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Between Pretext Only and Pretext Plus: Understanding St. Mary's Honor Center v. Hicks and its Application to Summary Judgment

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CASE COMMENT

Between Pretext Only and Pretext Plus: Understanding *St. Mary's Honor Center v. Hicks* and its Application to Summary Judgment

I. INTRODUCTION

In June 1993, the Supreme Court revisited an area of civil rights litigation it had defined twenty years earlier in the landmark case of *McDonnell Douglas v. Green*.[1] *McDonnell Douglas* established a well-known burden-shifting procedure designed to assist those Title VII plaintiffs who do not have direct evidence of their employers' discriminatory intentions. Originally established in the context of racial discrimination,[2] the reasoning of *McDonnell Douglas* and its burden-shifting framework have been extended into several other areas of federal anti-discrimination law, including age,[3] pregnancy,[4] and handicap discrimination.[5] In each of these areas, the *McDonnell Douglas* framework provides courts and litigants with an ordered method of determining a crucial, yet often elusive, element of the plaintiff's case: the employer's discriminatory intent.

The Supreme Court's opinion in *St. Mary's Honor Center v. Hicks*[6] does not represent its first return to *McDonnell Douglas* or its first attempt to clarify circuit-splitting differences over the decision's interpretation and application.[7] The *Hicks* opinion,

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1 411 U.S. 792 (1973).

2 Percy Green, the plaintiff in *McDonnell Douglas*, was a black employee who claimed that his dismissal was racially motivated. *McDonnell Douglas*, 411 U.S. at 794.

3 Age discrimination claims arise under the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §§ 621-634 (1988).

4 The Pregnancy Discrimination Act of 1978 amended Title VII to prohibit discrimination "because of or on the basis of pregnancy, childbirth, or related medical conditions . . . ." 42 U.S.C. § 2000e(k) (1988).

5 The Americans with Disabilities Act of 1990, 42 U.S.C. § 12202 (1990), prohibits job discrimination against persons with disabilities.

6 113 S. Ct. 2742 (1993).

7 *See* Furnco Constr. Corp. v. Waters, 438 U.S. 567 (1978); Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981); United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711 (1983).

which divided the Court 5-4 and produced a contentious exchange between Justices Scalia and Souter, once again examined an area of confusion produced by *McDonnell Douglas* and its progeny: what precisely must a Title VII plaintiff show in order to carry her burden of proof?

Most of the immediate reaction to *Hicks* agreed that the Court's decision made the Title VII plaintiff's burden more difficult to bear;[8] some commentators and civil rights lawyers went even further, claiming that the decision prevented recovery for all plaintiffs except those with direct evidence of discrimination.[9] Following the *Hicks* decision, Congress responded by introducing legislation designed to undo its effect,[10] and the EEOC has filed numerous amicus briefs in cases which test its holding.[11]

Although recent reaction to the case's effect has tempered somewhat,[12] fundamental questions regarding the interpretation

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8 *See* Linda Greenhouse, *Justices Increase Workers' Burden in Job-Bias Cases*, N.Y. TIMES, June 26, 1993, at A1; David G. Savage, *Justices Rule Fired Workers Must Prove Bias*, LOS ANGELES TIMES, June 26, 1993, at A1.

9 *See Leading Cases: Federal Statutes and Regulations*, 107 HARV. L. REV. 322, 343 (1993) (*Hicks* "effectively den[ies] remedy to many plaintiffs not fortunate enough to 'catch their bosses in the act.'"); Joan Biskupic, *High Court Erects New Barrier to Job Bias Suits; Employees Required to Furnish Direct Evidence of Discrimination, Which Can be Hard to Do*, THE WASH. POST, June 26, 1993, at A4; William H. Freivogel, *High Court Narrows Bias Test: St. Louis Case Changes 20-Year-Old Precedent*, ST. LOUIS POST-DISPATCH, June 26, 1993, at 1A ("Civil rights lawyers . . . said the decision sharply cut back on the legal protection available for two decades . . . ."); *Supreme Court Ruling Makes Job Bias Difficult to Prove*, (Nat'l Public Radio, "All Things Considered," June 25, 1993) ("Civil rights lawyers said today's ruling would severely curtail their ability to win individual discrimination cases. They contended that . . . employees will be able to win their cases only in the rare case where there is a smoking gun . . . .").

10 On November 22, 1993, Senate Labor Subcommittee Chairman Howard Metzenbaum and Representative Major Owens, Chairman of the Education and Labor Select Education and Civil Rights Subcommittee, introduced companion legislation that would "restore the legal framework federal courts . . . used . . . before the Supreme Court's June 1993 decision." *Congress Moves to Overturn Hicks Ruling*, Daily Lab. Rep. (BNA) No. 235 at d19 (Dec. 9, 1993). Congress was encouraged to do this by the EEOC. *EEOC Urges Congress to Overturn Supreme Court's 1993 Hicks Decision*, Daily Lab. Rep. (BNA) No. 193 at d7 (Oct. 7, 1993) (EEOC Chairman Tony Gallegos writing that "the decision will have a negative effect on its enforcement efforts and therefore should be overridden . . . .").

11 *Hicks Effects on Litigation are Narrow, D.C. Bar Association Panelists Contend*, Daily Lab. Rep. (BNA) No. 35 at d22 (Feb. 23, 1994) (Susan Buckingham Reilly, director of the Washington, D.C., EEOC Field Office, stating that the EEOC does not like the *Hicks* decision).

12 *Id.* (management and plaintiff's attorneys calling the *Hicks* decision "middle ground" and agreeing that it will have a "narrow effect" on employment discrimination litigation). *See also* Victoria A. Cundiff & Ann E. Chaitovitz, St. Mary's Honor Center v. Hicks: Lots of Sound and Fury, but What Does it Signify?, 9 EMPLOYEE REL. L.J. 47

of *Hicks* have arisen. While it may be generally agreed that the plaintiff's burden at trial is now heavier in many circuits than before, there remains some uncertainty concerning just how much more difficult a burden the plaintiff must carry. And when applied to motions for summary judgment, *Hicks* has produced two contending standards within the lower federal courts. Fueled in part by internally contradictory language,[13] *Hicks* has left this important issue unresolved.

This Comment will examine two areas of confusion that have arisen in the months following the *Hicks* decision: the scope of its holding and its application to motions for summary judgment. Part II briefly reviews the prior decisions which gave rise to the precise issue that *Hicks* addressed; Part III examines the decision itself, focusing on its possible interpretations. Part IV surveys the various judicial interpretations of the decision and the contrary results produced, then advocates a reading of *Hicks* which is most consistent with prior precedent. Finally, Part V considers the application of *Hicks* to motions for summary judgment and advocates a standard for deciding such motions which correctly reflects the holding of the decision.

II. A REVIEW OF THE HISTORY OF DISPARATE TREATMENT: FROM *MCDONNELL DOUGLAS* TO *HICKS*

A. Disparate Treatment

Disparate treatment claims arise when an individual is subjected to *intentionally* discriminatory treatment based upon his or her race, color, religion, sex, or national origin. Often, though, the disparate treatment claimant does not have direct evidence that his adverse employment treatment was the result of an impermissible motive.[14] Rather, he must rely upon indirect or circumstantial evidence to prove discrimination.[15] Disparate treatment

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(1993).

13 *See* Ellis v. NCNB National Bank, No. 3:91-CV-087-X, 1994 U.S. Dist. LEXIS 681, at *19 (N.D. Tex. Jan. 21, 1994) ("This Court concedes that the portions of language that tend to compete with one another in the St. Mary's decision are not immediately reconcilable.").

14 An example of direct evidence of discrimination would be a comment by the employer such as, "You're fired because you are black." With direct evidence, the only issue that the factfinder must decide is whether or not it believes the witness presenting the evidence. If so, then discrimination is directly proven.

