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Girls Rule, Boys Drool . . . and Must Apply: An Analysis of the Eighth Circuit's Perplexing Approach to a Failure-to-Apply Case in *EEOC v. Audrain Health Care, Inc.*, 756 F.3d 1083 (8th Cir. 2014)

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Note*

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I. INTRODUCTION

Gary is interested in the open tax attorney position he saw posted in the law firm's kitchen. Gary was recently approved to transfer to an employment law position. The firm's transfer policy states that to be eligible for a transfer, a lawyer must serve in his or her current position for at least six months unless the two impacted directors, in this case the tax and employment law directors, agree to an early transfer. Six days before Gary is scheduled to start working in the employment law position, he approaches Sally, the tax department director, and tells her he is interested in the open tax position. Sally replies, "Gary, we are really looking to hire a woman for this position." Sally does not consider Gary's qualifications and dismisses him solely because of his gender. Sally believes having more women in the tax department will make the female clientele feel more secure. How does Gary respond? Does he trudge ahead and apply anyway? Does he beg Sally and other members of the firm to reconsider? Or does he walk away, believing there is no point in applying? Gary decides not to apply, understanding that only females will be considered, and brings suit for gender discrimination under Title VII.

According to the Eighth Circuit, Gary is not entitled to relief because he failed to apply for the position. Under Eighth Circuit precedent, Gary did not suffer an adverse employment action because he was not *actually* denied the position. The Eighth Circuit's precedent does not support a conclusion that Sally's statement meant the firm systematically discriminated against men. To prevail on his claim, Gary would have to show he made every reasonable effort to convey his interest in the position to the law firm, and Eighth Circuit precedent indicates that he did not do so. Gary does not understand what was unreasonable about walking away after being told he would not be hired because he is a man. After *EEOC v. Audrain Health Care, Inc.*,[1] Gary is left with neither a remedy, nor an explanation.

This Note focuses on the narrow question of what the Eighth Circuit requires of plaintiffs in failure-to-apply cases, such as Gary's, and illustrates how the proper approach would have affected the outcome in *EEOC v. Audrain Health Care, Inc*. Part II of this Note provides a legal background of Title VII and the genesis of the futile gesture doctrine as articulated by *International Brotherhood of Teamsters v. United States*.[2] Additionally, Part II discusses *EEOC v. Audrain Health Care, Inc.*, including the factual background and the holding.

1. 756 F.3d 1083 (8th Cir. 2014).
2. 431 U.S. 324, 335 (1977).

Part III argues the *Audrain* Court: (a) erred in concluding the employer's statement was not direct evidence; (b) wrongly implied additional elements for majority plaintiffs in this case, and; (c) provided a free pass for the employer through rigid application of the *McDonnell Douglas* framework. Part III continues by exploring how the Eighth Circuit's new reasonable-ambitious standard turns thirty-seven-year-old Supreme Court precedent on its head, as well as the consequences that followed and which the Eighth Circuit could have avoided. Finally, Part IV concludes that the Eighth Circuit's perplexing approach to failure-to-apply claims penalizes individual plaintiffs in disparate treatment actions and gives the employer a free pass to avoid liability.

II. BACKGROUND

A. Proving Discrimination Generally Under Title VII

The goal of Title VII of the Civil Rights Act of 1964[3] is to compensate individuals who suffered as a result of an unlawful employment practice.[4] Most often, Title VII litigation involves disparate treatment claims.[5] When an employer makes an individual employment decision based on a protected trait, he or she engages in disparate treatment.[6] In a Title VII action, the plaintiff bears the initial burden of

3. 42 U.S.C. § 2000e–2(a) (2012). The anti-discrimination provision provides:

> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Id. This provision is limited to discrimination in the employment context.

4. Faragher v. City of Boca Raton, 524 U.S. 775, 805–06 (1998) (citing Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975)).

5. *Employment Section Overview*, THE UNITED STATES DEP'T OF JUSTICE, http://perma.unl.edu/WCX3-269U (last visited Apr. 12, 2015); *see also* Martha Chamallas, *The Market Excuse*, 68 U. CHI. L. REV. 579, 599–600 (noting the significant "conceptual" difference between disparate treatment and disparate impact "is that disparate treatment requires proof of discriminatory intent or motivations, while disparate impact reaches unintentional discrimination that stems from neutral policies or practices that have a disproportionate adverse effect").

6. *Int'l Bhd. of Teamsters*, 431 U.S. at 335 (explaining the difference between disparate treatment and disparate impact); *see also* 1 BARBARA T. LINDEMANN ET AL., *Disparate Treatment*, *in* EMPLOYMENT DISCRIMINATION LAW 2–2 to 2–28 (C. Geoffrey Weirich et al. eds., 5th ed. 2012) (noting that in disparate treatment cases, the employer simply treats some people less favorably because of their protected class).

establishing a prima facie case of discrimination.[7] A plaintiff can make his prima facie case of discrimination in one of two ways.

1. The Direct Evidence Route

First, "[t]he employee may produce direct evidence of discrimination, which is 'evidence showing a specific link between the alleged discriminatory animus and the challenged decision, sufficient to support a finding by a reasonable fact finder that an illegitimate criterion actually motivated the adverse employment action.'"[8] Under the direct evidence model, the question is "whether the [decision maker's] statements lead to the conclusion that the adverse action was taken because of the person's protected status without inference or presumption."[9] No "magic words," such as "because of," are required to establish direct evidence.[10]

a. Mixed-Motives

When the plaintiff has direct evidence of discrimination, he or she can proceed with a mixed-motives claim.[11] In mixed-motive claims, the plaintiff has evidence that a protected trait played a role in the employer's decision, but the employer also has legal justifications for making its decision.[12] In this situation, the fact finder does not have to choose whether to believe the employer or plaintiff. Instead, the fact finder must determine what to do when both the legal and illegal criterion motivated the employer's decision.[13] Because of the strength of the plaintiff's evidence, it is the defendant who bears the burden of proving by "a preponderance of the evidence that it would have made the same decision even if it had not taken the [protected characteristic] into account."[14] Such a showing relieves an employer of liability under Title VII.

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7. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).
8. McCullough v. Univ. of Ark. for Med. Sci., 559 F.3d 855, 860 (8th Cir. 2009) (quoting Russell v. City of Kansas City, Mo., 414 F.3d 863, 866 (8th Cir. 2005)).
9. EEOC v. Lehi Roller Mills Co., No. 2:08–CV–00591, 2014 WL 1757987, at *1 (D. Utah May 1, 2014).
10. *Id.* at *1.
11. The Eighth Circuit interpreted "direct evidence" in the mixed-motive concept as follows: "evidence of 'conduct or statements by persons involved in the decision-making process that may be viewed as directly reflecting the alleged discriminatory attitude . . . sufficient to permit the factfinder to find that that attitude was more likely than not a motivating factor in the employer's decision.'" Kriss v. Sprint Commc'n Co., 58 F.3d 1276, 1282 (8th Cir. 1995) (quoting Radabaugh v. Zip Feed Mills, Inc., 997 F.2d 444, 449 (8th Cir. 1993)).
12. Karen A. Haase, *Mixed Metaphors: Model Civil Jury Instructions for Title VII Disparate Treatment Claims*, 76 NEB. L. REV. 900, 906–08 (1997).
13. *Id.*
14. *Id.* at 907.

The Civil Rights Act of 1991 added § 2000e–2(m)[15] to Title VII, which provides: "[A]n unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice."[16] Under the Act, a mixed-motive plaintiff can recover declaratory relief, injunctive relief, and attorney fees and costs, if the defendant was at all motivated by the protected trait.[17] The Eighth Circuit will only allow a plaintiff to proceed with a mixed-motives claim if he or she has direct evidence of discrimination.[18] If the plaintiff does not have direct evidence, he or she may create an inference of discrimination through the *McDonnell Douglas* burden-shifting framework.[19]

2. The McDonnell Douglas *Framework*

Under the *McDonnell Douglas* framework, a plaintiff must make a prima facie showing by demonstrating the following: (1) the plaintiff is a member of a protected class; (2) the plaintiff applied and was qualified for a job for which the employer was seeking applicants; (3) despite the plaintiff's qualifications, the employer rejected the plaintiff; and (4) after the plaintiff's rejection, the position remained open and the employer continued to seek applicants from persons possessing the plaintiff's qualifications.[20] If the plaintiff can establish a prima facie case, the defendant then bears the burden of articulating a legitimate, nondiscriminatory basis for the alleged adverse action.[21] If the defendant meets its burden, the plaintiff must show a genuine issue of fact exists as to whether the defendant's stated reason for the adverse action is pretextual.[22] Said otherwise, the plaintiff must prove that his or her protected trait was the real reason for the employer's ac-

15. 42 U.S.C. § 2000e–2(m) (2012).

