); White v. Vathally, 732 F.2d 1037, 1042-43 (1st Cir.)("Merely casting doubt on the employer's articulated reason does not suffice to meet the plaintiff's burden of demonstrating discriminatory intent . . .."); cert. denied, 469 U.S. 933 (1984); Clark v. Huntsville City Bd. of Educ., 717 F.2d 525, 529 (11th Cir. 1983)("[A] simple finding that the defendant did not truly rely on its proffered reason, without a further finding that the defendant relied instead on race, will not suffice to establish Title VII liability.").

39. See, e.g., Keyes v. Secretary of the Navy, 853 F.2d 1016, 1026 (1st Cir. 1988)(holding that plaintiff must show not only pretext, but also "that those reasons were pretexts aimed at masking sex or race discrimination"); Loeb v. Textron, Inc., 600 F.2d 1003, 1018 (1st Cir. 1979)(stating that pretext means cover-up for age discrimination); EEOC v. Clay County Rural Tel., 694 F. Supp. 563, 575 (S.D. Ind. 1988)("[T]he plaintiff bears the burden of not only persuading the court that the defendant dissembled, but also that the defendant's pretextual reason hides an unlawful one.").

40. The question of just how much "plus" evidence is required for the plaintiff to prevail in the "pretext" stage of the McDonnell Douglas framework is a matter of debate both between and within the courts of appeals. At one extreme there are cases which have held that if the plaintiff proves that the defendant's proffered reason for its challenged action is false, the trier of fact can, but is not compelled to, find that the real reason for the defendant's action was prohibited discrimination. E.g., Visser v. Packer Engineering Assoc., Inc., 924 F.2d 655, 657 (7th Cir. 1991). Courts that follow this approach do not have a formal requirement that additional evidence be introduced. However, it is important to note that a show-
The divergence of opinion among the lower courts on the “pretext” issue highlighted conceptual and analytical problems in the Burdine opinion. One major weakness of the opinion was the Court's vague and ambiguous description of the plaintiff's burden at the third or “pretext” stage of the McDonnell Douglas framework. In portions of the opinion the Court uses language which could support the interpretation of the “pretext only” courts, but in others uses language which could support the interpretation of the “pretext-plus” courts. Another major shortcoming of Burdine was the Court's failure to provide substantial analysis concerning the applicability of Rule 301 of the Federal Rules of Evidence. The Court merely cited Rule 301 without any discussion of the rule's proper construction and application. These serious deficiencies set the stage for the Court's decision in St. Mary's Honor Center v. Hicks.

III. ST. MARY'S HONOR CENTER V. HICKS

A. Facts and Procedural History

Melvin Hicks, an African-American, was employed at St. Mary's Honor Center, a minimum security correctional facility, as a corrections officer from 1978 to 1984. St. Mary's hired Hicks as a corrections officer in 1978 and promoted him to shift commander, one of six supervisory positions at St. Mary's, in February 1980.

In 1983, the Missouri Department of Corrections and Human Resources (MDCHR) investigated the administration of St. Mary's after receiving numerous complaints concerning the conditions at the facili-

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41. For example, the Court states in Burdine that

[i]f the defendant carries this burden of production, the presumption raised by the prima facie case is rebutted, and the factual inquiry proceeds to a new level of specificity. Placing this burden of production on the defendant thus serves simultaneously to meet the plaintiff’s prima facie case by presenting a legitimate reason for the action and to frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext.

Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 255-56 (1981)(citations omitted).

42. Id. at 256 n.8.
43. 113 S. Ct. 2742 (1993).
44. Id. at 2746.
45. Id.
The investigation revealed a poorly maintained institution with substandard upkeep, inadequate security measures, and no effective rules or regulations. As a result, extensive changes of supervisory personnel were made in January 1984. Hicks was retained at his position, but John Powell became the new chief of custody and Steve Long was made the new superintendent.

Before the 1984 personnel changes, Hicks had a satisfactory employment record. However, under the supervision of John Powell, he became the subject of repeated and increasingly severe disciplinary actions. Hicks was suspended for five days on March 3, 1984, because his subordinates violated institutional rules. Later that same month, he received a letter of reprimand for allegedly failing to conduct an adequate investigation into a brawl between inmates that occurred on his shift. In April 1984, Hicks was demoted from shift commander to corrections officer for his failure to ensure that his subordinates recorded their use of a St. Mary’s vehicle into the official logbook. Finally, after a verbal altercation between Powell and Hicks, MDCHR fired Hicks in June 1984.

Hicks then filed suit against the defendant, St. Mary’s Honor Center, alleging that St. Mary’s had violated section 703(a)(1) of Title VII of the Civil Rights Act of 1964 by demoting and discharging him because of his race. The district court found that Hicks had established a prima facie case of racial discrimination; that St. Mary’s had rebutted that presumption by introducing evidence of two legitimate, nondiscriminatory reasons for its actions; and that Hicks had proved that St. Mary’s proffered reasons were not, in fact, the real reasons for his demotion and discharge. Despite these findings, the district court held that Hicks had not carried his ultimate burden of showing that the adverse actions taken against him were racially motivated.

The United States Court of Appeals for the Eighth Circuit set aside this determination, holding that Hicks was entitled to judgment as a matter of law once he had proved that all of the defendants’ proffered reasons were false. The court reasoned that because all of the de-
fendants’ proffered reasons were discredited, the “defendants were in no better position than if they had remained silent, offering no rebuttal to an established inference that they had unlawfully discriminated against plaintiff on the basis of his race.”

B. Majority Opinion

The United States Supreme Court reversed the decision of the Eighth Circuit. Writing on behalf of a 5-4 majority, Justice Scalia held that “the trier of fact’s rejection of an employer’s asserted reasons for its actions does not entitle the plaintiff to judgment as a matter of law.” Title VII liability may be imposed upon a defendant only when the factfinder determines that the defendant has unlawfully discriminated. Courts may not substitute the “different and much lesser finding that the employer’s explanation of its action was not believable.”

Justice Scalia stated that any doubt created by Burdine “that falsity of the employer’s explanation is alone enough to sustain a plaintiff’s case was eliminated by United States Postal Service Board of Governors v. Aikens.” There the Court said in language that cannot reasonably be mistaken that “the ultimate question [is] discrimination vel non.”

In reaching this decision, the Court clarified the procedural framework developed in McDonnell Douglas for litigating Title VII claims. Under the McDonnell Douglas scheme, once the plaintiff has established, by a preponderance of the evidence, a prima facie case of discrimination, a presumption arises that the defendant unlawfully discriminated. This presumption requires judgment in favor of the plaintiff unless the defendant produces evidence that sets forth the reasons for the plaintiff’s rejection and raises a genuine issue of fact as to whether it discriminated against the plaintiff.

Once the defendant has produced evidence of nondiscriminatory reasons, whether ultimately persuasive or not, it has satisfied its burden of production and has rebutted the presumption of intentional discrimination. The presumption then “drops from the case and the factfinder must then decide the ultimate factual issue of whether the defendant intentionally discriminated against the plaintiff.”

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55. Id. (quoting Hicks v. St. Mary’s Honor Ctr., 970 F.2d 487, 492 (8th Cir. 1992), rev’d, 113 S. Ct. 2742 (1993)).
57. Id.
58. Id. (citing United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711 (1983)).
61. Id. at 254-55.
compel judgment for the plaintiff for merely disproving the defendant's proffered reasons, argued Scalia, "would disregard the fundamental principle of Rule 301 that a presumption does not shift the burden of proof, and would ignore the admonition that the Title VII plaintiff at all times bears the ultimate burden of persuasion."\(^6\)

C. Dissenting Opinion

Justice Souter wrote a vigorous dissent which accused the majority of abandoning settled law and adopting "a scheme that will be unfair to plaintiffs, unworkable in practice, and inexplicable in forgiving employers who present false evidence in court."\(^6\) According to the dissent, the Eighth Circuit was correct in holding that the plaintiff was entitled to judgment as a matter of law for showing that the reasons offered by the defendant were false. The dissent agreed with the majority on the first two stages of the \emph{McDonnell Douglas} framework, but offered a different view of the third or pretext stage.