15 For example, indirect (or circumstantial) evidence would be used when two equally qualified applicants, one black and one white, interviewed for the same position, and

claims which rely on circumstantial evidence for proof of the employer's discriminatory motive are often difficult to prove. For these claims, the Supreme Court established a framework designed to "bring the litigants and the court expeditiously and fairly" to the "ultimate question" of intentional discrimination.[16]

B. The McDonnell Douglas *Framework*

The *McDonnell Douglas* framework consists of three stages. At the first stage, the plaintiff must establish a prima facie case that the employer discriminated against her. Second, the employer produces evidence of a legitimate, nondiscriminatory reason for its action. Finally, the plaintiff attempts to discredit the employer by proving that the employer's reason was a pretext for discrimination. In order to understand the issue that prompted the *Hicks* decision, it is first necessary to examine this framework and the reasoning behind it.

1. Stage 1: Plaintiff's Prima Facie Case

Under the *McDonnell Douglas* analytical framework, the plaintiff has the initial burden of establishing, through a preponderance of the evidence, a prima facie case of discrimination. This is usually accomplished by showing that: (i) the plaintiff is a member of a class protected by Title VII; (ii) the plaintiff applied and was qualified for a job for which the employer was seeking applicants; (iii) the plaintiff was rejected, despite his or her qualifications; and (iv) after his or her rejection, the position remained open and the employer continued to seek applicants from persons with the plaintiff's qualifications.[17] As the Court recognized, however, these four elements of the prima facie case may or may not apply to any given plaintiff, depending upon the facts of the case.[18]

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the white employee was hired. Because the black plaintiff has no direct evidence of racial discrimination, he must rely upon an inference of discrimination. In this situation, the factfinder must determine two issues: first, whether it finds the plaintiff's evidence credible, and second whether the conclusion of discrimination can reasonably be drawn from the evidence. Indirect evidence involves an inferential step not necessary with direct evidence.

16 Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981).

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

18 *Id.* at 802 n.13. For example, the fourth element of the prima facie case would not be necessary in a situation where the plaintiff is fired and his former position is eliminated entirely.

Although the burden of establishing a prima facie case is, by the Court's own admission, "not onerous,"[19] this requirement serves an important purpose: it "eliminates the most common nondiscriminatory reasons for the plaintiff's rejection."[20] After the most common reasons for the adverse employment action have been eliminated, the prima facie case gives rise to a rebuttable presumption that the real reason was discrimination.[21] As the Court explained in *Furnco Construction Corp. v. Waters*,[22] this presumption arises out of common-sense observations about the nature of employment relationships in general:

> [W]e are willing to presume this largely because we know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting. Thus, when all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, who we generally assume acts only with *some* reason, based his decision on an impermissible consideration such as race.[23]

After the plaintiff's prima facie case, the focus then turns to the employer's justification for its action.

2. Stage 2: Defendant's Response

In the second stage of the *McDonnell Douglas* framework, the employer has the responsibility of explaining its action toward the plaintiff. Since the prima facie case creates a presumption of discrimination, if the employer fails to respond to the prima facie case and if the trier of fact believes the plaintiff's prima facie evidence, then the plaintiff will receive judgment as a matter of law.[24] It is crucial to note, however, that only the burden of *production* shifts to the employer; at no time does the defendant need to *persuade* the trier of fact that "it was actually motivated by the

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

20 *Id.* at 253-54.

21 *Id.* at 254. In *Burdine* the Court also noted that the phrase "prima facie case" can be used in two ways: it may "denote the establishment of a legally mandatory, rebuttable presumption," or it may "describe the plaintiff's burden of producing enough evidence to permit the trier of fact to infer the fact at issue." *Id.* at 254 n.7. The *Burdine* Court emphasized that "in the Title VII context we use 'prima facie case' in the former sense." *Id.*

22 438 U.S. 567 (1978).

23 *Id.* at 577.

24 *Id.* at 254.

proffered reasons."[25] Rather, the employer must simply articulate a reason for his or her action through the introduction of admissible evidence.[26] The burden of persuasion remains at all times with the plaintiff, who must prove to the trier of fact "that the defendant intentionally discriminated against the plaintiff . . . ."[27]

Because the employer does not need to persuade the factfinder that the reason it offers is the true reason, it is possible for the employer to offer a *false* reason for its action and yet still rebut the mandatory presumption which arises out of the plaintiff's prima facie case. Although the Court recognized in *Texas Department of Community Affairs v. Burdine* that this was possible, it overruled an attempt by the Fifth Circuit to shift to the employer a heavier burden. In *Burdine*, the Fifth Circuit required the employer to persuade the court "that it had convincing, objective reasons for preferring the chosen applicant above the plaintiff."[28] The unanimous *Burdine* Court rejected this attempt and concluded that even though the employer could satisfy the burden of production by articulating a fictitious reason for its action, this would not hinder the plaintiff's attempt to prove discrimination.[29]

Even though the employer need only *produce* an explanation for its behavior, the reason given must still meet a variety of standards. *McDonnell Douglas* held that the reason must be "legitimate" and "nondiscriminatory."[30] In *Burdine*, the Court wrote that the explanation must be "legally sufficient to justify a judgment for the

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25 Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981).

26 *Id.* at 256. An employer cannot rely solely upon an answer to the complaint or upon the argument of counsel. *Id.* at 256 n.9.

27 *Id.* at 253.

28 *Id.* at 257.

29 The *Burdine* court offered three reasons for this conclusion:

> First, . . . the defendant's explanation of its legitimate reasons must be clear and reasonably specific . . . . Second, although the defendant does not bear a formal burden of persuasion, the defendant nevertheless retains an incentive to persuade the trier of fact that the employment decision was lawful . . . . Third, the liberal discovery rules applicable to any civil suit in federal court are supplemented in a Title VII suit by the plaintiff's access to the Equal Employment Opportunity Commission's investigatory files concerning her complaint. Given these factors, we are unpersuaded that the plaintiff will find it particularly difficult to prove that a proffered explanation lacking a factual basis is a pretext.

Id. at 258 (citations omitted). The precise nature of the employer's burden was also at issue in St. Mary's Honor Center v. Hicks, and Justice Scalia's opinion is discussed *infra* notes 65-78 and accompanying text.

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

defendant" if it were believed by the trier of fact.[31] According to *Burdine*, the reason must also be "clear" and "reasonably specific."[32] If the defendant's proffered explanation meets these standards, then it rebuts the presumption of discrimination.

The employer's rebuttal serves two purposes: first, it serves as a response to the prima facie case and moves the trial forward. Second, the employer's explanation frames the factual issues which remain disputed, and thereby defines the plaintiff's remaining task—proving that the employer's reason is a "pretext."[33]

3. Stage 3: Plaintiff's Proof of Pretext

The third phase of the *McDonnell Douglas* framework shifts the burden of production back to the plaintiff, who must persuade the trier of fact that the employer's articulated reason is a "pretext."[34] If the plaintiff succeeds in disproving the reason stated by the employer, then the controversy that prompted *St. Mary's Honor Center v. Hicks* arises: Is it enough that the plaintiff merely disprove the employer's proffered reason? Or must the plaintiff shoulder the additional burden of proving that the real reason was discrimination? Courts adhering to the former standard adopted what has been dubbed the "pretext only" position, and those adhering to the latter accepted the "pretext plus" position.[35]

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31 Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981).

32 *Id.* at 258.

33 *See id.* at 255-56.

34 *McDonnell Douglas*, 411 U.S. at 805. In other words, the plaintiff must have the opportunity to "demonstrate that the proffered reason was not the true reason for the employment decision." *Burdine*, 450 U.S. at 256. *Burdine* distinguished two different burdens the plaintiff must meet: the "intermediate evidentiary burdens" of the *McDonnell Douglas* framework and the "ultimate burden" of proving discrimination. At this stage, the plaintiff's evidentiary burden "merges with the ultimate burden of persuading the court that she has been the victim of intentional discrimination." *Burdine*, 450 U.S. at 256. The Court suggested that the plaintiff could prove pretext through the use of comparative evidence (i.e. showing that another employee similarly situated was treated differently), through statistical evidence, or anecdotal evidence. *McDonnell Douglas*, 411 U.S. at 804-05.