16. *Id.*

17. *Id.*

18. *See, e.g.*, Rivers-Frison v. Se. Mo. Cmty. Treatment Ctr., 133 F.3d 616, 619 (8th Cir. 1998); *see also* Kneibert v. Thomson Newspapers, Mich., Inc., 129 F.3d 444, 452 (8th Cir. 1997) (holding the plaintiff could not use the mixed-motives analysis because he failed to present direct evidence in support of his age retaliation claims).

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

20. *Id.* It is important to note the Court has stated the *McDonnell Douglas* framework "is an evidentiary standard, not a pleading requirement . . . [and] should not be transposed into a rigid pleading standard for discrimination cases." Swierkiewicz v. Sorema N.A., 534 U.S. 506, 512 (2002).

21. *McDonnell Douglas Corp.,* 411 U.S. at 802–03; Hunter v. United Parcel Serv., Inc., 697 F.3d 697, 702 (8th Cir. 2012).

22. *McDonnell Douglas Corp.,* 411 U.S. at 804.

tion.[23] It should be noted that the defendant in a pretext case at no time has to prove he or she did not discriminate, only that there was a nondiscriminatory reason for the decision.[24]

The third prong of the *McDonnell Douglas* framework requires there be an adverse employment action.[25] An adverse employment action takes place when an employer's actions sufficiently affect the employee's "compensation, terms, conditions, or privileges of employment."[26] Being denied the opportunity to compete for a position constitutes an adverse employment action.[27] However, in situations where it is not obvious that an employment decision resulted in a significant change in benefits, an employee must demonstrate the decision caused an "objectively tangible harm," and is not merely speculative.[28]

B. The Genesis of the Futile Gesture Doctrine

Historically, unless the applicant applied for the position, he or she was not entitled to relief. However, in *International Brotherhood of Teamsters v. United States*,[29] the Supreme Court held that even nonapplicants are entitled to relief under Title VII if they can perform the "difficult task"[30] of establishing: (1) they were deterred from applying due to their unwillingness to "subject themselves to the humiliation of explicit and certain rejection"[31] resulting from the employer's discriminatory practices; and (2) they would have applied had those practices not existed.[32]

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23. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 508 (1993); Lidge-Myrtil v. Deere & Co., 49 F.3d 1308 (8th Cir. 1996) (holding the plaintiff could not prove employer's failure to promote was pretextual and based on race).
24. *St. Mary's Honor Ctr.*, 509 U.S. 502.
25. *McDonnell Douglas Corp.*, 411 U.S. at 802.
26. 42 U.S.C. § 2000e–2(a)(1) (2012). Examples of adverse employment actions include "denying a position to an employee who meets the minimum compensation, decreasing employee compensation or denying an employee a raise, or transferring an employee to a position of less responsibility or pay." Holland v. Washington Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007); *see also* Autumn George, *"Adverse Employment Action"—How Much Harm Must Be Shown to Sustain a Claim of Discrimination Under Title VII?*, 60 MERCER L. REV. 1075 (2009) (discussing what "adverse employment action" means and how much harm a plaintiff must allege).
27. *See* Cones v. Shalala, 199 F.3d 512, 521 (D.C. Cir. 2000).
28. Russell v. Principi, 257 F.3d 815, 818 (D.C. Cir. 2001).
29. 431 U.S. 324 (1977).
30. *Id.* at 364.
31. *Id.* at 365.
32. *Id.* at 367–68. *Teamsters* established the futile gesture doctrine, which declares that where there is a consistently enforced pattern or practice of discrimination, failure to apply will not necessarily foreclose a plaintiff's relief. *Id.* at 367. However, it is "[o]nly in the rare case where an employer has essentially foreclosed

Teamsters involved a case in which the government alleged the employer, T.I.M.E.-D.C., Inc., a trucking company, had engaged in a pattern or practice of racial discrimination in hiring.[33] The government presented statistical evidence showing African-American and Latino employees were limited to the lowest paying jobs at the company.[34] The Supreme Court affirmed the lower courts' holdings that the government carried its burden of proof because the government showed racial discrimination "was the company's standard operating procedure—the regular rather than unusual practice."[35] The Court held that the government established a prima facie case under Title VII of the Civil Rights Act of 1964 by showing that the employer engaged in a pattern or practice of employment discrimination.[36]

Next, the Court discussed the question of individual relief for the employer's past discriminatory acts, a question that does not arise until a policy of unlawful discrimination is proved.[37] The discussion involved an analysis of whether relief could be awarded to nonapplicants, and the Court ultimately decided an employee's failure to formally apply for a job was not a per se bar to relief.[38] The Court observed that "[a] consistently enforced discriminatory policy can surely deter job applications from those who are aware of it and are unwilling to subject themselves to the humiliation of explicit and certain rejection."[39] As an illustration, the Court noted, "[i]f an employer should announce his policy of discrimination by a sign reading 'Whites Only' on the hiring-office door, his victims would not be limited to the

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the interactive process through its policies or explicit actions [that] the futile gesture doctrine [will] apply." Davoll v. Webb, 194 F.3d 1116, 1113 (10th Cir. 1999).

33. *Teamsters*, 431 U.S. at 329. The government alleged that the African-American and Latino employees were given less desirable jobs and were subsequently discriminated against in terms of promotions and transfers. *Id.*

34. *Id.* at 337; *see also* Christine Tsang, *Uncovering Systematic Discrimination: Allowing Individual Challenges to a "Pattern or Practice*," 32 YALE L. & POL'Y REV. 319, 333 (2013) ("Approximately 80% of the African-American and Latino workers held lower-paying jobs in operations and servicemen positions, as compared to approximately 40% of the white employees. Although the company workforce was about 9% African-American and Latino, less than 1% of all line drivers were African-American and Latino. All of the African-American line drivers, with only one exception, were hired after litigation had commenced.").

35. *Teamsters*, 431 U.S. at 336–37.

36. *Id.*

37. *Id.* at 361.

38. *Id.* at 364 (noting that failure to apply for a position "is not an inexorable bar to an award of retroactive seniority," and that individual nonapplicants "must be given an opportunity to undertake their difficult task of proving that they should be treated as applicants and therefore are entitled to relief accordingly").

39. *Id*. at 364. The Court further explained, "[w]hen a person's desire for a job is not translated into a formal application solely because of his unwillingness to engage in a futile gesture he is as much a victim of discrimination as is he who goes through the motions of submitting an application." *Id.* at 365–66.

few who ignored the sign and subjected themselves to personal rebuff."[40]

This decision marked the inception of the futile gesture doctrine for pattern or practice discrimination cases. Under this doctrine all of the affected class members are presumptively entitled to relief once the plaintiff establishes systematic discrimination. The employer can avoid liability only if it shows the individuals were not victims of the employer's discrimination.[41]

1. The Futile Gesture Doctrine—Some Things Never Change

The Supreme Court decided *Teamsters* in 1977, at which time there was still significant resistance to the newly implemented Civil Rights Acts of the 1960s.[42] Today, one is unlikely to find situations of "gross and pervasive" discrimination akin to that illustrated in *Teamsters*. Yet courts still apply *Teamsters*' futile gesture doctrine in cases where a plaintiff claims discrimination, but failed to formally apply for the position. Discrimination today typically takes on a much subtler form.[43] Because workplace discrimination is less obvious, it appears that some courts are ill-equipped to deal with situations where employers make overtly discriminatory statements, possibly because blatantly discriminatory statements are few and far between today.[44]

Recently, where the decision maker made an alarmingly blatant discriminatory statement, the *Teamsters* precedent foreclosed relief

40. *Id.* at 365.