The dissent acknowledged that the majority was correct in the analysis that the presumption of discrimination "drops from the case" when the defendant meets its burden of producing a legitimate, non-discriminatory reason for its action.\(^6\) However, the dissent asserted that the defendant's obligation to articulate a justification served an important function neglected by the majority: "to frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext."\(^6\) Thus, for the dissent, the production of legitimate, nondiscriminatory reasons by the defendant served the important function of narrowing the factual inquiry to the question of the defendant's veracity.\(^6\)

Consistent with its own paradigm, the dissent also disagreed with the majority over the meaning of "pretext." In the dissent's view, "pretext" means pretext in the generic sense, meaning any fabricated ex-

\(^{63}\) St. Mary's Honor Ctr. v. Hicks, 113 S. Ct. 2742, 2745 (1993).
\(^{64}\) \textit{Id.} at 2761 (Souter, J., dissenting). Justice Souter was joined by Justices White, Blackmun, and Stevens.
\(^{65}\) \textit{Id.} at 2759 (Souter, J., dissenting)(quoting Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 255 n.10 (1981)).
\(^{66}\) \textit{Id.} (Souter, J., dissenting)(quoting Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 255-56 (1981)).
\(^{67}\) \textit{Id.} at 2759 n.2 (Souter, J., dissenting). Justice Souter stated:

The majority contends that it would "fly" in the face of our holding in \textit{Burdine} to "resurrect" this mandatory presumption at a later stage, in cases where the plaintiff proves that the employer's proffered reasons are pretextual. Hicks does not argue to the contrary. The question presented in this case is not whether the mandatory presumption is resurrected (everyone agrees it is not), but whether the factual inquiry is narrowed by the \emph{McDonnell Douglas} framework to the question of pretext.

\textit{Id.} (Souter, J., dissenting)(citations omitted).
plation for an action. To support its analysis, the dissent pointed to language in Burdine which states that the plaintiff may meet his burden of showing pretext in either of two ways: "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence."

IV. ANALYSIS

A. Overview

Although the majority and the dissent were sharply divided on the outcome of the Hicks case, they agreed on the basic structure of the McDonnell Douglas procedural framework. Under McDonnell Douglas, the plaintiff bears the initial burden of establishing a prima facie case of discrimination by a preponderance of the evidence. Once the plaintiff satisfies this initial burden, the defendant is required to articulate a nondiscriminatory reason for its challenged employment action. If the defendant cannot meet this burden of production, the plaintiff is then entitled to judgment as a matter of law. However, if the defendant does satisfy its burden of production by articulating a legitimate, nondiscriminatory reason for its action, the presumption of discrimination raised by the plaintiff's prima facie case is rebutted and drops from the case. The case then moves into the pretext stage, where the plaintiff must meet the ultimate burden of proving that the defendant unlawfully discriminated in order to prevail.

It was here, at the final or pretext stage of the McDonnell Douglas framework, that the majority and dissenting opinions sharply diverged. The majority concluded that a plaintiff is not entitled to judgment as a matter of law for disproving the defendant's proffered explanation for its alleged discriminatory conduct. To prevail, the

68. Id. at 2759-61 n.5 (Souter, J., dissenting). Justice Souter accused the majority of rewriting McDonnell Douglas by replacing passages where "pretext" appears with "pretext for discrimination." Justice Souter expressed serious doubts about whether such a change in diction alters the meaning of the crucial passages. He then pointed to language in Burdine that states that the plaintiff satisfies his burden simply by proving that the employer's explanation does not deserve credence. Id. (Souter, J., dissenting)(citations omitted).

69. Id. at 2760 (quoting Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981)).

70. Id. at 2747; id. at 2758-59 (Souter, J., dissenting).

71. Id. at 2758-59 (Souter, J., dissenting).

72. Id. at 2747; id. at 2758 (Souter, J., dissenting).

73. Id. at 2747 ("If the defendant carries this burden of production, the presumption raised by the prima facie case is rebutted.")(citation omitted); id. at 2759 (stating "if the employer meets the burden, the presumption entitling the plaintiff to judgment "drops from the case") (Souter, J., dissenting)(citation omitted).

74. Id. at 2747-48; id. at 2760 (Souter, J., dissenting).

75. Id. at 2749.
plaintiff must make the much different and greater showing that the
defendant unlawfully discriminated.76 Thus, a factfinder could infer
the ultimate fact of intentional discrimination from its disbelief of the
defendant's proffered justifications, but it would not be required to do
so.77 The dissent, on the other hand, would mandate judgment as a
matter of law whenever the plaintiff shows the defendant's proffered
reasons to be false.78 The crucial difference in the two approaches is
that the majority requires that there be a judicial finding of inten-
tional discrimination before liability under Title VII attaches.79 The
dissent dispenses with this requirement, using the defendant's men-
dacity, instead, as the basis for liability.

At the heart of the Hicks case is a battle over the proper meaning
of "pretext for discrimination" and how it may be proved. The dissent
argues that "pretext for discrimination" is synonymous with "pretext"
in the generic sense, meaning any fabricated explanation for an ac-
tion. Thus, according to Justice Souter, the plaintiff can prove pretext
for discrimination by disproving the defendant's proffered reasons for
its challenged conduct.80 Under this view, the production of legiti-
mate, nondiscriminatory reasons by the defendant not only rebuts
the presumption of discrimination, but also serves the important function
of narrowing the factual inquiry to the question of the defendant's ve-
racity.81 The employer, in other words, "has a 'burden of production'
that gives it the right to choose the scope of the factual issues to be
resolved by the factfinder."82

In contrast, the majority gives "pretext for discrimination" a more
narrow meaning. According to the majority, "pretext for discrimina-
tion" refers to only one type of concealed motive: a motive based on

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76. Id.
77. Id. The Court stated:
The factfinder's disbelief of the reasons put forward by the defendant
(particularly if disbelief is accompanied by a suspicion of mendacity)
may, together with the elements of the prima facie case, suffice to show
intentional discrimination. Thus, rejection of the defendant's proffered
reasons, will permit the trier of fact to infer the ultimate fact of inten-
tional discrimination, and the Court of Appeals was correct when it
noted that, upon such rejection, "[n]o additional proof is required."
Id. (footnote and citation omitted).
78. Id. at 2760 (Souter, J., dissenting).
79. Id. at 2749. The Court explained in a footnote that "[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." Id. at 2749
n.4 (emphasis added).
80. Id. at 2760 (Souter, J., dissenting).
81. Id. at 2759 (Souter, J., dissenting).
82. Id. (Souter, J., dissenting).
unlawful discrimination. The plaintiff, under this approach, must convince the trier of fact that the defendant unlawfully discriminated before Title VII liability will be imposed. A mere showing that the defendant's explanation is unworthy of credence is not enough to compel judgment for the plaintiff as a matter of law. This result is required by the Court's application of Federal Rule of Evidence 301 which governs all presumptions under federal statutes. According to Rule 301, after the defendant has rebutted the presumption by producing evidence of a legitimate, nondiscriminatory reason for its conduct, the presumption drops from the case. The McDonnell Douglas procedural framework then becomes irrelevant, and the trier of fact is required to decide the ultimate question of fact in a disparate treatment case: whether the plaintiff has proven that the defendant has unlawfully discriminated.

The divergence in the opinions can be traced to the dissent's fundamental misunderstanding of the nature and operation of a presumption under federal law. This Note, therefore, adopts the analysis of the majority as the logical and necessary result of the proper construction and application of Federal Rule of Evidence 301 to the McDonnell Douglas-Burdine presumption. In support of this position, the Note advances the following arguments. First, Rule 301 of the Federal Rules of Evidence governs all presumptions in civil litigation under the federal statutes, including Title VII disparate treatment cases. Second, Rule 301 follows the view of presumptions propounded by Professor Thayer. Third, Burdine recognized that Rule 301 was applicable to disparate treatment cases and incorporated it into the McDonnell Douglas framework. Fourth, understanding Burdine according to the Thayer view of presumptions leads directly to the position taken by the Court in Hicks. Finally, any doubt as to the correctness of the majority's position was eliminated by the Court's decision in United States Postal Service Board of Governors v. Aikens.