35 For a comprehensive explanation and analysis of the state of this controversy before it was addressed by *Hicks*, see generally Catherine J. Lanctot, *The Defendant Lies and the Plaintiff Loses: The Fallacy of the "Pretext-Plus" Rule in Employment Discrimination Cases*, 43 HASTINGS L.J. 59 (1991).

C. Pretext Only and Pretext Plus

1. Distinguished

The differences between the pretext only and pretext plus positions are significant: before *Hicks*, a plaintiff in a pretext only circuit was entitled to judgment as a matter of law if he could prove that the employer's reason was not believable. The defendant in such a jurisdiction would be found to have violated Title VII if his reason was not believed by the trier of fact.

But in a pretext plus jurisdiction, the plaintiff cannot prevail merely by disproving the employer's reason. The plaintiff must establish that the real reason for the employer's action was discrimination. As noted by one commentator, often the plaintiff cannot accomplish this task without "produc[ing] some additional evidence other than the evidence supporting the prima facie case and other than the fact of the defendant's deception."[36] According to this position, the plaintiff's proof of pretext does not amount to proof of intentional discrimination; all that is shown by disproof of the employer's proffered reason is that the employer misrepresented the true reasons for the action, not that the employer violated Title VII. As a result of this higher standard of proof, a plaintiff who would have received judgment as a matter of law in a pretext only jurisdiction would lose for failing to meet his burden of proof in a pretext plus jurisdiction.

2. Support for the Pretext Only Position

Prior to *Hicks*, the pretext only position had been adopted by the Courts of Appeals for the Second, Third, Fifth, Sixth, Eighth, Ninth, Tenth, and District of Columbia Circuits.[37] The reasoning of these jurisdictions is rooted in the common-sense observations mentioned in *Furnco Construction Corp. v. Waters*: that employers usually do not act arbitrarily, and that once all the legitimate reasons for an employment decision are eliminated (including the legitimate reason offered by the employer), the real reason was probably discriminatory.[38] Based on these assumptions about the workplace and human decision-making, a reasonable inference of discrimination arises when the employer is shown to have misrep-

36 *Id.* at 88.
37 *Id.* at 71-75.
38 *See supra* note 23 and accompanying text.

resented the true motive for its action. This inferential step connects the finding of pretext with the finding of discrimination. Proof of pretext combined with the elements of the prima facie case, therefore, meet the plaintiff's burden of proving by a preponderance of the evidence—more likely than not—that discrimination motivated the employer's action.

This position also finds support in the language of *Burdine.* The Court held in *Burdine* that the plaintiff retains the burden of persuasion at all times and added that the opportunity to prove pretext "merges with the ultimate burden of persuading the court that she has been the victim of intentional discrimination."[39] This merged burden, however, may be carried in one of two ways: the plaintiff may prove discrimination "either *directly* by persuading the court that a discriminatory reason more likely motivated the employer *or indirectly* by showing that the employers's proffered explanation is unworthy of credence."[40] This passage from *Burdine* clearly equated proof of pretext with proof of discrimination.[41]

Finally, pretext only jurisdictions argue that this third stage of the *McDonnell Douglas* framework serves the important purpose of narrowing the disputed issues. Once the employer articulates a nondiscriminatory reason for its actions, the plaintiff's response is narrowed to attacking that reason alone. The plaintiff need not fear that other unmentioned motives will later be used to justify the employer's action—motives that the plaintiff was not given a "full and fair opportunity" to demonstrate were pretextual.[42]

3. Support for the Pretext Plus Position

Before *St. Mary's Honor Center v. Hicks,* a minority of circuits had adopted a pretext plus position, including the First, Fourth, and Eleventh Circuits.[43] Supporters of this position argue that Title VII does not outlaw poor business judgment, arbitrary behavior, or discrimination based on characteristics other than race,

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39 Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981).

40 *Id.* at 256.

41 Although the pretext only position was rejected by the *Hicks* Court, this passage provided difficulty to Justice Scalia. He acknowledged that "[t]he words bear no other meaning but that the falsity of the employer's explanation is *alone enough* to compel judgment for the plaintiff." St. Mary's Honor Center v. Hicks, 113 S. Ct. 2742, 2752 (1993). He went on to argue, however, that such an interpretation of this "dictum" contradicted the rest of the opinion. *Id.*

42 *Burdine,* 450 U.S. at 256.

43 Lanctot, *supra* note 38, at 82-85.

national origin, religion, sex, or color; employers who act upon such a motivation and then conceal their real reasons do not violate the purposes of Title VII. Merely demonstrating pretext is not tantamount to proving discrimination, and the employer should not be held liable for violating Title VII. The plaintiff, therefore, cannot prevail unless he proves *both* that the employer's proffered reason was false *and* that the real reason was discriminatory. More often than not, this requires that the plaintiff introduce additional evidence, on top of the evidence proving the prima facie case and pretext.[44]

As a result of the controversy that arose out of the competing pretext only and pretext plus standards, the Supreme Court agreed to hear the case of Melvin Hicks, a black security officer in Missouri. In resolving Mr. Hicks's lawsuit, the Court clearly rejected the pretext only position. The position that the Court adopted in its stead, however, is less clear.

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

A. The Factual Background

Melvin Hicks, a black employee of St. Mary's Honor Center, was discharged from his position after six years of employment.[45] Hicks began working at St. Mary's in 1978 as a correctional officer, and he was promoted to shift commander in 1980. For six years his work record was satisfactory.[46] But in January 1984, the organizational structure of the facility was changed dramatically, and Hicks came under new supervision.

Following this change in personnel, Hicks was subject to frequent discipline for procedural infractions.[47] Hicks was the only employee disciplined for the incidents which occurred during his shift,[48] and more serious infractions by other shift commanders,

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44 *Id.* at 88.

45 St. Mary's Honor Center is a minimum security correctional facility operated by the Missouri Department of Corrections and Human Resources. Hicks v. St. Mary's Honor Center, 756 F. Supp 1245 (E.D. Mo. 1991).

46 *Id.* at 1246.

47 In March of 1984, during the plaintiff's shift, the front door was improperly guarded and the first floor lights were off. The plaintiff was the only employee disciplined for the incident, and he received a five-day suspension. Later that month, the plaintiff was demoted for failing to insure that the use of a St. Mary's vehicle by another employee was properly recorded. Again, the other employees involved were not disciplined. *Id.* at 1246-47.

48 The chief of custody testified that it was his policy to discipline only the shift commander for violations which occur during his shift, not the other employees involved.

all of whom were white, went unpunished.[49] Finally, in June 1984, Hicks was terminated after a heated confrontation with his supervisor[50]—a confrontation later determined by the district court to have been "manufactured" in order to provoke Hicks.[51]

Hicks alleged that his termination and prior demotion were racially motivated and thereby violated Title VII. He established a prima facie case of racial discrimination and challenged his employer's asserted reasons for its action as false. The issue generated by these facts and presented to Judge Limbaugh of the Eastern District of Missouri focused on the sufficiency of the evidence and whether Hicks had carried his burden of proof.

B. The District Court Opinion

District Judge Limbaugh determined that Hicks had established his prima facie case of discrimination and that the employer had rebutted the presumption of discrimination by producing two nondiscriminatory reasons for Hicks's dismissal: the severity and the accumulation of violations committed by the plaintiff.[52] The district court[53] found that Hicks had proven his employer's reasons were pretextual, based on the evidence that Hicks had been singled out for harsh discipline when more serious infractions by others went unpunished.[54]

Despite the finding that the proffered reasons for Hicks's dismissal were not the real reasons, the district court granted judgment for St. Mary's. Given that the number of black employees at St. Mary's remained constant during the time of Hicks's firing and that black reviewers sat on the board which disciplined Hicks, the court held that Hicks failed to prove his ultimate burden of racial discrimination.[55] "It is clear," wrote the court, "that [Hicks's supervisor] had placed plaintiff on the express track to termination . . . . It is not clear, however, that plaintiff's *race* was the

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Id. at 1247.

49 For example, an acting shift commander (who was white) was negligent in carrying out an order to transport an inmate to the city jail and the inmate escaped. The employee received only a letter of reprimand. *Id.* at 1248.