41. *Id.; see generally The 1970s: The "Toothless Tiger" Gets Its Teeth—A New Era of Enforcement*, EEOC HISTORY: 35TH ANNIVERSARY, http://perma.unl.edu/9BJN-VZTL (last visited Mar. 8, 2015) (describing the *Teamsters* decision as applied in pattern-or-practice cases).

42. *See* Karen Anderson, LITTLE ROCK: RACE & RESISTANCE AT CENTRAL HIGH SCHOOL (2010) (detailing the desegregation crisis in Little Rock, Arkansas).

43. Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91 (Winter, 2003) (describing the shift in the nature of discrimination from overt racism and segregation to a much more subtle form, including inequalities in wages and advancement).

44. *See, e.g.*, EEOC v. Alton Packaging Corp., 901 F.2d 920, 923–25 (11th Cir. 1990). The Eleventh Circuit held the decision maker's statement that if this were his company he would not hire any black people constituted direct evidence of discrimination in a failure-to-promote case, which shifted the burden of producing a separate, racially-neutral reason for failing to promote the plaintiff to the employer. *Id.* Here, the employer could not prevail in a mixed-motives case by offering a legitimate reason for its decision because the legitimate reason did not motivate the employer at the time of the decision. The employer did not know the person he subsequently promoted was more qualified at the time the decision was made because the more qualified person did not apply until after the employer had determined the plaintiff was not qualified. *Id.* Nonetheless, the court held in favor of the employer because plaintiff had multiple instances of bad employee conduct and attendance on his record. *Id.*

for an employee who could not establish that his employer fostered an atmosphere of "gross and pervasive" discrimination necessary to excuse his failure to formally apply.[45] After *EEOC v. Audrain Health Care, Inc.*, to survive a summary judgment motion, absent "gross and pervasive discrimination," an employee would have to had applied for the position, even after being told by the relevant decision maker that he or she would not be hired.[46]

2. Failure-to-Apply Cases in the Eighth Circuit

In the Eighth Circuit, where the employer has a formal application process, "an employee's failure to formally apply for a position bar[s] her from establishing a *prima facie* case."[47] There are two exceptions.[48] First, "plaintiffs need not prove they formally applied for a position if they allege facts which, if proven, would be sufficient to establish that application was futile due to defendants' discriminatory practices."[49] The second exception exists where "the plaintiff made every reasonable attempt to convey his interest in the job to the employer."[50] However, the court in *Chambers v. Wynne School District* suggested that merely conveying interest in the job to the employer is not, by itself, enough to satisfy the second exception.[51] Instead, it will only suffice if the open position "was not officially posted or advertised and either: (1) the plaintiff had no knowledge of the job from other sources until it was filled, or (2) the employer was aware of the plaintiff's interest in the job notwithstanding the plaintiff's failure to make a formal application."[52]

Although the Eighth Circuit explicitly delineated two exceptions in failure-to-apply cases, in *Audrain,* the court suggested a plaintiff could still prevail on a discrimination claim if he or she made "every reasonable effort" to convey interest in the position to the employer.

The *Audrain* Court did not apply the first exception because the plaintiff failed to prove the employer's pattern or practice was discriminatory against men. Thus, the plaintiff could not establish submit-

45. EEOC v. Audrain Health Care, Inc., 756 F.3d 1083, 1087 (8th Cir. 2014).
46. *Id.* "Gross and pervasive" discrimination implies systematic discrimination against an entire class, such as that seen in *International Brotherhood of Teamsters v. United States,* 431 U.S. 324, 367 (1997).
47. Braziel v. Loram Maint. of Way, Inc., 943 F. Supp. 1083, 1100 (D. Minn. 1996) (citing Chambers v. Wynne Sch. Dist., 909 F.2d 1214, 1217 (8th Cir. 1990)).
48. *Id.*
49. *Id.* (quoting Winbush v. State by Glenwood State Hosp., 66 F.3d 1471, 1481 (8th Cir. 1995)).
50. *Id.* (quoting *Chambers*, 909 F.2d at 1217).
51. EEOC v. Midwest Div.–RMC, LLC, No. 04–00883–CV–W–REL., 2006 WL 6508508, at *2 (W.D. Mo. Aug. 17, 2006) (citing *Chambers*, 909 F.2d at 1217).
52. *Chambers*, 909 F.2d at 1217 (citing EEOC v. Metal Serv. Co., 892 F.2d 341, 348–49 (3d Cir. 1990); Paxton v. Union Nat'l Bank, 688 F.2d 552, 568 (8th Cir. 1982)).

ting his application would have been futile under the *Teamsters* precedent. Neither did the *Audrain* Court apply the second exception because the position at issue was advertised, and therefore whether the plaintiff made every reasonable attempt to convey his interest to the employer was a moot point.[53] Yet, the Eighth Circuit suggested the plaintiff could have prevailed on his discrimination claim if he had made every reasonable effort to convey his interest to the employer, thus seemingly propagating a third exception.[54] The court further muddied the waters by implying actual application is the only real way to meet the "every reasonable effort" standard of the third exception.[55]

C. *EEOC v. Audrain Health Care, Inc.*

1. Facts

In *Audrain*, the EEOC brought an action against Audrain Health Care, Inc. (Audrain), alleging that Audrain violated Title VII of the Civil Rights Act of 1964[56] and Title I of the Civil Rights Act of 1991[57] by refusing to consider transferring David Lunceford to a vacant operating room nurse position on the basis of his gender.[58]

Lunceford had worked as a nurse at Audrain since 2004 in several different departments.[59] Audrain allowed nurses to transfer between units and posted vacancies to inform current employees of opportunities to apply for transfer.[60] According to company policy, to be eligible for transfer, an employee must serve in his or her current position for at least six months unless the two impacted department directors agree to an early transfer.[61] To apply for a transfer, interested employees are required to fill out a "Request to Transfer" form.[62]

In March 2010, Audrain posted two job vacancies for nursing positions: a vacancy in the Operating Room (OR), and a vacancy in the

53. *Id.* at 1217.
54. EEOC v. Audrain Health Care, Inc., 756 F.3d 1083, 1087 (8th Cir. 2014).
55. *Id.* If actual application is the only way to excuse applying, then this is not an exception to the requirement that the plaintiff apply. This circular argument does nothing but couch the requirement to apply in obscure terms.
56. 42 U.S.C. § 2000e (2012).
57. 42 U.S.C. § 1981a (2012).
58. EEOC v. Audrain Health Care, Inc., No. 2:11–CV–57, 2013 WL 317311, at *2 (E.D. Mo. Jan. 28, 2013), *aff'd*, 756 F.3d 1083 (8th Cir. 2014).
59. *Id.*
60. *Id.*
61. *Id.* The impacted department directors are the director of the department to which the employee wants to transfer and the director of the department from which the employee would be transferred. *Id.*
62. *Id.* Upon completing the transfer request, the Human Resources Department would review the employee's personnel file for qualifications and performance issues to determine eligibility. *Id.*

Critical Care Unit (CCU).[63] Lunceford, who at the time was working in the Post Anesthesia Care Unit (PACU), completed a transfer request form from PACU to CCU.[64] Lunceford successfully transferred to the CCU and was scheduled to start on April 22, 2010.[65] On April 16, 2010, before his scheduled start date in the CCU, Lunceford asked Brooks, the clinical coordinator of PACU and the OR, if she would consider him or train him for the OR position.[66] Lunceford did not have any OR experience and was not qualified for the position without further training.[67] Brooks told Lunceford she "wanted to fill the position with a woman" because she wanted to have the right mix of patients to staff based on gender.[68] According to Lunceford, Brooks stated, "I hate to discriminate against you because you're a man, but the doctors want more female nurses in the OR."[69] Further, Brooks admitted she would not hire a man, regardless of his qualifications.[70] Lunceford reported this conversation to Audrain's Vice President of Clinical Services and Chief Nursing Officer, and stated he no longer wanted to work for Brooks.[71]

Lunceford never filled out a "Request for Transfer" form for the OR position.[72] In July, Audrain filled the OR position with a female nurse.[73]