83. Id. at 2752. The majority believes that “pretext” means “pretext for the sort of discrimination prohibited by [Title VII]” (pretext for discrimination). Id. at 2752 n.6 (citations omitted).
84. Id. at 2751. The Court stated that it had “no authority to impose liability upon an employer for alleged discriminatory employment practices unless an appropriate factfinder determines, according to proper procedures, that the employer has unlawfully discriminated.” Id. (emphasis added).
85. Fed. R. Evid. 301.
86. Id.
B. Rule 301 Governs All Presumptions Under the Federal Statutes

Rule 301 of the Federal Rules of Evidence was intended by Congress to govern all presumptions in civil litigation under federal statutes.90 Only presumptions that were specifically created by an Act of Congress and whose terms conflict with the provisions of the rule were exempted.91 All other presumptions, whether created by common law or by judicial construction, are governed by Rule 301.92

In the congressional debates over the Federal Rules of Evidence, including Rule 301, there was no indication that these rules were not to be applied to Title VII litigation. Indeed, the language of Rule 301 was modified twice to ensure that the rule would apply to all civil litigation and not apply to any criminal matters.93 Consequently, the judicially created McDonnell Douglas-Burdine "prima facie case" presumption is governed by Rule 301.94

C. Rule 301 Follows the Thayer View of Presumptions

Long before the enactment of the Federal Rules of Evidence, legal scholars debated the proper operational effect of presumptions. Two primary theories emerged from the academy: one associated with Professor Thayer and the other with Professor Morgan. Professor Thayer's view advocated the so-called "bursting bubble" theory, in which the sole effect of a presumption is to shift the burden to the

89. 1 DAVID W. LOUISELL & CHRISTOPHER B. MUELLER, FEDERAL EVIDENCE § 68, at 540 (1977).
90. Id.
91. 10 JAMES W. MOORE, MOORE'S FEDERAL PRACTICE ¶ 301.02, at III-14 (2d ed. 1988) ("If the statute does not declare the effect, [of a presumption] then the Thayer effect stated in Rule 301 would govern.").
94. For a more detailed history of Rule 301, see Hugh Joseph Beard Jr., Title VII and Rule 301: An Analysis of the Watson and Atonio Decisions, 23 AKRON L. REV. 105 (Fall 1989).
opponent to produce evidence contrary to the presumed fact.95 Once
the opponent has satisfied this burden of production, the presumption
is dispelled and the factfinder is required to disregard whatever role
the presumption may have had in the trial. The factfinder then pro-
cceeds to decide the ultimate issues in the case. Professor Morgan’s
theory, on the other hand, posits that a presumption shifts both the
burden of production and the burden of persuasion.96 This approach
views the use of presumptions as a means of advancing desirable so-
cial policy.

In 1965, Chief Justice Earl Warren appointed an Advisory Com-
mittee to formulate rules of evidence for use in the federal courts.97
After much debate, the Advisory Committee recommended that the
Morgan theory of presumptions be accepted over the view propounded
by Professor Thayer. This recommendation was accepted by the
Supreme Court and submitted to Congress.98

The recommendation of the Advisory Committee and the Court
met with considerable opposition from the bench and the bar on the
grounds that a Morgan presumption shifted too great a burden of
proof.99 This led the House of Representatives to propose a rule that
was a compromise between the Morgan theory and the Thayer the-
ory.100 This proposal was severely criticized as unworkable.101 For
example, Professor Edward W. Cleary, Reporter for the Advisory Com-
mittee on the Federal Rules of Evidence, stated that the House propo-
sal on Rule 301 was probably the only instance in which “what the
House has done has been to make a rule that is just totally unwork-
able. The other disagreements that we have with the House are sim-
ply matters of judgment. But this one is not. I think we can say flatly
it just won’t do.”102

95. JAMES B. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 336 (Augustus M. Kelly 1969)(1898).
210-213 (1941)).
98. Id.
99. Id. § 301[01], at 301-18 to 301-19 & n.2.
100. The House proposal stated:
In all civil actions and proceedings not otherwise provided for by an Act
of Congress or by these rules a presumption imposes on the party
against whom it is directed the burden of going forward with the evi-
dence, and even though met with contradicting evidence, a presumption
is sufficient proof of the fact presumed to be weighed by the trier of facts.
Rules of Evidence: Hearings Before the Special Subcomm. on Reform of Federal
Criminal Laws of the House Comm. on the Judiciary, 93d Cong., 1st Sess. 221
(1973). See 10 JAMES W. MOORE, MOORE’S FEDERAL PRACTICE ¶ 301.01 [7], at III-
11 (2d ed. 1988).
101. Rules of Evidence: Hearings on H.R. 5463 Before the Senate Comm. on the Judici-
102. Id.
During the Senate's consideration of Rule 301, substantial support was shown for the Thayer view of presumptions. It was supported by both the American Law Institute and the Model Code of Evidence. One prominent member of the bar, Richard H. Keatinge, the former chairman of the California Evidence Law Revision Commission, was an outspoken supporter of the Thayer bursting bubble theory.

Adoption of the "bursting bubble theory" will encourage the use of presumptions. The use of presumptions in this manner will still serve to expedite trials. The minute controverting evidence is introduced the presumption should disappear. Once controverting evidence is introduced the presumption ceases to have any value. In our California code we have the specific provision that presumptions are not evidence and they affect merely the burden of producing evidence. If we have to make a choice it would definitely be the "bursting bubble theory," because once the controverting evidence is introduced, as a practical matter, you know that the jury or the judge is going to look at both sides of the case anyway, and, as a practical matter, I don't care how the instruction is given, or how you handle it, both sets of evidence, both for and against the basic facts, are going to get weighed by the finder of fact whether a jury or a judge. Therefore, as a practical matter, if you have to make a choice, the "bursting bubble" is the choice.

In the face of increasing support for the Thayer theory, the Senate rejected both the Supreme Court's and the Advisory Committee's Morgan approach and the House compromise rule. Instead, the Senate adopted a version of Rule 301 that was essentially the Thayer "bursting bubble" approach. The Senate version of Rule 301 read as follows:

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

The disagreement between the House and Senate on Rule 301 and other rules was taken up by a conference committee appointed by both houses. The conference committee eventually accepted the Senate language. The Conference Report described in detail the operation of the proposed Senate version of the Rule:

Under the Senate Amendment, a presumption is sufficient to get a party past an adverse party's motion to dismiss made at the end of his case in chief. If the adverse party offers no evidence contradicting the presumed fact, the court will instruct the jury that if it finds the basic facts, it may presume the

103. WEINSTEIN & BERGER, supra note 97 § 300(01), at 300-5 (1989).
106. See 120 CONG. REC. 36,925 (1974).
existence of the presumed fact. If the adverse party does offer evidence con-
tradicting the presumed fact, the court cannot instruct the jury that it may
presume the existence of the presumed fact from proof about the basic facts.
The court may, however, instruct the jury that it may infer the existence of
the presumed fact from proof of the basic facts.108

A careful examination of the history of the adoption of Rule 301
makes it quite clear that Congress intended Rule 301 to be governed
by the Thayer “bursting bubble” theory of presumptions.109 The Mor-
gan view, which was supported by both the Advisory Committee and
the Supreme Court, was carefully considered by the House and the
Senate and yet ultimately rejected. Indeed, to the extent that the con-
ference committee’s understanding can be said to deviate from the
Thayer view, it is not toward that of endowing presumptions with a
greater effect (the Morgan view). Rather, it is toward that of granting
a lesser effect to a presumption in which a finding is not compelled,
but merely permitted (“may presume the existence of the presumed
fact”), when the defendant fails to offer any rebuttal evidence to the
presumption.110 Thus, it is beyond dispute that presumptions under
the federal statutes are uniformly governed by the Thayer “bursting
bubble” view of presumptions incorporated by Congress into Rule
301.111