50 *Id.* at 1247.

51 *Id.* at 1251.

52 *Id.* at 1250.

53 Given that this trial occurred before the implementation of the 1991 Civil Rights Act, a jury trial was unavailable and the case was tried to Judge Limbaugh. *Id.* at 1245.

54 *Id.* at 1250-51.

55 *Id.* at 1252.

motivation for the harsh discipline."[56] Perhaps, opined the court, the real reason behind the supervisor's actions was personal dislike, apart from racial considerations.[57]

Through this reasoning, the district court aligned itself with the pretext plus position, demanding more from Hicks than a prima facie case and a showing of pretext. In order to win his case, Hicks had to prove "by direct evidence or inference that his unfair treatment was motivated by his race."[58]

C. *The Eighth Circuit Opinion*

The Eighth Circuit overruled the district court and aligned itself with the pretext only position.[59] It held that the lower court was incorrect in two of its conclusions. First, having no evidence to support the assumption, the district court wrongly assumed a *personal* (rather than racial) motivation for the supervisor's actions.[60] The supervisor had not claimed that personal animosity motivated his actions, and the plaintiff never had an opportunity to refute the proposition.[61]

Second, the district court erroneously required that the plaintiff prove something more than a prima facie case and pretext; upon proof of the prima facie case and pretext, Hicks deserved judgment as a matter of law.[62] The appellate court reasoned that after Hicks discredited his employer's proffered nondiscriminatory reasons for the demotions and termination, St. Mary's was in no better position than if it had remained silent; the pretextual reasons for its actions could not rebut the presumption of racial discrimination Hicks raised through his prima facie case. Therefore, the presumption stood and compelled a judgment for the plaintiff.[63] Proving a prima facie case and pretext alone "satisfied [the plaintiff's] ultimate burden of persuasion. No additional proof of discrimination [was] required."[64] Under this reasoning, a prima facie case combined with proof of pretext equaled proof of discriminatory intent.

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56 *Id.* at 1251 (emphasis added).
57 *Id.* at 1252.
58 *Id.*
59 Hicks v. St. Mary's Honor Center, 970 F.2d 487 (8th Cir. 1992).
60 *Id.* at 492.
61 *Id.*
62 *Id.*
63 *Id.*
64 *Id.* at 493.

D. The Supreme Court's Opinion

1. Justice Scalia's Majority Opinion

Five Supreme Court justices disagreed with the Eighth Circuit and rejected the reasoning of the pretext only position. Writing for the majority,[65] Justice Scalia analyzed the *McDonnell Douglas* line of cases quite differently than the pretext only courts had.

Justice Scalia's primary argument focused on the interplay between the burden of production and the burden of proof as governed by Rule 301 of the Federal Rules of Evidence.[66] The presumption enjoyed by the plaintiff in a disparate treatment case, wrote Scalia, operates like all presumptions in that it simply shifts the burden of production to the other party, as described in Rule 301 of the Federal Rules of Evidence.[67] The purpose of this presumption is to "forc[e] the defendant to come forward with some response."[68] He reiterated that even though the burden of production shifted to the defendant at the second stage of the *McDonnell Douglas* framework, "'[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.'"[69]

Saddled with the burden of production, the defendant may rebut the presumption of discrimination by "'clearly set[ting] forth, through the introduction of admissible evidence,' reasons for its actions which, *if believed by the trier of fact,* would support a finding that unlawful discrimination was not the cause of the employment action."[70] Essential to Justice Scalia's reasoning is that this rebuttal is effective by the mere production of the evi-

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65 Justice Scalia was joined by Justices O'Connor, Kennedy, Thomas, and Chief Justice Rhenquist. St. Mary's Honor Center v. Hicks, 113 S. Ct. 2742, 2745 (1993).

66 Rule 301 provides that:

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

FED. R. EVID. 301.

67 *Hicks,* 113 S. Ct. at 2747.

68 *Id.* at 2749.

69 *Id.* at 2747 (quoting Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981)).

70 *Id.* (quoting *Burdine,* 450 U.S. at 255).

dence—its persuasive effect is irrelevant, as the defendant at no time bears the "risk of nonpersuasion."[71]

Justice Scalia then addressed the Eighth Circuit's argument that if a defendant misrepresents the real reasons for the employment action, the misrepresentation cannot effectively rebut the presumption and give the defendant an advantage he would not have enjoyed by remaining silent.[72] In response, Justice Scalia pointed out that such a result is not uncommon and that procedural rules often benefit the dishonest litigant.[73]

One passage in *Burdine*, however, proved problematic to the majority's position. According to *Burdine*, the employee may "succeed in [proving his ultimate burden] 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."[74] Justice Scalia agreed with Justice Souter's dissent that this language "bear[s] no other meaning but that the falsity of the employer's explanation is *alone enough* to compel judgment for the plaintiff."[75] Such a conclusion based upon this "dictum," however, would contradict the holdings of *McDonnell Douglas* and of *Burdine* itself.[76] The passage, he maintained, could only be explained as an "inadvertence."[77]

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71 FED. R. EVID. 301. *See Hicks*, 113 S. Ct. at 2748 ("By producing *evidence* (whether ultimately persuasive or not) of nondiscriminatory reasons, petitioners sustained their burden of production . . . .").

72 The Eighth Circuit held:

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

Hicks v. St. Mary's Honor Center, 970 F.2d 487, 492 (8th Cir. 1992).

73 For example,

> [a] defendant who fails to answer a complaint will, on motion, suffer a default judgment that a deceitful response could have avoided. A defendant whose answer fails to contest critical averments in the complaint will, on motion, suffer a judgment on the pleadings that untruthful denials could have avoided. And a defendant who fails 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.

St. Mary's Honor Center v. Hicks, 113 S. Ct. 2742, 2755 (1993) (citations omitted).

74 Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981) (emphasis added).

75 *Hicks*, 113 S. Ct. at 2752.

76 *Id.* at 2752-53.

77 *Id.* at 2753.

In essence, the majority rejected the Eighth Circuit's holding that a finding of pretext compelled judgment for the plaintiff. "It is not enough," wrote Justice Scalia, "to *dis*believe the employer; the factfinder must *believe* the plaintiff's explanation of intentional discrimination."[78]

2. Justice Souter's Dissenting Opinion

Justice Souter, writing for the minority,[79] vehemently disagreed with Justice Scalia's majority opinion. Calling the majority's holding a "depart[ure] from settled precedent,"[80] Justice Souter's dissent attacked the majority opinion on several fronts. First, the decision unfairly "saddle[d] the victims of discrimination with the burden of either producing direct evidence of discriminatory intent or eliminating the entire universe of possible nondiscriminatory reasons for a personnel decision."[81] If proof that the employer's proffered reason is pretext does not compel judgment for the plaintiff, then it is possible for the factfinder to determine that a reason other than the one articulated by the employer was the actual motivation.

An illustration of this argument is found in the district court's opinion. In dismissing Hicks's claim, Judge Limbaugh wrote that although Hicks had proven that his superiors wished to terminate him, he had not sufficiently proven that the motivation arose out of racial, rather than personal, animosity.[82] Personal animosity, as mentioned above, had not been introduced by the defendants at trial as a possible motivation for their behavior.[83] In fact, one of Hicks's supervisors testified that he did not have any personal difficulties with Hicks.[84] At trial Hicks was unable to predict that this would be considered a possible explanation for St. Mary's action and, therefore, was unable to discredit the possibility. By rejecting

78 *Id.* at 2754 (rephrasing United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 716 (1983)).

79 Justice Souter was joined by Justices White, Blackmun, and Stevens. *Hicks*, 113 S. Ct. at 2756.

80 *Id.* at 2757.

81 *Id.* at 2758.

82 Hicks v. St. Mary's Honor Center, 756 F. Supp. 1244, 1252 (E.D. Mo. 1991).

83 The two reasons offered by St. Mary's for Hicks's termination were "the severity and the accumulation of violations committed by plaintiff." *Id.* at 1250.