The EEOC brought action against Audrain, alleging the company discriminated against Lunceford on the basis of his gender by failing to consider him for transfer.[74] Audrain moved for summary judgment, arguing it did not discriminate against Lunceford because he did not apply for the position and was not eligible or qualified for it.[75]

The district court concluded that the EEOC failed to establish direct evidence of discrimination[76] because Lunceford never completed a

63. *Id.*
64. *Id.* at *3.
65. *Id.*
66. *Id.*
67. *Id.*
68. Brief for Petitioner-Appellant at *10, *Audrain Health Care, Inc.*, 756 F.3d 1083 (No. 13–1720), 2013 WL 3293757, at *I.
69. *Id.* at *9.
70. *Id.* at *14.
71. *Audrain Health Care, Inc.*, 2013 WL 317311, at *3.
72. *Id.*
73. *Id.* Prior to Lunceford's inquiry, a female nurse with no OR experience applied for the position, but was not considered because of her lack of experience. *Id.* "Employees cannot be considered for an exception to the transfer policy without first completing a Request for Transfer." *Id*. at *2.
74. *Id.* at *1.
75. *Id.*
76. *Id.* at *5 ("It cannot be disputed that Brooks's remark that she wanted to hire a woman for the position indicates a discriminatory bias to hire a woman for the OR nurse position instead of a man. It is also undisputed that this remark involved a decision-maker discussing the vacant job at issue. None of the EEOC's

Request for Transfer, and therefore there was no adverse employment action because Audrain never actually made the decision to deny him the position.[77] In addition, the court held that the EEOC failed to establish an inference of discrimination under the *McDonnell Douglas* framework.[78] The district court was not persuaded by the EEOC's argument that Lunceford was excused from applying because he took "extraordinary" steps to express his interest in the position.[79] The court noted that in addition to not applying, Lunceford also conveyed to Audrain's Vice President of Clinical Services that he no longer wanted to work for Brooks at all.[80] The district court granted Audrain's summary judgment motion.[81] The EEOC appealed.[82]

2. The Eighth Circuit Weighs In

The Eighth Circuit refused to revisit the district court's findings regarding direct evidence or inference of discrimination, and instead focused its analysis on the question of whether Lunceford suffered an adverse employment action.[83] The EEOC argued that a jury could find Lunceford's failure to apply was excused because Brooks' comment that she wanted to fill the vacant position with a woman made it clear applying for the position would be futile.[84] The EEOC relied on language from the Supreme Court's decision in *International Brotherhood of Teamsters v. United States*, in which the Court stated that "[v]ictims of gross and pervasive discrimination could be denied relief precisely because the unlawful practices had been so successful as to-

proof, however, establishes a direct link between the decision to hire someone else for the vacant OR nurse position and Brooks' remark.").

77. *Id.* In its brief, the EEOC made the argument that there was in fact an adverse employment action because Brooks refused to consider Lunceford or any other man for the OR position, and admitted that this refusal was based on gender, not qualifications. This denied men the employment opportunity to even compete for the job on the basis of gender. Brief for Petitioner-Appellant, *supra* note 68, at *22.

78. *Audrain Health Care, Inc.*, 2013 WL 317311, at *5 (stating Lunceford failed to meet the second prong of the burden-shifting analysis since "Lunceford did not apply for the vacant OR nurse position. Audrain could not hire Lunceford for a job that he did not apply for").

79. *Id.* at *6 (reasoning Audrain never rejected his application because Lunceford did not apply, and further noting Lunceford was not qualified or eligible to apply for the OR position).

80. *Id.*

81. *Id.* at *7.

82. EEOC v. Audrain Health Care, Inc., 756 F.3d 1083, 1084 (8th Cir. 2014).

83. *Id.* at 1087.

84. Brief for Petitioner-Appellant, *supra* note 68, at *31–32. The EEOC argued that Brooks' statement that she would not hire *any* man regardless of qualifications amounted to a pattern or practice of discrimination as illustrated by *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 367–68 (1977).

tally to deter job applications from members of [a protected class]."[85] Said differently, the EEOC argued that men, as a class, were deterred from applying for this position because of the decision maker's comment that men would not be considered.

The Eighth Circuit found the EEOC had failed to establish that Audrain fostered an atmosphere of "gross and pervasive discrimination" comparable to the discrimination at issue in *Teamsters*.[86] The court stated, "*Teamsters* involved a class action and may be inapplicable to the present case because such analysis 'is usually applied to other class actions, rather than to actions brought by individual plaintiffs.'"[87] The court explained, "[i]n any event, this court has reiterated that an employee who does not formally apply must make every reasonable attempt to convey his [or her] interest in the job to the employer before he or she may prevail on a discrimination claim. . . . Here, Lunceford did not make every reasonable attempt to convey his interest. He did not apply for the position . . . ."[88] Ultimately, the Eighth Circuit affirmed the district court's summary judgment, holding the EEOC did not establish a prima facie case of employment discrimination.[89]

III. ANALYSIS

The Eighth Circuit's holding suggests that if the discrimination is not "gross and pervasive," an employee's failure to apply will preclude him or her from establishing a prima facie case of discrimination unless he or she makes every reasonable effort to convey his or her interest in the position.[90] The Eighth Circuit implies that every reasonable effort means actual application, thereby obscuring whether an em-

85. *Teamsters*, 431 U.S. at 367.

86. *Audrain*, 756 F.3d at 1087 (referencing *Teamsters*, 431 U.S. at 367–68, 328–31).

87. *Id.* (quoting Lockridge v. Bd. of Trs., of the Univ. of Ark., 315 F.3d 1005, 1011 (8th Cir. 2003) (en banc)) (citing Celestine v. Petroleos de Venezuella SA, 266 F.3d 343, 355–56 (5th Cir. 2001); Brown v. Coach Stores, Inc., 163 F.3d 706, 711 (2d Cir. 1998); Craik v. Minn. State Univ. Bd., 731 F.2d 465, 469–70 (8th Cir. 1984)).

88. *Id.* (quoting Lockridge, 315 F.3d at 1011; Chambers v. Wynne Sch. Dist., 909 F.2d 1214, 1217 (8th Cir. 1990)) (alteration in original) (internal quotation marks omitted) (citing Jackson v. United Parcel Serv., Inc., 643 F.3d 1081, 1086 (8th Cir. 2011)). The EEOC suggested men were the class in *Audrain* because Brooks acknowledged her refusal to consider Lunceford was based on his gender, not his qualifications. Brief for Petitioner-Appellant, *supra* note 68, at *30–31.

89. *Audrain*, 756 F.3d at 1087. After meeting with Lunceford regarding Brooks' comment that she wanted to hire a woman for the position, Audrain's Director of Human Resources stated that during her meeting with Lunceford, she did not believe he was expressing an interest in the OR position and instead believed he was merely advising her he was upset after his conversation with Brooks. A single conversation does not amount to every reasonable effort. *Id.* at 1087–88.

90. The every reasonable effort standard applies regardless of whether the position is posted. In *Audrain* the vacant position was posted, so this Note focuses on the third exception.

ployee in the Eighth Circuit has a remedy under Title VII for isolated incidents of discrimination that deter him or her from applying for a position.[91] This holding begs the question of what the court means by "every reasonable effort" when the position is posted and the employee is deterred from applying.

In the same vein, is it reasonable to require an employee to "subject themselves to the humiliation of explicit and certain rejection"[92] after being told by the relevant decision maker that his or her protected class would not be considered for a position, regardless of qualifications?

A. The Eighth Circuit Wrongly Circumvented the Direct Evidence Discussion

Direct evidence is "evidence showing a specific link between the alleged discriminatory animus and the challenged decision, sufficient to support a finding by a reasonable fact finder that an illegitimate criterion actually motivated the adverse employment action."[93] The relevant inquiry is "whether the [decision maker's] statements lead to the conclusion that the adverse action was taken because of the person's protected status without inference or presumption."[94] Direct evidence "most often comprises remarks by decisionmakers that reflect without inference, a discriminatory bias."[95] Direct evidence includes "proof of an admission that gender was the reason for an action."[96]

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91. *Audrain*, 756 F.3d at 1087.

92. Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 365 (1977).