D. Burdine Recognized the Applicability of Rule 301

Whatever doubt that may have existed regarding the meaning of
Rule 301 and its applicability to employment discrimination cases was
eliminated by the Court’s opinion in Texas Department of Community
Affairs v. Burdine.112 Although the Court in Burdine did not provide
much analysis concerning the application of Rule 301, it did essen-
tially describe the operation of a Thayer presumption and cite to both
Professor Thayer’s treatise and Rule 301.113 Justice Powell, writing
for a unanimous Court in Burdine, discussed the defendant’s burden
under the McDonnell Douglas procedural framework:

The burden that shifts to the defendant, therefore, is to rebut the presump-
tion of discrimination by producing evidence that the plaintiff was rejected, or
someone else was preferred for a legitimate, nondiscriminatory reason. The
defendant need not persuade the court that it was actually motivated by the
proffered reasons. . . . If the defendant carries this burden of production, the
presumption raised by the prima facie case is rebutted, and the factual in-
quiry proceeds to a new level of specificity.114

108. Id. at 7099.
110. See Belton, supra note 20, at 1235-36.
111. Rule 301 by its own terms governs all presumptions under the federal statutes,
unless Congress has otherwise provided an exception. Fed. R. Evm. 301.
113. Id. at 256 nn.8&10.
114. Id. at 254-55 (1981)(citation and footnotes omitted).
This passage, if read in accordance with the applicable footnotes, leaves little doubt that the Court intended the McDonnell Douglas-Burdine presumption to be governed by the Thayer approach and Rule 301. For example, footnote eight makes clear that "[t]he word 'presumption' properly used refers only to a device for allocating the production burden." This is followed immediately by a citation to Federal Rule of Evidence 301. Then, in footnote ten of the opinion, the Court cites Professor Thayer's Preliminary Treatise on Evidence and then explains the effect of the defendant's rebuttal evidence. It states:

In saying that the presumption drops from the case, we do not imply that the trier of fact no longer may consider evidence previously introduced by the plaintiff to establish a prima facie case. A satisfactory explanation by the defendant destroys the legally mandatory inference of discrimination arising from the plaintiff's initial evidence. Nonetheless, this evidence and inferences properly drawn therefrom may be considered by the trier of fact on the issue of whether the defendant's explanation is pretextual.

This analysis by the Court shows that the McDonnell Douglas-Burdine prima facie case presumption is governed by Rule 301 and the Thayer theory of presumptions. Consequently, it is nonsense to argue, as the dissent does, that "the factual inquiry is narrowed" by the operation of the McDonnell Douglas-Burdine presumption to a question of pretext. There is simply no support for that notion under the Thayer theory of presumptions.

The dissent, whether aware of it or not, is advocating a modified Morgan presumption. By using the defendant's rebuttal evidence

115. Id. at 254-56 nn.8-10.
116. Id. at 256 n.8 (citation omitted).
117. Id. (citing Fed. R. Evid. 301).
118. Id. at 256 n.10 (citing JAMES B. THAYER, PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 336, 346 (Augustus M. Kelly, 1969)(1888)).
119. Id. at 256 n.10.
120. The Court also made mention of Rule 301's applicability in Wards Cove Packing Co. v. Attonio, 490 U.S. 642, 659-60 (1989). There the Court stated that "[t]his rule [assigning the burden of persuasion on the issue of discrimination to the plaintiff at all times in an employment discrimination case] conforms with the usual method for allocating persuasion and production burdens in the federal courts, and more specifically, it conforms to the rule in disparate-treatment cases that the plaintiff bears the burden of disproving an employer's assertion that the adverse employment action or practice was based solely on a legitimate neutral consideration." Id. (citations omitted). The dissent in Wards Cove, while disputing the applicability of Rule 301 to disparate impact cases, agreed that Rule 301 applies to cases (such as disparate treatment cases) that involve "shifting of evidentiary burdens upon establishment of a presumption." Id. at 762 n.18 (Stevens, J., dissenting)(citation omitted).
121. In saying that Justice Souter seeks to create a modified Morgan presumption, this does not mean that he seeks to shift the burden of persuasion onto the party the presumption is directed against. This is, of course, what is advocated by those who adhere to the view of presumptions propounded by Professor Morgan.
to narrow the factual inquiry to the question of the defendant's veracity, the dissent seeks to use the *McDonnell Douglas-Burdine* presumption as an instrument to advance the important social policies behind Title VII.122 While the dissent cannot be faulted for its good intentions, Rule 301 does not allow the Court to create presumptions that operate in the manner advanced by Justice Souter. Only Congress may advance social policy by creating Morgan presumptions excepted from Rule 301's purview. Thus, under the Thayer theory adopted in Rule 301, the *McDonnell Douglas-Burdine* presumption, like any other presumption, can have no further effect once the defendant has satisfied its burden of producing a legitimate, nondiscriminatory reason for its challenged employment action.

E. Understanding *Burdine* in Accordance with Rule 301

Once *Burdine* is understood in accordance with Thayer's view of presumptions, much of the confusion that resulted from the Court's use of vague and ambiguous language to describe the pretext stage of the *McDonnell Douglas* framework is cleared up. For example, *Burdine* states that after the defendant has met his production burden, "the factual inquiry proceeds to a new level of specificity."123 The dissent takes this to mean that the defendant "has a 'burden of production' that gives it the right to choose the scope of the factual issues to be resolved by the factfinder."124 Thus, in the dissent's view, the new level of specificity referred to is whether the defendant's asserted reason is true or false.125 However, once this passage is read with Thayer's view of presumptions in mind, the passage is better understood to "refer to the fact that the inquiry now turns from the few generalized factors that establish a prima facie case to the specific proofs and rebuttals of discriminatory motivation the parties have introduced."126

Similarly, the dissent takes the next sentence in *Burdine*, which states that the defendant's production burden serves "to frame the fac-

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What is referred to here is Justice Souter's assertion that the defendant's production burden of articulating a legitimate nondiscriminatory reason serves to do more than rebut the plaintiff's prima facie case. Justice Souter believes that it also serves to narrow the factual inquiry to the question of the defendant's truthfulness, a notion that is alien to the Thayer view of presumptions inherent in Rule 301. *St. Mary's Honor Ctr. v. Hicks*, 113 S. Ct. 2742, 2759 (1993)(Souter, J., dissenting).


125. *Id.* at 2759-60 (Souter, J., dissenting).

126. *Id.* at 2752.
tual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext" to mean that the only factual issue remaining in the case is whether the defendant's reason is false.\textsuperscript{127} The dissent again ignores the operation of Rule 301.\textsuperscript{128} Under the Thayer approach to presumptions contained within Rule 301, once the defendant has introduced enough evidence to rebut the presumption, the "bubble bursts" and the presumption disappears.\textsuperscript{129} Since the presumption is destroyed, "pretext" is more reasonably understood in light of the plaintiff's ultimate burden of proving that the defendant unlawfully discriminated against him. This would give "pretext" a meaning synonymous with "pretext for discrimination," requiring the plaintiff to meet the ultimate burden of showing that the defendant's proffered reasons were false and that unlawful discrimination was the real reason for the defendant's action.\textsuperscript{130}

The dissent also relies on language in \textit{Burdine} which states:

([The plaintiff] now must have the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision. This burden now merges with the ultimate burden of persuading the court that she has been the victim of intentional discrimination.\textsuperscript{131}

Justice Souter understands this "merger" to mean that the plaintiff can satisfy his ultimate burden in the case by showing that the defendant's proffered reason was not the real reason for the defendant's employment action.\textsuperscript{132} However, as Justice Scalia points out, this "would be a merger in which the little fish swallows the big one."\textsuperscript{133} Since the plaintiff's ultimate burden of persuading the court that the defendant unlawfully discriminated is the greater of the two burdens, it seems logical to assume that the plaintiff's lesser burden of proving the employer's reason to be false has been subsumed by the larger burden of proving that the employer unlawfully discriminated. Thus, the burden of proving the defendant's reason false "becomes part of (and often considerably assists) the greater enterprise of proving that the real reason was intentional discrimination."\textsuperscript{134}