84 James R. Neely, Jr., Deputy General Counsel of the EEOC, Preliminary Guidance on the Impliciatons of the Supreme Court's Decision in St. Mary's Honor Center v. Hicks 8 (Aug. 3, 1993) (unpublished memorandum, available through EEOC Office of General Counsel).

the pretext only position, argued Justice Souter, the majority opinion denied Hicks and other plaintiffs in his position the opportunity to aim their responses at a specific target: disproving the employer's stated explanation for its action. Rather, they must "disprove *all* other reasons suggested, no matter how vaguely, in the record."[85]

Second, the dissent criticized the majority for failing to describe practically how a plaintiff possessing evidence only of the prima facie case and pretext can meet the "ultimate burden" of proving discrimination.[86] *Burdine*, wrote Justice Souter, said that this purpose may be accomplished "indirectly by showing that the employer's proffered explanation is unworthy of credence."[87] The majority's rejection of this method was explicit, but it did not clarify what the plaintiff must do instead.

Third, the majority opinion did not adequately explain why a showing of pretext and the inference of discrimination that arises out of it is insufficient. Once the plaintiff proves that the employer is concealing its true reasons for the adverse employment action, "'common experience' tells us that it is 'more likely than not' that the employer who lies is simply trying to cover up the illegality alleged by the plaintiff."[88] Additionally, the dissent argued that employers who misrepresent the true motivations behind their actions are thereby "exempt[ed] . . . from responsibility for lies."[89]

Fourth, the dissent argued that the purposes of Title VII were frustrated by the majority's holding. By making it more difficult for plaintiffs to anticipate which explanations might be relied upon by the factfinder, the careful plaintiff must anticipate and prepare for all "side issues" that might arise, making discovery more tedious and trials longer. The increased costs and decreased certainty of Title VII litigation would discourage plaintiffs like Melvin Hicks from bringing suit.[90]

Finally, the dissent disagreed with the majority's reading of *McDonnell Douglas* and its progeny, especially *United States Postal*

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85 St. Mary's Honor Center v. Hicks, 113 S. Ct. 2742, 2762 (1993) (quoting the majority's opinion at 2756).

86 *Id.* at 2761.

87 *Id.* at 2762 (quoting *Burdine*, 450 U.S. at 256).

88 *Id.* at 2763 (quoting Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978)).

89 *Id.*

90 *Id.*

Service Board v. Aikens.[91] The greatest problem with the majority's reliance upon *Aikens*, wrote Justice Souter, is that *Aikens* quoted with approval the passage in *Burdine* that the majority's opinion dismissed as an "inadvertence."[92] Following this passage, the Court in *Aikens* remanded the case and directed the district court to choose "which party's explanation of the employer's motivation it believes."[93] Contrary to the majority's interpretation, the dissent wrote that this directive limits the lower court's options to one of the two presented by the litigants and prohibits the court from seeking out a third explanation hidden somewhere in the record.[94]

IV. TWO ALTERNATIVE INTERPRETATIONS OF THE SCOPE OF *HICKS*

Although the majority clearly rejected the pretext only position, it is questionable what standard of proof it adopted to fill the vacancy. As highlighted by Justice Souter's dissent, the majority's opinion can arguably be read to support two alternate positions. Justice Souter notes that at one point the majority holds that proof of a prima facie case and pretext may permit the factfinder to infer discrimination. Yet at another point, the majority's language supports a "more extreme conclusion"—that proof of pretext, without more, will not be sufficient to sustain a judgment for the plaintiff.[95] Despite the majority's assertion that there is nothing inconsistent between these two readings,[96] subsequent interpretation of the *Hicks* decision reveals that it has sent "conflicting signals."[97]

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91 460 U.S. 711 (1983).

92 *Hicks*, 113 S. Ct. at 2765; *see supra* note 77 and accompanying text.

93 United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 716 (1982).

94 *Hicks*, 113 S. Ct. at 2765.

95 *Id.* at 2762.

96 In response to Justice Souter's conclusion that the majority's opinion sends "conflicting signals," *id.*, the majority claims that:

> there is nothing whatever inconsistent between [our statement that pretext may sustain a finding of discrimination] and our later statement[] that . . . the plaintiff must show "*both* that the reason was false, *and* that discrimination was the real reason . . . ." Even 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 (citations omitted).

97 *Id.* at 2762.

A. *Support for a Pretext Plus Interpretation*

One possible interpretation of *Hicks* is that it is an affirmation of the pretext plus position discussed above; in other words, a showing of pretext, without more, is *never* sufficient to sustain the plaintiff's burden of proof unless combined with some additional evidence of discriminatory intent.[98] Textual support for this reading is found in the language of *Hicks* that appears to require a dual evidentiary showing from the plaintiff. For example, Justice Scalia wrote that "a reason cannot be proved to be 'a pretext *for discrimination*' unless it is shown *both* that the reason was false, *and* that discrimination was the real reason."[99] He also stated that "nothing in law would permit us to substitute for the required finding that the employer's action was the product of unlawful discrimination, the much different (and much lesser) finding that the employer's explanation of its action was not believable."[100]

This interpretation also finds support in portions of the opinion that denigrate the probative value of the prima facie case, suggesting that a prima facie showing is merely a procedural ordering of the production of evidence. For example, Justice Scalia wrote that once the employer rebuts the presumption of discrimination, "the *McDonnell Douglas* framework—with its presumptions and

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98 For example, in Vega v. Kodak Caribbean, Ltd., 3 F.3d 476 (1st Cir. 1993), the plaintiffs claimed that the defendant's early retirement program was implemented in a manner that discriminated on the basis of age. In examining the plaintiff's burden of proof under the *McDonnell Douglas* framework, as modified by *Hicks*, the court wrote:

> To prevail at this third stage, the plaintiff must ordinarily do more than impugn the legitimacy of the employer's asserted justification; he must also adduce evidence "of the employer's discriminatory animus." [S]ee also Hazen Paper Co. v. Biggins, 113 S. Ct. 1701, 1706, 1708 (1993) (stating that liability under the ADEA depends upon whether age "actually motivated the employer's decision" and hesitating to infer age-based animus solely "from the implausibility of the employer's explanation") . . . .

Id. at 479 (citation omitted). The First Circuit appeared to prefer a pretext plus position, given its hesitancy to infer discrimination from a showing of pretext without additional evidence. But this issue was not reached as the plaintiffs failed to establish a prima facie case. *Id.* at 480.

99 St. Mary's Honor Center v. Hicks, 113 S. Ct. 2742, 2752 (1993). *See also id.* at 2747 ("The plaintiff then has 'the full and fair opportunity to demonstrate,' . . . 'that the proffered reason was not the true reason for the employment decision' and that race was.") (citation omitted) (quoting Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981); *Id.* at 2749 n.4 ("Even though . . . rejection of the defendant's proffered reasons is enough at law to *sustain* a finding of discrimination, *there must be a finding of discrimination.*").

100 *Id.* at 2751.

burdens—is no longer relevant."[101] Therefore, after the initial profferings of evidence, the only remaining issue for the court is whether the plaintiff proved discrimination by a preponderance of the evidence. The majority also stated that after the second stage of the *McDonnell Douglas* framework, the inquiry then moves from "the few generalized factors that establish a prima facie case to the specific proofs and rebuttals of discriminatory motivation . . . ."[102] These comments indicate that the prima facie case and proof of pretext do not have much value in and of themselves, but only serve as procedural steps along the way to establishing the ultimate issue of discrimination.

B. Support for a "Permissive Inference" Interpretation

1. Textual Argument

An alternate interpretation of *Hicks* contends that the holding of the opinion is much narrower in scope. Rather than establishing an additional burden of proof for the plaintiff, the opinion merely reverses the Eight Circuit's holding that a prima facie case plus a showing of pretext *compels* judgment for the plaintiff as a matter of law. According to this interpretation, proof of the prima facie case and pretext *permits* the factfinder to infer discrimination, although it does not mandate such a judgment. Courts which interpret the opinion in this manner rely upon the following language:

> 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 intentional discrimination, and the Court of Appeals was correct when it noted that, upon such rejection, "[n]o additional proof of discrimination is *required* . . . ."[103]

If this is the proper interpretation of *Hicks*, then the opinion adopted a third position which falls between the requirements of pretext only and pretext plus: that although not entitled to judg-

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101 *Id.* at 2749. *See also id.* at 2755 ("[T]he *McDonnell Douglas* presumption is a *procedural* device, designed only to establish an order of proof and production.").