93. McCullough v. Univ. of Ark. for Med. Sci., 559 F.3d 855, 860 (8th Cir. 2009) (quoting Russell v. City of Kansas City, Mo., 414 F.3d 868, 873 (8th Cir. 2007) (internal citations omitted)).

94. EEOC v. Lehi Roller Mills Co., No. 2:08–CV–00591, 2014 WL 1757987, at *1 (D. Utah May 1, 2014).

95. *McCullough*, 559 F.3d at 861; *see also* Ducksworth v. St. Louis Metro. Police Dept., 491 F.3d 406 (8th Cir. 2007) (finding "I believe there is a definite need for female officers on the night watch," followed by the reassignment of only females to the night watch, along with an admission by the defendants that "[a]ppellees' gender was the reason they were involuntarily assigned to the night watch," constituted direct evidence of gender discrimination). It is hard to reconcile *Ducksworth* with *Audrain*, because in both cases the employers made explicit comments linking gender to the subsequent action and admitted that gender was the only factor they considered, yet the comment in *Ducksworth* constituted direct evidence and the comment in *Audrain* did not.

96. Kerns v. Capital Graphics, Inc., 178 F.3d 1011, 1017 (8th Cir. 1999). In *Audrain*, Brooks acknowledged that gender was the only factor she considered during her conversation with Lunceford. Brief for Petitioner-Appellant, *supra* note 68, at *10. It is surprising the Eighth Circuit did not find this to be "proof of an admission that gender was the reason for the action." *Kerns*, 178 F.3d at 1017.

In *Audrain*, the relevant decision maker told Lunceford that "she wanted to fill the position with a woman."[97] The district court stated:

> It cannot be disputed that Brooks' remark that she wanted to hire a woman for the position indicates a discriminatory bias to hire a woman . . . instead of a man. It is also undisputed that this remark involved a decisionmaker discussing the vacant job at issue. None of the EEOC's proof, however, establishes a direct link between the decision to hire someone else for the vacant OR nurse position and Brooks' remark.[98]

The EEOC's brief pointed out that the district court's reasoning was counterintuitive because in acknowledging Brooks was biased against men and would not have selected one regardless of qualifications, it conceded there was clearly a connection between Brooks' bias against men and her decision to hire a woman.[99] In other words, the EEOC did not think an inference was required to draw this conclusion. The Eighth Circuit declined to review this finding,[100] which forced the EEOC to prove an inference of discrimination under the *McDonnell Douglas* framework. The Eighth Circuit's conclusion that the statement did not constitute direct evidence is flawed when considered in conjunction with past precedent.

The court in *Kerns v. Capital Graphics, Inc.*[101] stated that direct evidence might include "proof of an admission that gender was the reason for an action, discriminatory references to the particular employee in a work context, *or stated hostility to [a specific gender] being in the workplace at all*."[102] In *Audrain*, Brooks' admission that she

97. EEOC v. Audrain Health Care, Inc., No. 2:11–CV–57, 2013 WL 317311, at *3 (E.D. Mo. Jan. 28, 2013).

98. *Id.* at *5.

99. Brief for Petitioner-Appellant, *supra* note 68, at *30. "Indeed, since Lunceford is a man and Brooks would not hire a man, she necessarily would have had to hire someone else. . . . [A] jury could . . . [conclude] that Brooks did exactly what she announced she was going to do—fill the position with a woman, rather than a man." *Id.*

100. EEOC v. Audrain Health Care, Inc., 756 F.3d 1083, 1087 (8th Cir. 2014).

101. 178 F.3d 1011.

102. *Id.* at 1017 (emphasis added); *see also* Browning v. President Riverboat Casino-Mo., Inc., 139 F.3d 631, 634-35 (8th Cir. 1998) (involving a case where the principal decision maker called an employee "that white boy," and the court held the comment "did not simply evidence an awareness of the employee's gender or race, it reveal[ed] a decidedly negative attitude toward [white] people on the part of [a person] responsible for [the employment decision]."); Rivers-Frison v. Se. Mo. Cmty. Treatment Ctr., 133 F.3d 616, 619 (8th Cir. 1998) (discussing the distinction between "[c]omments which demonstrate a 'discriminatory animus in the decisional process' or those uttered by individuals closely involved in employment decisions," from 'stray remarks in the workplace,' 'statements by nondecisionmakers,' or 'statements by decisionmakers unrelated to the decisional process.'"); Stacks v. Sw. Bell, 27 F.3d 1316, 1324 (8th Cir. 1994) ("Not all comments that reflect a discriminatory attitude will support an inference that an illegitimate criterion was a motivating factor in an employment decision. Hudson's comment that 'women were the worst thing' that ever happened to the com-

would not consider a man for the position, whether qualified or not, appears to be a "stated hostility" to men working in the OR at all.[103]

In *McDermott v. Lehman*,[104] the plaintiff, a fifty-five-year-old engineer, inquired about an open Navy mechanical engineering position and was told by the decision maker that he was looking to hire a young engineer.[105] The Maine court found that the statement was direct evidence of discrimination. The court explained that the employer:

> [E]ither rejected Plaintiff because of his age or deterred him from applying because of his age. Under these circumstances, it is unnecessary to rigidly hold Plaintiff to proof of the elements of a *prima facie* case. Plaintiff need not have completed the formal application if it would have been *futile* for him to have done so.[106]

It further held that there was still a question of fact as to whether the Plaintiff's failure to further pursue the position was caused by the decision maker's comment or the plaintiff's own lack of interest.[107] Because the "resolution of these issues of fact [was] essential to [the] determination of this case," the court denied the employer's summary judgment motion and remanded the case.[108] In *Audrain*, the Eighth Circuit could have done the same by remanding the case to allow a jury to determine whether Brooks' discrimination or Lunceford's lack of interest caused Lunceford not to apply.

Similarly in *Scheick v. Tecumseh Public Schools*,[109] the Sixth Circuit held that summary judgment was improper where there was direct evidence of discrimination. There, a superintendent told a high school principal "they just want[ed] somebody younger," before making the decision not to renew the fifty-six-year-old's contract. The Sixth Circuit's decision was unaffected by the fact that the school had evidence that its decision was actually based on complaints about the principal's performance and "lack of leadership."[110] In *Perry v. Kunz*,[111] the Eighth Circuit concluded that statements by a decision maker that the plaintiff would be selected for lay-off because of her

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pany . . . warrants such an inference, even though it was not made during the decisional process.").

103. Brief for Petitioner-Appellant, *supra* note 68, at *30.

104. 594 F. Supp. 1315 (D. Me. 1984).

105. The plaintiff asked if it made much of a difference that he was older, to which the employer responded he thought so because a couple of older engineers would soon be retiring, so they wanted a younger engineer to take their place. *Id.*

106. *Id.; see* Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 365–67 (1977).

107. *McDermott*, 594 F. Supp. at 1323 ("This testimony and other statements made by Plaintiff constitute direct evidence that Defendant's employee . . . either rejected Plaintiff because of his age or deterred him from applying because of his age.").

108. *Id.*

109. No. 13-1558, 2014 WL 4403175 (6th Cir. Sept. 2, 2014).

110. *Id.* at *5–6. The court remanded to determine whether age was the "but-for" cause of the employer's allegedly discriminatory decision. *Id.*

111. 878 F.2d 1056 (8th Cir. 1989).

age, if believed, constituted direct evidence of discrimination.[112] Both *Scheick* and *Perry* illustrate that a statement far less blatant than Brooks' statement in *Audrain* can be considered direct evidence, suggesting the Eighth Circuit erred in concluding otherwise.