Unfortunately, not all of the dicta in \textit{Burdine} can be interpreted like the preceding passages to support the position taken by the ma-

\begin{itemize}
  \item \textsuperscript{127} Id. at 2759 (Souter, J., dissenting)(quoting Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 255-56 (1981)).
  \item \textsuperscript{128} See FED. R. EVID. 301.
  \item \textsuperscript{129} See generally 9 JOHN H. WIGMORE, WIGMORE ON EVIDENCE § 2491, at 289 (3d ed. 1940)("If the opponent \textit{does} offer evidence to the contrary (sufficient to satisfy the judges requirement of some evidence), the presumption disappears as a rule of law.").
  \item \textsuperscript{130} St. Mary's Honor Ctr. v. Hicks, 113 S. Ct. 2742, 2752 (1993).
  \item \textsuperscript{131} Id. at 2759-60 (Souter, J., dissenting)(quoting Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981)).
  \item \textsuperscript{132} Id. at 2760 (Souter, J., dissenting).
  \item \textsuperscript{133} Id. at 2752.
  \item \textsuperscript{134} Id.
jority in *Hicks*. One passage, heavily relied upon by the dissent, unmistakably means that the falsity of the employer's explanation is alone enough to compel judgment for the plaintiff. It states that the plaintiff may carry his burden "indirectly by showing that the employer's proffered explanation is unworthy of credence." The opinion then cites to *McDonnell Douglas* for support. However, a careful examination of *McDonnell Douglas* reveals no support for the *Burdine* statement. In fact, as Justice Scalia notes, *McDonnell Douglas* says just the opposite: "on the retrial respondent must be given a full and fair opportunity to demonstrate by competent evidence that the presumptively valid reasons for his rejection were in fact a coverup for a racially discriminatory decision." Thus, the *Hicks* majority opinion is consistent with *Burdine* to the extent that *Burdine* is consistent with *McDonnell Douglas*.

Another problem with this particular passage from *Burdine* is that, if given its plain meaning, it renders whole portions of the *Burdine* opinion incoherent. To allow the plaintiff to carry his burden by merely proving the defendant's asserted reason false presupposes that the defendant's production burden has served the function of narrowing the factual inquiry to a question of the defendant's veracity. But that is not how presumptions in general, or the *McDonnell Douglas-Burdine* presumption in particular, work under Rule 301. Once the defendant has met its production burden, the presumption is dispelled (the bubble bursts), and the factfinder is required to disregard whatever role the presumption may have had in the trial. The factfinder then proceeds to decide the ultimate issues in the case. It is not possible for the Court to have adopted both Thayer's approach to presumptions and this other method of proof. Therefore, Justice Scalia is correct in arguing that this dictum "must be regarded as an inadvertence" since the Court in *Burdine* recognized explicitly that Rule 301 applies to disparate treatment cases.

A sober assessment of the *McDonnell Douglas* line of cases before *Hicks* reveals a confused maze filled with vague and ambiguous direc-
It therefore should be no surprise to anyone that neither the majority nor the dissent are able to reconcile the Court's precedents neatly. However, the majority opinion, despite the dissent's protests, is clearly the best interpretation of the Court's prior cases.

F. **Aikens Supports the Majority Analysis**

The Court's decision in *United States Postal Service Board of Governors v. Aikens* also supports the position of the *Hicks* majority. In *Aikens*, the Court held that once the defendant has introduced sufficient rebuttal evidence, the presumption "drops from the case," and the factfinder must then decide the ultimate factual issue of whether the defendant discriminated against the plaintiff. The Court went on to say that "the District Court... should have proceeded to this specific question directly, just as district courts decide disputed questions of fact in other civil litigation." The Court quoted the problematic passage from *Burdine* which says that the plaintiff may carry her burden "indirectly by showing that the employer's proffered explanation is unworthy of credence." Significantly, though, the Court qualified the passage as follows: "In short, the district court must decide which party's explanation of the employer's motivation it believes." This suggests that it is not enough for the factfinder to disbelieve the employer. The factfinder must accept the plaintiff's explanation of intentional discrimination.

This interpretation seems to be bolstered by the fact that Justice Blackmun, although joining the Court's opinion in *Aikens*, wrote a separate concurrence for the sole purpose of expressing the view advanced by the dissent in *Hicks*. The *Aikens* majority evidently thought *Aikens* meant something different than Justice Blackmun did.

V. **IMPLICATIONS OF THE HICKS DECISION**

A. **The Concerns of the Critics**

Notwithstanding the sound legal reasoning behind the Court's opinion in *Hicks*, the decision has met with severe criticism. Sev-

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143. See supra text accompanying notes 14-43.
145. Id. at 714.
146. Id. at 715-16.
147. Id. at 716 (quoting Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981)).
148. Id. at 716.
149. Id. at 717 (Blackmun, J., concurring). Justice Blackmun was joined only by Justice Brennan.
eral civil rights organizations, as well as the Equal Employment Opportunity Commission (EEOC), have echoed the concerns of the dissent and charged that *Hicks* will be unfair to disparate treatment plaintiffs.\(^\text{151}\) For example, EEOC Chairman Tony Gallegos stated in a letter to Education and Labor Committee Chairman William Ford that he believed "the decision will have a negative effect on its enforcement efforts and therefore should be overridden" by appropriate legislation.\(^\text{152}\) Gallegos cited the difficulty in obtaining "smoking gun-type" evidence in discrimination cases and his belief that *Hicks* made it more difficult to draw inferences of discrimination, thereby imposing a direct evidence requirement on the plaintiff.\(^\text{153}\) As a result of the advocacy of the EEOC and civil rights groups, legislation was introduced in both houses of Congress which would change the law to the position advanced by the *Hicks* dissent and the "pretext-only" courts.\(^\text{154}\)

Although *Hicks* has been characterized by the EEOC and many civil rights groups as a decision that adversely affects the interests of disparate treatment plaintiffs, an examination of the critics' claims is necessary to determine whether this characterization is merely political rhetoric or whether it reflects legitimate concerns. Justice Souter's dissent, as the most complete catalogue of the opinion's alleged shortcomings, provides a useful vehicle to fully explore these issues and is used below for that purpose.

The first objection advanced by the dissent is that the framework adopted by the *Hicks* majority will result in great unfairness to plain-

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\(^{151}\) For example, attorney Mario Mareno of the Mexican American Legal Defense and Educational Fund viewed the *Hicks* decision as "a giant step backwards" for civil rights because it would require evidence "something along the order of a smoking gun." Similarly, Nina Pillard, attorney at the NAACP Legal Defense and Educational Fund, stated that "[t]here well may be a need for some restorative legislation," because "the decision is a blow to effective civil rights enforcement." *Management, Civil Rights Attorneys Differ on Effects of Hicks Decision*, Daily Lab. Rep. (BNA) No. 126, at D26, (July 2, 1993); *EEOC Urges Congress to Overturn Supreme Court's 1993 Hicks Decision*, Daily Lab. Rep. (BNA) No. 193, at D7, (Oct. 7, 1993).


\(^{153}\) Id.

tiffs because it disfavors those “without the good luck to have direct evidence of discriminatory intent.”

Justice Souter seems to believe that the majority has imposed a direct evidence requirement on the disparate treatment plaintiff. However, nothing could be further from the truth. *Hicks* clearly states that “[t]he factfinder’s disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied with a suspicion of mendacity) may, together with... the prima facie case, suffice to show intentional discrimination.”

In other words, a plaintiff who presents evidence that puts the veracity of the defendant’s reasons sufficiently in doubt, has presented all of the evidence necessary to permit the factfinder to find intentional discrimination. There is no requirement that the plaintiff present direct evidence showing intentional discrimination. It may be inferred from the defendant’s lack of veracity. However, it is important to remember that casting doubt on the defendant’s explanation alone does not assure judgment for the plaintiff. The factfinder must not only disbelieve the defendant’s explanation, it must believe the plaintiff’s explanation—that the real reason was intentional discrimination.

Additionally, Justice Souter argues that *Hicks* requires the plaintiff to “disprov[e] all possible nondiscriminatory reasons that a factfinder might find lurking in the record.” This suggests that the inquiry at the third stage of the *McDonnell Douglas* framework “is wide open, not limited at all by the scope of the employer’s proffered explanation.” But this is not true. The inquiry is limited at this stage to the ultimate question of whether the defendant unlawfully discriminated against the plaintiff. The defendant’s production burden, by forcing the employer to explain itself, serves to focus the case on the employer’s actual motivations. This provides the plaintiff a full and fair opportunity to create an inference of unlawful discrimination by disproving the employer’s explanation for its action. Thus, under this design, disparate treatment plaintiffs are not required to disprove every possible nondiscriminatory reason “lurking in the record,” but are merely required to persuade the factfinder that the defendant intentionally discriminated.