102 *Id.* at 2752.

103 *Id.* at 2749 (citations and footnotes omitted).

ment as a matter of law upon proof of a prima facie case and pretext, a plaintiff may prevail without having to introduce additional evidence of discrimination.

What the *Hicks* decision makes clear, however, is that even if a court infers discrimination from the plaintiff's prima facie case and pretext, it still must make a *specific finding* of intentional discrimination in order for the plaintiff to carry its ultimate burden. Justice Scalia emphasized this requirement in footnote four of his opinion, where he wrote that "[e]ven though . . . rejection of the defendant's proffered reasons is enough at law to *sustain* a finding of discrimination, *there must be a finding of discrimination.*"[104]

The requirement of a specific finding of discrimination reflects two conclusions developed in Justice Scalia's opinion. First, such a finding is mandated because the majority recognized a distinction between proof of pretext and proof of intentional discrimination. Because the majority did not equate "the required finding that the employer's action was the product of unlawful discrimination" with "the much different (and much lesser) finding that the employer's explanation of its action was not believable,"[105] the factfinder must specifically state that it draws from the evidence of pretext an inference of discrimination, thereby connecting what the majority declined to equate.

Second, as Rule 301 of the Federal Rules of Evidence makes clear, the plaintiff at all times retains the ultimate burden of proving intentional discrimination.[106] Requiring the district court to make the specific finding of intentional discrimination avoids conjecture as to whether or not the plaintiff carried this burden.

The Eleventh Circuit recently illustrated the importance of this aspect of *Hicks*. In *Meeks v. Computer Associates International*,[107] the court overturned a judgment for the plaintiff because the district court had failed to make a specific finding of intentional discrimination. The defendant, Computer Associates, had been found liable under the Equal Pay Act (EPA) by a jury and had been found liable for sex discrimination and retaliation by the district court. The district court had considered itself bound by the jury's special verdict on the EPA claim and concluded that

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104 *Id.* at 2749 n.4.

105 *Id.* at 2751.

106 "[A] presumption . . . does not shift . . . the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast." FED. R. EVID. 301.

107 No. 92-2926, 1994 U.S. App. LEXIS 4073 (11th Cir. Mar. 7, 1994).

the defendant violated Title VII as well by engaging in gender-based wage discrimination. The defendant argued that a violation of the EPA is not a per se violation of Title VII because "Title VII requires proof of the additional element of discriminatory intent."[108]

The Eleventh Circuit agreed with this argument and overturned the district court's judgment of Title VII liability. The court reasoned that the jury's special verdict merely determined that the defendant had failed to prove that the salary differential between the plaintiff and her coworkers was based on factors other than sex. The verdict did not establish that the salary differential was based on gender or that the discrimination was intentional.[109] Because neither the jury nor the district court found that the defendant intentionally discriminated on the basis of gender, the judgment was overturned. The court reinforced this conclusion with the holding of *Hicks*:

> Even if we were to accept Meeks' invitation to treat the jury's finding as establishing that she had disproved Computer Associates' proffered justifications, we would still have to reverse Meeks' Title VII wage discrimination judgment. As *Hicks* makes clear, the trier of fact must make a finding of intentional discrimination . . . . The court may have believed that Meeks proved intent, but it did not so find, and its findings are therefore insufficient under *Hicks* to support its Title VII wage discrimination judgment.[110]

On remand, the district court was instructed to enter additional findings of fact, including whether the court found intentional discrimination.[111] Had the district court made a specific finding of intentional discrimination, pursuant to *Hicks*, the judgment would not have been overturned.

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108 *Id.* at *16.

109 *Id.* at *22-23.

110 *Id.* at *23-*25 (citations omitted).

111 *Id.* at *25. *See also* Gaworski v. ITT Commercial Finance Corp., No. 92-1753, 1994 U.S. App. LEXIS 3541 (8th Cir. Mar. 2, 1994) (Gibson, J., dissenting) (arguing that the general jury instructions failed to require that the jury specifically find pretext and intentional discrimination); Ellis v. NCNB Texas Nat'l Bank, No. 3:91-CV-087-X, 1994 U.S. Dist. LEXIS 681, at *20 (N.D. Tex. Jan. 21, 1994) (articulating jury instructions which "anchor a finding of pretext necessarily in a finding of unlawful discrimination."). *But see* McNabola v. Chicago Transit, 10 F.3d 501 (7th Cir. 1993) (interpreting a jury's general verdict to stand for a finding of pretext and intentional discrimination).

2. Structural Argument

Additional support for a permissive inference reading of *Hicks* is found in the structure of the majority's opinion. The language which seems to support a pretext plus position appears in Parts III and IV of the *Hicks* opinion.[112] These sections, however, were written to support further the holding of the case and to respond to the criticisms of the dissent.[113]

Part II of the opinion contains the holding of the case and the reasoning behind it, beginning with a brief review of Title VII, *McDonnell Douglas*, and *Burdine*. The Court then concludes that the mere production of legitimate, non-discriminatory reasons for the defendant's action rebuts the *McDonnell Douglas* presumption under Rule 301 of the Federal Rules of Evidence and that the plaintiff always retains the ultimate burden of proving discrimination. At this point, the Court makes clear that in order to carry this burden, the plaintiff need not produce any additional evidence of discrimination. It is enough that the plaintiff present his or her prima facie case and evidence of pretext, and from this evidence discrimination may be inferred.[114] Often, language used to support a contrary reading is not selected from the Court's holding in Part II, but is mistakenly drawn from the Court's arguments in response to the dissent.

3. Support from the Assumptions Underlying the *McDonnell Douglas* Framework

Justice Scalia wrote that the Court's holding would upset only those unfamiliar with the Court's case law.[115] A permissive inference interpretation of *Hicks* is consistent with the assumptions that gave rise to the *McDonnell Douglas* framework in the first place. As explained in *Furnco*, a finding of pretext points toward discrimination because of two common-sense observations: (1) employers generally do not act arbitrarily, and (2) if an employer conceals

112 *See supra* notes 99-102 and accompanying text.

113 Part III declares itself to be a review of prior precedent and an attempt to show congruence of *Hicks* with the past 20 years of holdings. *Id.* at 2750. Part IV addresses the "dire practical consequences" that the dissent claims will arise from the decision. *Id.* at 2754.

114 *Id.* at 2749.

115 *Id.* at 2750.

the real reason for the adverse employment action, the real reason is most likely discrimination.[116]

A permissive inference reading of *Hicks* accurately reflects these common-sense assumptions by permitting the trier of fact to use them. Because of these two assumptions, the trier of fact may infer discrimination when the employer's proffered explanations for the adverse employment action have been discredited. A pretext plus understanding of *Hicks*, however, necessarily *disregards* these observations. By requiring that the plaintiff produce additional evidence, such a standard essentially ignores the inference of discrimination that arises when the plaintiff eliminates the most common reasons for the adverse employment action[117] and the explanation given by the defendant. Given Justice Scalia's insistence that the *Hicks* opinion was a further refinement of the *McDonnell Douglas* line of cases rather than a departure from it, the permissive inference understanding of the holding is the most consistent interpretation.

4. Subsequent Judicial Interpretation

In the months of confusion following the *Hicks* decision, the permissive inference reading gained favor as the correct interpretation, most notably in the Second,[118] Fourth,[119] Fifth,[120]

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116 Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978).

117 As stated in Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981), the "most common nondiscriminatory reasons for the plaintiff's [adverse employment action]" are eliminated by the four elements of the plaintiff's prima facie case. *Id.* at 253-54.