In *EEOC v. Lehi Roller Mills Co., Inc.*,[113] when putting the plaintiff on leave, the employer told the plaintiff he was "getting old," and that the company wanted younger employees with new ideas.[114] The Utah court noted that when determining if a statement constituted direct evidence the relevant inquiry is "whether the statements lead to the conclusion that the adverse action was taken because of the person's protected status without inference or presumption."[115] The court stated that "[h]ere, if proven at trial, the statements Plaintiffs allege were made constitute direct evidence of discriminatory motive under the ADEA because they were made in temporal proximity to his termination and were made by a decision maker to [plaintiff] . . . ."[116] The court denied summary judgment because there was direct evidence of discriminatory motive.[117]

The Eighth Circuit did not review whether Brooks' statement constituted direct evidence, instead focusing on whether there was an adverse employment action. The Eighth Circuit could have concluded the adverse employment action in *Audrain* was the decision maker's refusal to consider any man for the open position, regardless of qualifications.[118] Lunceford was denied the *opportunity to compete* for the open position. If being denied the opportunity to compete constituted an adverse employment action, then the Eighth Circuit could have concluded Brooks' statement that she wanted to fill the OR position with a woman was direct evidence of discriminatory motive. This would have allowed Lunceford to proceed using a mixed-motives analysis. Under this analysis, if Lunceford could prove his gender was a motivating factor, then he could recover from Audrain, regardless of Audrain's nondiscriminatory justifications.

B. "Reverse Discrimination": The (White) Elephant in the Room

Reverse discrimination claims involve plaintiffs from groups that have been favored historically, such as whites and males.[119] When

112. *Id.* at 1058-60.
113. 2:08–CV–00591, 2014 WL 1757987 (D. Utah May 1, 2014).
114. *Id.*
115. *Id.*
116. *Id.*
117. *Id.* Someone older replaced the plaintiff, but the court pointed out that replacement by someone younger is not a required element of the prima facie case. *Id.* at *2.
118. Brief for Petitioner-Appellant, *supra* note 68, at *14.
119. LINDEMANN ET AL., *supra* note 68, at 2–28.

establishing a prima facie case of reverse discrimination, some courts impose upon the plaintiff the additional burden of proving background circumstances sufficient to raise the inference that the employer is the unusual employer who discriminates against the majority.[120] The rationale is that because the plaintiff was not historically discriminated against, "an inference of discrimination should not automatically apply where the employer takes action benefitting another group."[121]

There are two types of evidence that can be used to satisfy the "background circumstances" test: (1) "evidence indicating that the particular employer at issue has some reason or inclination to discriminate invidiously against [the majority]" and (2) "evidence indicating that there is something 'fishy' about the facts of the case at hand that raises an inference of discrimination."[122] "An expression of an interest in hiring a female by the person in charge of hiring" is sufficient to satisfy the background circumstances analysis.[123]

In *Mills v. Health Care Service Corp.*,[124] after an assistant manager position was created, the plaintiff, a white male, and three females applied for the position.[125] The employer ultimately hired a female.[126] The plaintiff brought suit alleging gender discrimination in violation of Title VII. The district court granted summary judgment in favor of the defendant after concluding that the plaintiff could not establish that the employer's proffered reasons for not promoting the plaintiff were pretextual.[127] The Seventh Circuit analyzed the claim for discrimination brought by a majority plaintiff under the *McDonnell Douglas* framework.[128] The court replaced the first prong of the *McDonnell Douglas* framework with a "background circumstances" test, which required the plaintiff to show sufficient "background circumstances which give rise to an inference of

120. Susan C. Thies, Comment, Mills v. Health Care Service Corporation*: Are "Background Circumstances" Too Much to Ask of a Plaintiff Alleging Reverse Discrimination in Employment?*, 74 ST. JOHN'S L. REV. 537, 550 (Spring 2000).

121. *Id.* at n.103.

122. *Id*. at 550–51 (citing Harding v. Gray, 9 F.3d. 150, 153 (D.C. Cir. 1983)).

123. *Id.* at 551 (citing Duffy v. Wolle, 123 F.3d 1026, 1037 (8th Cir. 1997), *abrogated by* Torgerson v. City of Rochester, 643 F.3d. 1031 (2011)). The *Duffy* Court stated that interest in hiring a female, evidence of the plaintiff's superior qualifications, and evidence of other female hires were all "background circumstances." *Duffy*, 123 F.3d at 1036–37. The Plaintiff was "statutorily exempt from bringing a claim under Title VII." *Id.* at 1036 (citing 42 U.S.C. § 2000e-16 (2012)). The plaintiff instead brought a *Bivens* action, but the court still applied the "background circumstances" test as a replacement for the first prong of the *McDonnell Douglas* framework. *Id.* at 1036–37.

124. 171 F.3d 450 (7th Cir. 1999).

125. *Id.* at 453.

126. *Id.*

127. *Id.* at 453–54.

128. *Id.* at 545–55.

discrimination. . . . to overcome the background presumption that a white man was not subject to employment discrimination."[129]

Although not mentioned in *Audrain*, the Eighth Circuit has adopted the background circumstances test.[130] In *McGinnis v. Union Pacific Railroad*,[131] the Eighth Circuit applied the background circumstances test and rejected the male plaintiff's gender discrimination claim on the grounds that at the time he was terminated, 82% of the train dispatchers were men.[132]

Men, especially white men, have not been historically discriminated against and, therefore, courts hold them to a higher burden of proof and potentially presume an absence of discrimination.[133] Because Audrain was not the "unusual employer who discriminates against [men]," it is probable that Lunceford was fighting an uphill battle in establishing his prima facie case of gender discrimination.[134]

C. Failure-to-Apply—An Employer's Free Pass Under the *McDonnell Douglas* Framework

Under the *McDonnell Douglas* framework a plaintiff must show: (1) the plaintiff is a member of a protected group; (2) the plaintiff applied and was qualified for the position for which the employer was seeking applicants; (3) despite the plaintiff's qualifications, the employer rejected the plaintiff; and (4) after the plaintiff's rejection, the position remained open and the employer continued to seek applicants from persons possessing the plaintiff's qualifications.[135] "The prima facie case serves an important function in litigation: it eliminates the most common nondiscriminatory reasons for the plaintiff's rejection."[136] The prima facie proof required for Title VII litigation is not immutable. In *McDonnell Douglas Corp. v. Green*, the Court stated "[t]he facts necessarily will vary in Title VII cases, and the specifica-

129. *Id.* at 457; *see also* Thies, *supra* note 120, at 543 n.28 (concluding the fact that the employer disproportionately promoted women during the seven years the plaintiff was employed constituted sufficient background circumstances for the court).
130. McGinnis v. Union Pac. R.R., 496 F.3d 868, 875 (8th Cir. 2007) ("To establish the first prong of his prima facie case, McGinnis must show Union Pacific is the unusual employer who discriminates against the majority because McGinnis is a man.").
131. *Id.*
132. *Id.* The court also noted other reasons, such as the plaintiff's rule violations and failure to pass the apprentice training course. *Id.*
133. Thies, *supra* note 120, at 553–54 ("By requiring a greater degree of proof from some plaintiffs and not others, the 'background circumstances' test violates the intent of the neutral language in Title VII.").
134. Looking at the facts of *Audrain*, the Eighth Circuit, possibly presuming Lunceford was not discriminated against, may have made its decision long before it reached the adverse employment action issue.
135. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).
136. Tex. Dept. of Cmty. Affairs v. Burdine, 450 U.S. 248, 253–54 (1981).

tion . . . of the prima facie proof required from respondent is not necessarily applicable in every respect to differing factual situations."[137] This discussion will focus on the application requirement because the *Audrain* decision centered on the plaintiff's lack of application.

To make a prima facie case under the *McDonnell Douglas* framework, the plaintiff must apply for the position in question.[138] The application requirement is a protectionist tool for the employer. Actual application allows the employer the opportunity to consider the applicant and then make an informed decision.[139] But how does this rationale stand up in cases like *Audrain*, where the protectionist purpose is extraneous because the decision maker made her decision regarding the applicant prior to actual application?

In *Audrain*, Brooks' statement that she would not consider men for the position was so explicit that it deterred Lunceford from applying, thereby preventing him from making his prima facie case under the *McDonnell Douglas* framework. The Eighth Circuit held that because Lunceford did not apply, he was not denied the position and therefore there was no adverse employment action. Following this rationale, if an employer's comments are discriminatory enough to deter an applicant from applying, then the employer has a free pass under the *McDonnell Douglas* framework in the Eighth Circuit. The *McDonnell Douglas* framework "is an evidentiary standard, not a pleading requirement. . . . [It] should not be transposed into a rigid pleading standard for discrimination cases."[140] In *Audrain*, the Eighth Circuit should have overlooked the application requirement because failing to do so absolved Audrain of liability at Lunceford's expense.