Since *Hicks* does not require the plaintiff to present direct evidence of intentional discrimination or to disprove all possible nondiscriminatory reasons “lurking in the record,” it is difficult to see how the plaintiff would bear an unfair burden. *Hicks* sets the plaintiff’s burden

156. *Id.* at 2749.
157. *Id.* at 2754.
158. *Id.* at 2762 (Souter, J., dissenting).
159. *Id.* at 2761 (Souter, J., dissenting).
160. *Id.* at 2749.
161. *Id.*
according to general principles of litigation and not according to the
worthiness of the litigants in terms of extra legal criteria. The dispa-
rate treatment plaintiff is treated just like any other civil plaintiff in
federal court and required to bear the same burden: the burden of
proving his case by a preponderance of the evidence. This arrange-
ment is consistent with the Supreme Court's repeated admonition
that the Title VII plaintiff at all times bears the "ultimate burden of
persuasion" and the Court's intention to subject civil rights litiga-
tion to the same procedural rules as other civil litigation. Consequently, it is no more unfair to require the disparate treatment
plaintiff to prove that the defendant unlawfully discriminated than it
is to require the tort plaintiff to prove the elements of negligence.

Another matter which seems to trouble the dissent is that in its
view, the majority adopted a rule for "the benefit of employers who
have been found to have given false evidence" in court. Under the
majority scheme, an employer can offer a false nondiscriminatory rea-
son for its conduct, have that reason disproved at trial by the plaintiff,
and nevertheless win because the factfinder believed that the em-
ployer acted for an unknown reason rather than a prohibited discrimi-
natory reason. The dissent finds this scheme objectionable because

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162. See, e.g., Patterson v. McLean Credit Union, 491 U.S. 164, 187 (1989); Price Waterhouse v. Hopkins, 490 U.S. 228, 245-46 (1989)(plurality opinion of Bren-
nan, J., joined by Marshall, Blackmun, and Stevens, JJ.); id. at 260 (White J.,
concurring in judgment); id. at 270, (O'Conner, J., concurring in judgment); id. at
286-88, (Kennedy, J., joined by Rehnquist, C.J. and Scalia, J., dissenting); Wards Cove
Packaging Co. v. Attonio, 490 U.S. 642, 659-60 (1989); id. at 668 (Stevens, J.,
dissenting); Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 986 (1988);
Cooper v. Federal Reserve Bank of Richmond, 467 U.S. 867, 875 (1984); United
Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981)).

163. See, e.g., Martin v. Wilks, 490 U.S. 765 (1989); Wards Cove Packaging Co. v. Attonio,
490 U.S. 642, 644 (1989)(noting that this is the "usual method for allocating per-
suasion and production burdens in federal court"); id. at 673 (Stevens, J., dissent-
ing)("Ordinary principles of fairness require that Title VII actions be tried like
any lawsuit."); Price Waterhouse v. Hopkins, 490 U.S. 228, 253 (1989)(Brennan,
J.)("Conventional rules of civil litigation generally apply in Title VII cases ... .");
Patterson v. McLean Credit Union, 485 U.S. 617, 620 (1988)(per curiam)("We do not
believe that the Court may recognize any such exception to the abiding rule
that it treat all litigants equally; that is, that the claim of any litigant for special
application of a rule to its case should not be influenced by the Court's view of the
worthiness of the litigant in terms of extra legal criteria."); United States Postal
many of these cases were partially reversed by the Civil Rights Act of 1991, there
is no indication that Congress intended to exempt Title VII from the general rules
and procedures applicable to civil litigation. See Civil Rights Act of 1991, Pub. L.

164. St. Mary's Honor Ctr. v. Hicks, 113 S. Ct. 2742, 2763 (1993) (Souter, J.,
dissenting).

165. Id. at 2764 (Souter, J., dissenting).
it sometimes will allow dishonest employers to escape liability for their falsehoods.\footnote{166}{Id.}

While the dissent's objection may have some surface appeal, it should persuade only those who are unfamiliar with the operation of presumptions under the federal statutes. A presumption imposes upon the adverse party the burden of coming forward with evidence to contradict the presumed fact.\footnote{167}{FED. R. EVID. 301.} In disparate treatment cases, the presumption of discrimination forces the defendant to come forward with a legitimate, nondiscriminatory reason for its challenged conduct or else face an adverse judgment.\footnote{168}{Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 254-55 (1981).} Thus, under this arrangement, a defendant who offers a false reason for its action will be in a better legal position than the defendant who remains silent and offers no reason at all for its conduct. This is because the false reason rebuts the presumption of discrimination. Silence does not.

Although this arrangement may seem unfair, it must be remembered that a presumption is merely a procedural device, designed only to establish an order of proof and production. The law employs other means to deal with those who are foolish enough to offer false evidence in court.\footnote{169}{For this reason, the law books are full of...} For this reason, the law books are full of...
procedural rules that place the perjurer, initially at least, in a better position than the truthful litigant who makes no response at all.\textsuperscript{170}

The operation of the \textit{McDonnell Douglas} presumption also explains why the majority scheme sometimes will allow dishonest employers to win, despite having their proffered reason disproved by the plaintiff at trial. Under the \textit{Hicks} scheme, once the presumption of discrimination has been rebutted by the employer's false explanation, the presumption has no further effect on the litigation. The plaintiff is then left to bear the ultimate burden of proving that the defendant unlawfully discriminated. A mere showing by the plaintiff that the defendant's explanation is unworthy of credence is not sufficient for the plaintiff to satisfy this burden.\textsuperscript{171} The plaintiff must instead convince the trier of fact that the real reason for the defendant's challenged conduct was intentional discrimination in order to prevail.\textsuperscript{172} This means that there will be instances where the plaintiff will be able to disprove the defendant's explanation but will have insufficient proof to convince the factfinder that discrimination was the real reason for the action.

Once the dissent's objection is understood in this context, it becomes clear why the dishonest employer is allowed to win in cases when the factfinder concludes that the employer acted for an unknown reason rather than a for a discriminatory reason: the plaintiff has failed to carry his burden of persuasion on the ultimate issue of discrimination. Reduced to this, the dissent's objection becomes nothing more than a plea to allow the plaintiff to prevail without the necessary showing that the defendant unlawfully discriminated. Since nothing in the law would permit substituting for this required finding the much different and lesser finding that the employer's explanation was not believable, the \textit{Hicks} majority was clearly correct to insist that the plaintiff bear the burden of proving intentional discrimination.\textsuperscript{173}

\textsuperscript{170} For example, a defendant who fails to answer a complaint will, on the plaintiff's motion, suffer a default judgment which could have been avoided by lying. \textit{Fed. R. Civ. P. 55(a)}. Similarly, a defendant who neglects to submit affidavits creating a genuine issue of fact in response to a motion for summary judgment will suffer a dismissal that false affidavits could have avoided. \textit{Fed. R. Civ. P. 56(e)}. In all of the above examples, as well as under the \textit{McDonnell Douglas} framework, the defendant may purchase a chance at the factfinder by presenting false evidence. However, there are substantial risks involved. Litigants may face both criminal and civil sanctions if their falsehoods are discovered by the court.

\textsuperscript{171} \textit{St. Mary's Honor Ctr. v. Hicks}, 113 S. Ct. 2742, 2754 (1993).

\textsuperscript{172} Of course, proving the employer's reason to be false is a part of (and often considerably assists) the greater enterprise of proving that the real reason for the employer's action was intentional discrimination. \textit{Id.} at 2752.