118 In DeMarco v. Holy Cross High School, 4 F.3d 166 (2d Cir. 1993), the plaintiff, a teacher at a Catholic school, claimed that he was dismissed because of his age. The district court dismissed the plaintiff's claim because consideration of the case would result in excessive entanglement in religion. *Id.* at 169. The Second Circuit reversed and concluded that the issues arising under an age discrimination claim do not give rise to First Amendment claims. Describing the issues presented under an age discrimination claim, the Second Circuit interpreted the holding of *Hicks* to support a permissive inference position:

> The Supreme Court recently held . . . that the mere fact that a defendant proffers a false reason for a challenged employment action does not necessarily establish liability. Proof that the employer has provided a false reason for its action permits the finder of fact to determine that the defendant's actions were motivated by an improper discriminatory intent, but does not compel such a finding.

Id. at 170.

The Second Circuit also articulated this interpretation of *Hicks* in Saulpaugh v. Monroe Community Hosp., 4 F.3d 134, 142 (2d Cir. 1993) ("In some instances, as Justice

Eighth,[121] and Eleventh Circuits.[122] Recently, the permissive inference position was expressly recognized by the Seventh Circuit in

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Scalia notes, a plaintiff may meet this ultimate burden of proof by combining her proof of the elements constituting a prima facie case with evidence that defendant's proffered reasons for its acts were false."). Because the plaintiff had introduced substantial *direct* evidence of retaliation, however, the decision did not rest upon the issue of pretext. *Id.* at 141, 142.

119 In United States v. McMillon, 14 F.3d 948 (4th Cir. 1994), the Fourth Circuit also appeared to favor the permissive inference interpretation of *Hicks*. McMillon, an African American, claimed that her drug conviction violated the Equal Protection clause because the United States exercised a peremptory strike against an African American woman. In discussing the defendant's burden of proving a discriminatory motive, the court referred to the similar inquiry in the Title VII context:

> As in *Hicks*, simply showing that the reasons advanced are pretextual does not automatically compel a finding of intentional discrimination (although under the proper facts such a showing can be sufficient). Instead, the inquiry always remains the same: the challenging party (here, the defendant) must show, through all relevant circumstances, that the prosecutor intentionally exercised his strike because of racial concerns.

Id. at 952 n.3.

120 In Moham v. Steego Corp., 3 F.3d 873 (5th Cir. 1993), the Fifth Circuit reviewed a judgment for the plaintiff on his claim that the defendant denied him the opportunity to seek employment because of his race. The defendant's witness testified that the plaintiff was not hired because he had not applied for the position. The court found the testimony "unconvincing." *Id.* at 875. Based upon this finding of pretext, the district court inferred the ultimate fact of racial discrimination, and the Fifth Circuit did not challenge this conclusion. *Id.* at 876.

121 In Gaworski v. ITT Commercial Finance Corp., No. 92-1753 (8th Cir. March 2, 1994), the defendant argued that the evidence for the plaintiff's ADEA claim was insufficient and, therefore, improperly submitted to the jury. *Id.* at *2. The Eighth Circuit refused to grant the defendant's motion because the plaintiff had met the evidentiary requirements mandated by *Hicks*. The court outlined the minimum showing required by the plaintiff and concluded that:

> if (1) the elements of a prima facie case are present, and (2) there exists sufficient evidence for a reasonable jury to reject the defendant's proffered reasons for its actions, then the evidence is sufficient to allow the jury to determine whether intentional discrimination has occurred, and we are without power to reverse the jury's finding.

Id. at *10. As this indicates, the Eighth Circuit did not require additional evidence of discrimination and, therefore, rejected a pretext plus interpretation of *Hicks*.

122 In Meeks v. Computer Associates International, No. 92-2926, 1994 U.S. App. LEXIS 4073 (11th Cir. Mar. 7, 1994), the Eleventh Circuit concluded that *Hicks* "modified slightly" the pretext only position which the Circuit had formerly followed. *Id.* at *19 n.1. *Meeks* accepted a permissive inference of *Hicks*, as it referred to the "suspicion of mendacity" language and emphasized that "'no additional proof of discrimination is required' to support a finding of intentional discrimination." *Id.* (citation omitted). The Eleventh Circuit reversed the district court's judgment for the plaintiff on her sex discrimination claim. This was done, however, because the district court had failed to *make a finding of* intentional discrimination, even though it may have properly inferred discrimination. *Id.* at *23-*25.

Anderson v. Baxter Healthcare Corp.[123] Arthur Anderson was discharged from his position as unit manager for heating, ventilating, and air conditioning at Baxter's facility in Deerfield, Illinois. He claimed that his discharge was wrongfully motivated by his age, in violation of the Age Discrimination in Employment Act (ADEA). In response to Anderson's claim, Baxter introduced evidence of several incidents which occurred "as a direct result of Anderson's inattentiveness to preventative maintenance and overall poor work performance."[124] After discovery, Baxter moved for summary judgment, and the district court granted the motion, agreeing that Anderson had failed to raise a genuine issue of material fact as to his age discrimination claim.

The Seventh Circuit panel of Judges Kanne, Easterbrook, and Flaum agreed with the district court. Judge Kanne, writing for the panel, directly addressed the confusion surrounding the holding of *Hicks.* He asserted that three competing positions had developed on the issue of the plaintiff's burden: pretext only, pretext plus, and what the Seventh Circuit termed the "modified pretext only" position.[125] The modified pretext only position was adopted by the Seventh Circuit prior to the *Hicks* decision in *Visser v. Packer Engineering Association,* a 1991 en banc decision.[126] According to *Visser,* "if the employer offers a pretext—a phony reason—for why it fired the employee, then the trier of fact is permitted, although not compelled, to infer that the real reason was age."[127]

The Seventh Circuit held that *Hicks* clearly rejected the pretext only position, and, although less clear, the Supreme Court adopted *Visser*'s version of pretext only rather than the pretext plus position.

> In our view the holding in *Hicks* is that a plaintiff is not entitled to judgment as a matter of law simply because she proves

123 13 F.3d 1120 (7th Cir. 1994).

124 *Anderson,* 13 F.3d at 1121. Baxter claimed that Anderson was responsible for four incidents: a fire valve was incorrectly left closed for months in violation of fire marshall policy; fuses in the fire alarm system were improperly pulled, causing the alarm system to fail; Anderson failed to have tests performed on a high voltage switch gear in the main electrical breaker to ensure that it was operating properly; and Anderson failed to check the installation of an air handler motor. *Id.*

125 I refer to this position as the "permissive inference" position, a name used by the EEOC in its preliminary guidance on St. Mary's Honor Center v. Hicks. *See* Neely, *supra* note 84, at 3.

126 924 F.2d 655 (7th Cir. 1991).

127 *Visser,* 924 F.2d at 657 (citing Shager v. Upjohn Co., 913 F.2d 398, 401 (7th Cir. 1990)).

> her prima facie case and shows that the employer's proffered reasons for her discharge are false. The next logical question is whether the plaintiff may prevail, not automatically as a matter of law, but through submission of her case to the ultimate factfinder, under such circumstances. *Hicks* answers this question in the affirmative.[128]

The court observed that language in the *Hicks* decision could support a pretext plus reading, requiring additional evidence in order to sustain the plaintiff's burden of proof. "However," concluded the court, "such language is dicta."[129] Even though the plaintiff is not required to introduce additional evidence of discriminatory intent, wrote the court, "the plaintiff might be well advised" to do so.[130]

5. Interpretation by the EEOC

The EEOC has also supported a permissive inference reading of *Hicks*. In his Preliminary Guidance on the decision, Deputy General Counsel James R. Neely, Jr. wrote that "the finding of pretext may, of itself, constitute a sufficient *basis* for the ultimate finding of discrimination, but the factfinder must make an independent finding of discrimination."[131] Neely supported this conclusion with *Hicks's* "suspicion of mendacity" language,[132] as well as footnote four of Justice Scalia's opinion, which stated that "[e]ven though . . . rejection of the defendant's proffered reasons is enough at law to *sustain* a finding of discrimination, *there must be a finding of discrimination.*"[133] While acknowledging that the opinion presents language which could be read to support a pretext plus interpretation, Neely concluded that *Hicks* rejects the pretext plus position because it does not require additional evidence to support a finding of discrimination.[134]