D. Every Reasonable (Ambitious) Effort

"Reasonable" means "[f]air, proper, or moderate under the circumstances."[141] But scholars have noted "[i]t is extremely difficult to state what lawyers [or judges] mean when they speak of 'reasonableness.'"[142] By its definition, reasonableness does not mean extreme efforts. After *Audrain*, however, it appears that in failure-to-apply

137. *McDonnell Douglas Corp*, 411 U.S. at 802 n.13.

138. *Id.* at 802; *see, e.g.*, Lockridge v. Bd. of Trs., of the Univ. of Ark., 315 F.3d 1005, 1010 (8th Cir. 2003) (en banc). Typically the employee must show that "she applied . . . and was rejected." *Id.*

139. *McDonnell Douglas Corp.*, 411 U.S. at 802.

140. Swierkiewicz v. Sorema N.A., 534 U.S. 506, 510, 512 (2002).

141. BLACK'S LAW DICTIONARY 1456 (9th ed. 2009).

142. John Salmond, JURISPRUDENCE 183 n.(u) (Glanville L. Williams ed., 10th ed. 1947).

cases, an employee will not be excused from applying unless his or her efforts are ambitious and relentless.[143]

This ambitious-reasonable standard has not always been the rule in the Eighth Circuit. In *Easley v. Empire Inc.*,[144] the court noted that it will excuse failure to submit a formal application "when a known discriminatory policy, such as reflected by the statements [of two managers that 'men do not like to take orders from women'] deters potential jobseekers" such as the plaintiff, a woman.[145] Explaining this exception, the court later stated "[i]t would be ironic—bizarre, in fact—if a victim of discrimination were unable to vindicate her rights because she had the peculiar misfortune of being discriminated against in a way that necessarily prevented her from making her *prima facie* case."[146] It should be noted that the plaintiff in *Easley* inquired on several occasions about the vacant position.[147] It seems likely this persistence led the Eighth Circuit to excuse the formal application as futile. The court emphasized Easley's multiple inquiries and the fact she was more qualified for the position than the man who ultimately received the job.[148] The employer argued Easley failed to make her prima facie case in part because she did not prove that she applied for or was qualified for the position.[149] The Eighth Circuit categorically rejected this argument, stating:

> The Supreme Court has warned against excessive quibbling over the prima facie case after the defendant has proceeded with evidence of a legitimate nondiscriminatory reason for the challenged personnel decision. The purpose of the prima facie case, that of airing the most common reasons why applicants are not hired, will have been met, and those concerns will have merged into the ultimate issue of the case—whether the applicant was treated less favorably because of sex.[150]

Although the court did not reach the prima facie case issue, it noted formal application would be excused here because of the supervisor's statements.[151] The Eighth Circuit was also quick to point out that the plaintiff need only show that his or her qualifications "fell

143. Although the Eighth Circuit stated that absent application a plaintiff must make every reasonable attempt to convey his or her interest in the position, the court implied that every reasonable attempt means actual application.
144. 757 F.2d 923 (8th Cir. 1985).
145. *Id.* at 930 n.7. The plaintiff told her supervisor she would like to apply for the position of retail manager, to which her employer responded, "You know men do not like to take orders from women." *Id.* The plaintiff's supervisor's supervisor later repeated this comment. *Id.*
146. Shannon v. Ford Motor Co., 72 F.3d 678, 682 (8th Cir. 1996) (citing Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 367 (1977)).
147. *Easley*, 757 F.2d at 930.
148. *Id.* at 931.
149. *Id.* at 929.
150. *Id.* at 929–30 (citations omitted).
151. *Id.* at 930 n.7 (citing Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 363–68) (noting that following a showing of class-wide discrimination, a nonap-

within general range of qualifications possessed by other persons considered for the job."[152] Said otherwise, the plaintiff would not have to show that her qualifications were the same or better than the other applicants, just in the general range. The Court ultimately sided with the plaintiff,[153] finding the employer's explanation for failing to consider her for the position was largely pretextual, and this type of gender discrimination was the employer's "general policy and practice."[154] Lunceford, unlike Easley, only inquired about the open OR position once. This distinction could very well have been what doomed Lunceford.

Easley can be contrasted with *Culpepper v. Vilsack*,[155] where the court held that the plaintiff did not make every reasonable effort to convey her interest in the position.[156] In *Culpepper*, the plaintiff, a hearing-impaired employee, claimed the district court erred in failing to excuse as futile her failure to apply for the loan specialist position, and erred in failing to find discrimination when the announcement referred to "listening."[157] The plaintiff argued her failure to apply for the loan specialist position should have been excused because of the history of discrimination against her[158] and the inclusion of the discriminatory "listening experience" language in the announcement.[159] Culpepper's assertion of futility ultimately failed because the lower

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plicant member of the class is entitled to show that the discriminatory policies deterred him from applying).

152. *Id.* at 930 n.8 (discussing the fact that a company chose a better qualified applicant aids the employer's burden of articulating a legitimate, nondiscriminatory reason for its employment decision, not the plaintiff's prima facie case); *see also* United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711 (1983) (recounting how the Supreme Court stated the ultimate issue is whether the fact finder may conclude that the plaintiff's qualifications were not the real motivation for the personnel decision).

153. *Easley*, 757 F.2d at 932. The court discussed how plaintiff's success should dispel the "discriminatory atmosphere" at the company and also noted the district court's idea that plaintiff's suit "would deter future overt, intentional discrimination." *Id.*

154. *Id.* at 931. Nine out of about 300 retail managers were women, and four of them were hired after plaintiff's discharge. Additionally, the employer's policy manual stated, "Past experience has proven that a male Office Manager generally is better qualified to perform these required duties; and therefore, it is recommended that a male applicant be hired if possible." *Id.*

155. 664 F.3d 252 (8th Cir. 2011) (involving a case where the plaintiff brought an action against the Secretary of the United States Department of Agriculture for workplace discrimination and retaliation in violation of the Rehabilitation Act of 1973, 29 U.S.C.S. § 701 (2012)).

156. *Id.*

157. *Id.* at 256–57 (noting the job announcement referred to "successful activity/experience in listening").

158. *Id.* at 255 (discussing the multiple complaints that the plaintiff filed with the USDA over the course of her employment).

159. *Id.* at 257.

court found the recent death of her father—not discrimination—deterred her from applying.[160] The Eighth Circuit left this finding undisturbed.[161]

The plaintiff also claimed that after the "listening" language was removed, the USDA continued to discriminate against her by not promoting her through the accretion-of-duties process.[162] The accretion-of-duties process is a noncompetitive promotion process where employees working above their grade level can ask to have their grade level reclassified to reflect the level at which they are actually performing.[163] Either the employer or employee can initiate the accretion-of-duties promotion by requesting a desk audit; however, Culpepper did not request a desk audit or request that her employer do so.[164] The plaintiff never applied for an accretion-of-duties promotion, and the Eighth Circuit held she did not make every reasonable effort to convey her interest in the promotion to her employer, thus foreclosing the possibility of relief.[165]

Audrain falls somewhere between *Easley* and *Culpepper*. Lunceford did not inquire about the OR position as persistently as the plaintiff in *Easley*, but he did at least inquire about the position, unlike the plaintiff in *Culpepper*. *Audrain* appears to be more like *Easley* than *Culpepper*. Therefore, the Eighth Circuit should have denied Audrain's motion for summary judgment.