\textsuperscript{173} \textit{Id.} at 2751.
B. Impact in the Lower Courts

Because of the vehement opposition to the Hicks decision by the EEOC and many civil rights groups, it is very easy to overstate the opinion's impact on disparate treatment litigation. Hicks does make some significant changes in the McDonnell Douglas procedural framework. However, the manner in which disparate treatment litigation is conducted will remain, for the most part, unchanged.174

The biggest change will occur in those circuits which, prior to Hicks, granted judgment as a matter of law to the plaintiff for disproving the employer's explanation for its action. Plaintiffs in these "pretext-only" courts will find their chances of obtaining summary judgment or a directed verdict greatly diminished.175 This is because under Hicks disparate treatment plaintiffs must do more than show that the defendant's proffered reason is false to gain judgment. Plaintiffs must show that a rational jury could come to no other conclusion than that the defendant unlawfully discriminated in order to prevail. This is because the presumption raised by the plaintiff's prima facie case has dropped from the case.176 With the presumption gone, the plaintiff is then left with the burden of proving that the defendant unlawfully discriminated.177

Hicks does not substantially alter the ways in which employers defend against disparate treatment claims. The employer's defense will continue to depend on developing and presenting solid evidence to rebut claims and inferences of discrimination.178 Employers who offer complete and credible reasons for their action and effectively undermine the opposition's claims of pretext will have the best chance of winning at trial.179


177. Id.


179. Id. at 156.
On the other hand, the prospects of employers seeking to obtain summary judgment in disparate treatment cases will depend substantially on which circuit they are in. The majority of circuit courts which have applied Hicks to summary judgment have articulated a standard that is favorable to plaintiffs. \(^{180}\) Plaintiffs can defeat a defendant's motion for summary judgment by merely raising a genuine factual issue regarding the authenticity of the employer's stated motive. Because the factfinder in a Title VII case is entitled to infer discrimination from the plaintiff's proof of a prima facie case and a showing of pretext, these courts have held that there will always be a question for the factfinder once the plaintiff establishes a prima facie case and raises a genuine issue as to whether the employer's explanation for its action is true. \(^{181}\) This view finds support in language in Hicks which states 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 . . . suffice to show intentional discrimination." \(^{182}\)

Plaintiffs, in these circuits, will find it easy to get their cases to the factfinder. By merely raising a genuine issue of fact concerning the authenticity of the employer's stated motive, plaintiffs can survive the defendant's motion for summary judgment. This, coupled with the fact that plaintiffs seeking compensatory or punitive damages are now entitled to a jury trial under the Civil Rights Act of 1991, may increase

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180. See, e.g., Fuentes v. Perskie, 32 F.3d 759, 765 (3d Cir. 1994) ("To survive summary judgment, [plaintiff] has to . . . present sufficient evidence to meaningfully throw into question, i.e., to cast substantial doubt upon, the [defendant's] reasons for not hiring him."); Hairston v. Gainesville Sun Publ. Co., 9 F.3d 913, 921 (11th Cir. 1993) (holding that the "grant of summary judgment . . . is generally unsuitable in Title VII cases in which the plaintiff has established a prima facie case because of the 'elusive factual question' of intentional discrimination"); Moore v. Eli Lilly & Co., 990 F.2d 812, 815 (5th Cir. 1993) ("To overcome a motion for summary judgment . . . the plaintiff need only produce evidence to create a genuine issue of material fact concerning pretext."); Thomas v. Ethicon, No. CIV.A.93-3836, 1994 WL 171345, at *2 (E.D. Pa. May 5, 1994) ("A plaintiff may defeat a motion for summary judgment by pointing to evidence which establishes a reasonable inference that the defendant's proffered explanation for its decision is not worthy of credence."); Reiff v. Philadelphia Court of Common Pleas, 827 F. Supp. 319, 324-25 (E.D. Pa. 1993) ([A] plaintiff who offers reasonably sufficient evidence of pretext along with the elements of a prima facie case will survive a summary judgment motion."); Flynn v. Goldman, Sachs & Co., No. 91 CIV. 0035, 1993 WL 338987 (S.D.N.Y. Sept. 2, 1993) (holding summary judgment to be inappropriate where the plaintiff has colorable evidence of pretext); Brom v. Bozell, Jacobs, Kenyon & Eckhardt, Inc., No. 89C7021, 1993 WL 313049, at *6 (N.D. Ill. Aug. 13, 1993) (holding that an employee may avoid summary judgment "by showing that the employer was motivated by a discriminatory reason, or that the reason given is unworthy of credence").

181. E.g., Washington v. Garrett, 10 F.3d 1421, 1433 (9th Cir. 1993).

the vulnerability of defendants. Given the likelihood of larger verdicts with juries and the increased expense of jury trials, employers may be more amenable to settlement. Clearly, this development will work to the advantage of disparate treatment plaintiffs in these circuits.

Not all circuits, however, have employed a summary judgment standard advantageous to plaintiffs. In a minority of circuit courts plaintiffs must do more than introduce evidence that raises a genuine issue of fact concerning the authenticity of the employer’s proffered reasons to survive the defendant’s motion. The plaintiff must introduce evidence from which the factfinder could reasonably conclude that the employer acted for a discriminatory reason. Under this approach, the court does not ignore evidence of pretext, but it determines whether the evidence as a whole would permit the factfinder to infer the ultimate burden of discriminatory animus. This standard will make it more difficult for the plaintiffs to survive the defendant’s motion for summary judgment. Consequently, summary judgment should continue to be a useful tool to employers in these circuits.

C. The Real Significance of Hicks

The real significance of the Hicks decision lies in the fact that the Supreme Court has made it clear Title VII is not intended to remedy different or discriminatory treatment alone, but only discrimination that is proven to be based upon the plaintiff’s protected status. Merely being a member of a protected class and suffering an adverse employment action is not sufficient to prove discrimination under Title VII. It must be demonstrated that the adverse action was the result of discrimination based upon protected class characteristics.

183. Civil Rights Act of 1991, 42 U.S.C. § 1981a(c)(1988), provides that any party may demand a trial by jury if a complaining party seeks compensatory or punitive damages.

184. See, e.g., LeBlanc v. Great American Ins. Co., 6 F.3d 836, 842 (1st. Cir. 1993)(defeating summary judgment requires “not only ‘minimally sufficient evidence of pretext,’ but evidence that overall reasonably supports a finding of discriminatory animus”) (quoting Goldman v. First Natl Bank of Boston, 985 F.2d 1113, 1117 (1st Cir. 1993)); Bodenheimer v. PPG Industries, Inc., 5 F.3d 955 (5th Cir. 1993)(stating that plaintiff must produce sufficient evidence to establish that the defendant’s reasons were pretexts for age discrimination).

185. Damages are awarded under Title VII “only against employers who are proven to have taken adverse employment action by reason of . . . race [or other protected characteristic].” St. Mary’s Honor Ctr. v. Hicks, 113 S. Ct. 2742, 2756 (1993).

186. See, e.g., EEOC v. Flasher Co., 986 F.2d 1312 (10th Cir. 1992). In Flasher, the court stated that “the plaintiff must prove that the disparity in treatment was based upon the plaintiff’s race, religion, sex, or national origin rather than upon either a valid nondiscriminatory reason or upon no particular reason at all.” Id. at 1319.

187. Id.
By insisting upon this basic requirement for Title VII liability, *Hicks* repudiates some longstanding but mistaken notions held by courts and commentators.

The most important of these notions finds its roots in *Furnco*, where the Court explained why proof of a prima facie case raised a presumption of discrimination against the defendant. The Court reasoned that "when all legitimate reasons for rejecting an applicant have been eliminated . . . 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 race." Although this line of reasoning was offered by the Court in *Furnco* for the limited purpose of justifying the practice of imposing a presumption of discrimination against the defendant upon proof of the plaintiff's prima facie case, it has often been misapplied to the pretext stage of the *McDonnell Douglas* framework. Courts that have made this mistake insist that the defendant's explanations and motives be viewed with suspicion, even at the pretext stage of the proceedings. This view was explicitly rejected in *Hicks*. The Court made it clear that once the presumption of discrimination has been rebutted by the defendant, it can have no further effect on the litigation. Thus, the only assumptions about the employer's conduct that the factfinder should indulge are those indicated by the evidence in the case and the inferences drawn from the evidence in light of the factfinder's experience.

Another mistaken idea repudiated by *Hicks* was the idea that Title VII liability can be imposed on employers if their articulated reason is

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189. *Id.*
190. The Court in *Furnco* explained that "[a] prima facie case under *McDonnell Douglas* raises an inference [presumption] of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors." *Id.* (citation omitted).
191. One of the best examples of the misapplication of the *Furnco* reasoning to the pretext stage is Judge Adams' opinion in *Duffy v. Wheeling Pittsburgh Steel Corp.*, 738 F.2d 1393, 1400 (3d Cir.) (Adams, J., dissenting on other grounds), cert. denied, 469 U.S. 1087 (1984). It states:

> The *Furnco* presumption benefits a plaintiff at both the first and third steps of the *McDonnell Douglas* test. Assisted by the suspicion that accompanies unexplained employer actions, the plaintiff may establish a prima facie case simply by showing membership in the protected class, qualification for the job, and unfavorable treatment in comparison with someone outside the protected class. But once the employer comes forward with evidence that the discharge was motivated by a legitimate, nondiscriminatory reason, the plaintiff may respond with indirect proof of discrimination, aided again by the *Furnco* suspicion of employer motive.

*Id.* at 1400. See also *Ibrahim v. New York State Dep't of Health*, 904 F.2d 161, 168 (2d Cir. 1990) (stating that plaintiff met his ultimate burden of persuasion by demonstrating that the defendant's preferred explanation was pretext).
"arbitrary" or is not "business-related." According to some courts and commentators, reasons that are arbitrary or not related to business interests do not satisfy the defendant's burden because they are not legitimate, nondiscriminatory reasons as contemplated by McDonnell Douglas. Thus, under this view some reasons offered by the defendant to explain its conduct would not be sufficiently strong to "meet and refute" the plaintiff's prima facie case. For example, if an employer offered an explanation of nepotism to explain its actions, it would not be considered a legitimate reason and would not rebut the presumption of discrimination generated by the plaintiff's prima facie case. In short, the defendant would be in the same position as it would have been had it chosen to remain silent and not offer any reason at all.

However, Hicks flatly rejected this requirement of business rationality. An employer can satisfy its burden of production by merely "introducing evidence which, taken as true, would permit the conclusion that there was a nondiscriminatory reason for the adverse action." This means that any reason supported by the evidence and not prohibited by Title VII is a lawful justification for an adverse em-

193. See Brown v. Tennessee, 693 F.2d 600, 605 (6th Cir. 1982)(holding that refusal to take polygraph is legitimate, nondiscriminatory reason, "at least when polygraph testing is a lawful method for determining employment-related questions"); Miller v. WLFI Radio, Inc., 687 F.2d 136, 138 (6th Cir. 1982)(stating that employer's burden is to produce "business reasons"); Valdez v. Church's Fried Chicken, 638 F. Supp. 596, 634 (W.D. Tex. 1988)("If illegitimate reasons such as nepotism or irrational personal dislike unrelated to job performance were deemed sufficient to rebut the plaintiff's case, the plaintiff would face an impossible task in demonstrating pretext."); Harris v. Marsh, 679 F. Supp. 1204, 1285 (E.D. N.C. 1987)("For the employer's reason to be deemed sufficient to overcome the presumption against him, it must have a rational connection with business goal of securing a competent and trustworthy work force."); Grabb v. Bendix Corp., 666 F. Supp. 1223, 1244 (N.D. Ind. 1986)("It is not the court's duty to determine the validity of a defendant's employment decision as long as the decision was made in good faith."); Hannah A. Furnish, A Path Through the Maze: Disparate Impact and Disparate Treatment Under Title VII of the Civil Rights Act of 1964 After Beazer and Burdine, 23 B.C. L. Rev. 419, 437 (1982)("For the employer's reason to be deemed sufficient to overcome the presumption against him, it must have a connection with the business goal of securing a competent and trustworthy work force."); Mack A. Player, Defining "Legitimacy" in Disparate Treatment Cases: Motivational Inferences as a Talisman for Analysis, 36 Mercer L. Rev. 855, 884-85 (1985)("Arbitrary or idiosyncratic reasons are incapable of supporting a reasonable inference of legal motivation, and for this reason arbitrariness cannot be legitimate.").


195. Player, supra note 193, at 884.

196. See Lewis v. University of Pittsburgh, 725 F.2d 910, 927-28 (3d Cir. 1983)(Adams, J., dissenting). Judge Adams argued that nepotism would not be a legitimate reason and would not carry the defendant's burden. The plaintiff's prima facie case would not be rebutted. Id.

ployment action under Title VII. Even discrimination not prohibited by Title VII, such as age discrimination, would be an acceptable defense to Title VII liability. Otherwise, Title VII would become a statute requiring employers to show good cause or business relatedness to justify their employment actions.

VI. CONCLUSION

By articulating a coherent set of rules to govern the allocation of the burden of proof in disparate treatment cases, Hicks marks a major step forward in the Court's employment discrimination jurisprudence. Under the Court's approach, the plaintiff is not entitled to judgment as a matter of law for disproving the defendant's proffered explanation for its challenged conduct. Rather, the plaintiff must make the much different and greater showing that the defendant unlawfully discriminated in order to prevail. The Court's decision simplifies the McDonnell Douglas framework by conforming disparate treatment litigation to the same procedural rules as all other civil litigation in the federal courts. Hicks plainly establishes that courts are not to treat the question of discrimination differently than any other ultimate question of fact.

The Court's decision to predicate Title VII liability upon an actual finding of unlawful intentional discrimination was correct both as a matter of law and as a matter of policy. It was correct as a matter of law because the proper construction of Rule 301 of the Federal Rules of Evidence mandates that the presumption of discrimination created by the plaintiff's prima facie case be dispelled when the defendant has met its production burden of articulating a legitimate, nondiscriminatory reason for its action. With the presumption dispelled, it has no further effect upon the litigation and the only issue remaining for the factfinder is whether the defendant unlawfully discriminated against the plaintiff. Consistent with the Supreme Court's repeated admonition, the plaintiff bears this "ultimate burden of persuasion."

198. An employer who offered age discrimination as its explanation for its adverse employment action may escape Title VII liability. However, its defense could be used as an admission in a subsequent age discrimination case brought under the ADEA. See 29 U.S.C. §§ 621-634 (1988).
200. Id.
201. See supra text accompanying notes 89-143.
203. See, e.g., Patterson v. McLean Credit Union, 491 U.S. 164, 187 (1989); Price Waterhouse v. Hopkins, 490 U.S. 228, 245-46 (1989)(plurality opinion of Brennan, J., joined by Marshall, Blackmun, and Stevens, JJ.); id. at 260 (White J., concurring in judgment); id. at 270 (O'Connor, J., concurring in judgment); id. at 286-88 (Kennedy J., joined by Rehnquist, C.J. and Scalia, J., dissenting); Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 659-60 (1989); id. at 668 (Stevens, J.,
Basing Title VII liability upon an actual finding of discrimination was also the correct policy to follow. In contemporary society, finding an employer guilty of invidious discrimination means more than a mere violation of the law; it is a violation of one of the most deeply held moral norms of the community. As Professor Richard Epstein has observed, "[t]here is little question that a broad antidiscrimination principle lies at the core of American political and intellectual understandings of a just and proper society, not only in employment but . . . in all areas of public and private life."204 Given that those found liable of a Title VII violation often face the vehement moral condemnation of the community in addition to legal sanctions, justice demands that some steps be taken to avoid moral mistakes and ensure that innocent employers are not harmed by faulty factfinding.205 Hicks provides some added assurance of accurate factfinding by requiring an actual finding of unlawful discrimination before Title VII liability can be proved.

As then Circuit Judge Scalia recognized, "the question facing triers of fact in discrimination cases is both sensitive and difficult. The reason it is sensitive is that without careful and conscientious factfinding..."
the anti-discriminatory laws can either be frustrated by, or be converted into instruments of, the very evil they are designed to prevent."206 By focusing disparate treatment cases directly upon the "ultimate question of discrimination vel non,"207 Hicks promotes the careful and conscientious factfinding needed to administer Title VII's prohibitions on discrimination.

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