The Fifth Circuit in *Hailes v. United Air Lines*[166] used a different standard. In *Hailes*, United Air Lines (United) placed an advertisement in the newspaper for stewardesses under the "Help Wanted—Females" column, and Hailes, a man, filed a Title VII lawsuit alleging gender discrimination.[167] Hailes never applied for the position, nor did he communicate in any way with United.[168] The court first considered whether Hailes was an "aggrieved" person under the Act.[169] The *Hailes* court found that "the types of advertisements sought to be proscribed by this subsection are those, which by their expression of preference for one sex, effectively inhibit members of the opposite sex from seeking employment with the company inserting the advertisement."[170] United argued that because Hailes did not apply, he could

160. *Id.*
161. *Id.*
162. *Id.*
163. *Id.*
164. *Id.* Culpepper did not make any attempt, let alone a reasonable one.
165. *Id.* at 257–58.
166. 464 F.2d 1006 (5th Cir. 1972).
167. *Id.*
168. *Id.* at 1008.
169. 42 U.S.C. § 2000e–5(e) (2012).
170. *Hailes*, 464 F.2d at 1008.

not be aggrieved.[171] The court rejected this proposition stating, "[t]he very appearance at an employer's offices of one who had read the discriminatory ad but nevertheless continued to seek the job, would demonstrate that the reader was not deterred by this unlawful practice and therefore not aggrieved."[172]

The Fifth Circuit refused to hold that a "mere casual reader" of an advertisement could bring suit, instead finding that "[t]o be aggrieved under this subsection a person must be able to demonstrate that he has a real, present interest in the type of employment advertised. In addition, that person must be able to show he was effectively deterred by the improper ad from applying for such position."[173] The court held that whether Hailes was reasonably deterred from seeking the position in violation of Title VII was a question for the trial court.[174]

By requiring the plaintiff to demonstrate a "real, present interest" in the position, the court showed that the pool of potential futile-gesture plaintiffs is not unlimited. This standard would have helped Lunceford in *Audrain* and alleviated any concern the Eighth Circuit may have had about opening the floodgates in failure–to-apply cases. As an illustration, in *Audrain*, Lunceford would be an aggrieved person because he expressed a "real, present interest" in the open OR position, whereas another male nurse in the OR who heard Brooks' statement would not. Because the Eighth Circuit did not use this approach, future plaintiffs are subject to the ambiguous and ambitious "every reasonable effort" standard.

E. The Legal Landscape After *Audrain*

In the Eighth Circuit, under the *McDonnell Douglas* framework, an employee is excused from applying when: (1) he can show that absent "gross and pervasive" discrimination he would have applied;[175] (2) the position was not posted, and he made every reasonable effort to convey to the employer his interest in the position;[176] or (3) the position is officially posted, but instead of applying he made every reasonable effort to convey to the employer his interest in the position.[177]

171. *Id.*
172. *Id.* ("Thus, if we were to hold that Hailes cannot challenge this advertisement, then nobody could ever complain of this practice which Congress has so directly proscribed.").
173. *Id.*
174. *Id*. at 1009.
175. Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 367 (1977). After establishing a pattern or practice of discrimination, a class member plaintiff who failed to apply has the opportunity to prove that he or she would have applied if the discrimination was not present. *Id.*
176. Chambers v. Wynne Sch. Dist., 909 F.2d 1214, 1217 (8th Cir. 1990) (citing EEOC v. Metal Serv. Co., 829 F.2d 341, 348 (3d Cir. 1990)).
177. EEOC v. Audrain Health Care, Inc., 756 F.3d 1083, 1087 (8th Cir. 2014).

Stated differently, the plaintiff must show that he made "every reasonable effort" whether or not the position was posted. This third category is rather questionable considering precedent, which applies the every reasonable effort test only when the position was not officially advertised.[178] Yet, the Eighth Circuit discussed whether Lunceford made every reasonable effort in *Audrain*, where the position was posted.[179]

Post-*Audrain*, the Eighth Circuit has left little guidance for future plaintiffs that fail to apply. First, Eighth Circuit precedent provides no meaningful examples of "every reasonable effort." The *Audrain* court suggested that actual application is the only way to meet the standard. This position automatically dooms any plaintiff who does not apply, and renders the exception meaningless. The Eighth Circuit would have been more transparent by stating, "Lunceford you should have applied, and because you did not, you cannot be afforded relief." The peculiar facts in *Audrain* could be part of the reason the court came to its conclusion.[180] The Eighth Circuit may have intended the holding to be exclusive to the facts. However, by failing to include a caveat saying as much, the court passively accepted isolated instances of discrimination by implying the court would not excuse failure to apply unless and until a pattern or practice of discrimination was established.

The Supreme Court in *Teamsters* recognized the need for a failure-to-apply exception and noted that "[i]f an employer should announce his policy of discrimination by a sign reading 'Whites Only' on the hiring office door, his victims would not be limited to the few who ignored the sign and subjected themselves to personal rebuffs."[181] Likewise in *Audrain*, the employer announced her policy to discriminate against men verbally.[182] The *Teamsters* Court found that a sign reading "Whites Only" amounted to a pattern or practice of discrimination.[183] This begs the question: Why did the Eighth Circuit not find the same?

One possible rationale is a sign on the door is more notorious than a statement made to a single class member within earshot of two

178. It is possible the court distinguishes between advertised and unadvertised positions because advertised positions provide extrinsic evidence that the employee had reason to be aware of the open position.

179. *Audrain*, 756 F.3d at 1087–88.

180. The plaintiff was a white male and Brooks' comment was blatantly discriminatory, whereas in other failure-to-apply cases the employer's comments required a more strenuous inference of discrimination. *Compare* Easley v. Empire Inc., 757 F.2d 923, 930 (8th Cir. 1985) ("You know men do not like to take orders from women."), *with Audrain*, 756 F.3d at 1085.

181. Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 365 (1977). The failure-to-apply exception is predicated upon the existence of a pattern or practice of "gross and pervasive" discrimination. *See supra* note 175 and accompanying text.

182. *Audrain*, 756 F.3d 1083.

183. *Teamsters*, 431 U.S. 324.

others. Perhaps the more notorious the statement, the more likely excluded persons would be deterred from applying, and therefore be victims of discrimination. However, this ignores the purpose of Title VII, which is to protect individual plaintiffs who are members of a protected class from discrimination. Further, it would require multiple individuals to be affected before Title VII protection becomes available. The statement made in *Audrain*, if advertised on a door, would amount to a pattern or practice of discrimination, yet the court reached a conclusion contrary to *Teamsters* because only two people heard it. This case would have been the perfect opportunity for the court to articulate a narrow gateway to relief for plaintiffs who, in the absence of "gross and pervasive" discrimination, are deterred from applying for a position because of an employer's blatantly discriminatory statement.

IV. CONCLUSION

Forcing plaintiffs to apply for a position after they have already been rejected is humiliating. When the Eighth Circuit tells Gary he should have applied at the law firm irrespective of Sally's comments, he will likely feel degraded. The failure-to-apply exception was once a useful tool for plaintiffs who, because of "gross and pervasive" discrimination, were deterred from applying for a position in which they would have otherwise been interested. The failure-to-apply exception could have saved Gary additional embarrassment by not requiring him to go through the motions of applying, when he knew he would be denied the job. However, after *Audrain*, a plaintiff in the Eighth Circuit should not rely on the exception unless there is a very clear pattern or practice of discrimination.

In *Audrain*, the plaintiff only alleged that Brooks' statement was direct evidence, and that the court should excuse the plaintiff's failure to apply as futile. The Eighth Circuit did not review the lower court's holding that the statement was direct evidence, instead focusing on the fact that because the plaintiff did not apply, there was no adverse employment action. For the reasons outlined above, the Eighth Circuit erred in not concluding the statement was direct evidence. Because the court construed the causation aspect of direct evidence narrowly, future plaintiffs should expand their complaints to include sufficient evidence to survive summary judgment under the *McDonnell Douglas* framework as well.

The *Audrain* opinion rested on the fact that there was no adverse employment action. Future plaintiffs who do not apply for a position cannot rely on the failure-to-apply exception. Instead, they should allege they were denied the *opportunity to compete*—this is the battleground for future plaintiffs. Being denied the opportunity to compete satisfies the adverse employment action prong of *McDonnell Douglas*.

Majority plaintiffs must also be cognizant of the presumption against discrimination working against them and, therefore, would be wise to allege background circumstances that support the proposition that their employer is the unusual employer who discriminates against the majority. Future plaintiffs need to produce evidence they enthusiastically conveyed their interest in the position to the employer, absent application. A mere inquiry or statement of interest will likely not suffice post-*Audrain*.

Although these alternative suggestions may help future plaintiffs, the *Audrain* opinion and the volume of precedent in the Eighth Circuit working against individual employees claiming discrimination indicate future plaintiffs will face a hard road to success.