V. APPLICATION OF *HICKS* TO SUMMARY JUDGMENT

The holding of *St. Mary's Honor Center v. Hicks* addressed the burden of proof that the plaintiff must bear at trial. In the

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128 *Anderson*, 13 F.3d at 1123.
129 *Id.* at 1124 n.3.
130 *Id.* at 1124.
131 Neely, *supra* note 84, at 3.
132 *See supra* note 103 and accompanying text.
133 St. Mary's Honor Center v. Hicks, 113 S. Ct. 2742, 2749 n.4 (1993).
134 Neely, *supra* note 84, at 3.

months following this decision, the federal courts have struggled with an issue that *Hicks* did not directly address: what burden must the plaintiff bear to survive the defendant's motion for summary judgment? Two alternate standards have been articulated, both of which root themselves in the language of *St. Mary's Honor Center v. Hicks.*

A. Majority Position: Genuine Issue of Material Fact as to Pretext

Even though the holding of *St. Mary's Honor Center v. Hicks* made it more difficult for many plaintiffs to prevail at trial, the majority of circuits which have addressed the application of *Hicks* to summary judgment have articulated a standard which is favorable to plaintiffs. The Ninth Circuit's discussion and holding in *Washington v. Garrett*[135] represents this position. The plaintiff, a black woman, worked as a Public Affairs Specialist at the Naval Training Center in San Diego, California. She claimed she was discharged from her position because of her race and gender. After an administrative review, the district court granted the defendant's motion for summary judgment.[136]

In reversing the district court's judgment, Judge Betty Fletcher of the Ninth Circuit wrote that the

> burden on summary judgment . . . is thus to establish a prima facie case of discrimination and, if the employer articulates a legitimate, nondiscriminatory reason for its actions, to raise a genuine factual issue as to whether the articulated reason was pretextual. If a plaintiff succeeds in raising a genuine factual issue regarding the authenticity of the employer's stated motive, summary judgment is inappropriate, because it is for the trier of fact to decide which story is to be believed.[137]

The court referred to the language in *Hicks* which states that a trier of fact may infer discrimination from a showing of a prima facie case and pretext. It continued:

> Because, as *St. Mary's* recognizes, the factfinder in a Title VII case is entitled to infer discrimination from plaintiff's proof of a prima facie case and showing of pretext without anything more, there will always be a question for the factfinder once a

135 10 F.3d 1421 (9th Cir. 1993) (as amended Jan. 26, 1994).
136 *Id.* at 1424-28.
137 *Id.* at 1433 (citations omitted).

> plaintiff establishes a prima facie case and raises a genuine issue as to whether the employer's explanation for its action is true. Such a question cannot be resolved on summary judgment.[138]

This reasoning has also been stated by the Fourth,[139] Seventh,[140] Tenth,[141] and Eleventh[142] Circuits and is often based

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138 *Id.*

139 The Fourth Circuit's holding in Mitchell v. Data Gen. Corp., 12 F.3d 1310 (4th Cir. 1993), appears to have followed the majority rule. In examining the defendant's motion for summary judgment, the court held that the plaintiff could be defeated by the motion in two ways: by failing to establish a prima facie case or "by failing to show a genuine factual dispute over the employer's legitimate nondiscriminatory explanation." *Id.* at 1317. The plaintiff in this case, however, "failed to establish a prima facie case and failed to carry the ultimate burden of persuasion . . . by establishing a genuine issue of material fact in connection with the [defendant's] explanation." Therefore, summary judgment was granted. *Id.* at 1318.

140 In Anderson v. Baxter Healthcare Corp., 13 F.3d 1120 (7th Cir. 1994), the Seventh Circuit reviewed the defendant's motion for summary judgment and wrote:

> For summary judgment purposes, the non-moving party . . . has a lesser burden. He must only "produce evidence from which a rational factfinder could infer that the company lied" about its proffered reasons for his dismissal."
>
> . . . If the only reason an employer offers for firing an employee is a lie, the inference that the real reason was a forbidden one, such as age, may rationally be drawn. This is the common sense behind *McDonnell Douglas* . . . . The point is only that if the inference of improper motive *can* be drawn, there must be a trial.

Id. at 1124 (quoting Shager v. Upjohn, Co., 913 F.2d 398, 401 (7th Cir. 1990)) (citations omitted). Despite this lower standard for summary judgment, the plaintiff's evidence of pretext (including an affidavit from a former supervisor and the deposition of a former co-worker) were conclusory and insufficient to create a material issue of fact. *Id.* at 1125. The motion for summary judgment, therefore, was granted.

141 In Durham v. Xerox Corp., No. 92-6398, 1994 U.S. App. LEXIS 3444 (10th Cir. Feb. 24, 1994), the plaintiff claimed that the defendant failed to promote her because of her race. At trial, the defendant responded that the plaintiff was passed over for promotion because she was less qualified than the other candidates. *Id.* at *3. The plaintiff had introduced evidence that she was, in fact, more qualified than those who were promoted, but the district judge did not take the evidence into account. *Id.* at *8. This evidence, concluded the Tenth Circuit, was improperly ignored:

> [P]roof that Durham was more qualified would disprove Xerox's only explanation for its actions, that Durham was less qualified than the successful candidates. Although a prima facie case combined with disproof of the employer's explanations does not prove intentional discrimination as a matter of law, it may permit the factfinder to infer intentional discrimination, and thus preclude summary judgment for the employer.

Id. at *8-*9. Even under this lower standard, however, the plaintiff's evidence only addressed whether the plaintiff was *qualified* for the position, not whether she was *more* qualified. *Id.* at *9. As a result, the Tenth Circuit concluded that the motion for summary judgment was properly granted. *Id.* at *13.

142 In Hairston v. Gainesville Sun Publishing, 9 F.3d 913 (11th Cir. 1993), the plaintiff alleged that he was terminated in retaliation for filing an age discrimination com-

upon the "suspicion of mendacity" language found in Part II of the *Hicks* decision. This standard focuses on the sufficiency of the evidence regarding the issue of pretext: if the plaintiff succeeds in raising a genuine issue of material fact regarding pretext, he survives summary judgment.

B. Minority Position: Genuine Issue of Material Fact as to Intentional Discrimination

A minority of courts, including the First[143] and Fifth[144] Circuits, have chosen a standard for deciding summary judgment motions which makes it more difficult for the plaintiff to prevail than under the majority position. According to these courts, in order to prevail at the summary judgment stage, it is not enough that the plaintiff introduce evidence that raises a genuine issue of

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plaint with the EEOC, and the district court granted the defendant's motion for summary judgment. *Id.* at 915. The Eleventh Circuit noted the difficulty in ascertaining the true motives of an employer and, therefore, the general unsuitability of resolving such issues on summary judgment. *Id.* at 919, 921. The court then articulated its standard for summary judgment motions:

> [The] plaintiff's burden at summary judgment is met by introducing evidence that could form the basis for a finding of facts, which when taken in the light most favorable to the non-moving party, could allow a jury to find by a preponderance of the evidence that the plaintiff has established pretext, and that the action taken was in retaliation for engaging in the protected activity.

Id. at 921. Because the plaintiff "provided a sufficient factual basis in the record upon which a reasonable trier of fact may find that the stated reasons for the adverse employment actions were mere pretext," the Eleventh Circuit remanded the case for trial. *Id.*

143 The First Circuit, in LeBlanc v. Great American Ins. Co., 6 F.3d 836 (1st Cir. 1993), considered the evidence presented in support of the plaintiff's age discrimination claim. Articulating its standard for summary judgment motions, the court wrote that it "required not only 'minimally sufficient evidence of pretext,' but evidence that overall reasonably supports a finding of discriminatory animus." *Id.* at 842-43 (quoting Goldman v. First Nat'l Bank of Boston, 985 F.2d 1113, 1117 (1st Cir. 1993)). The First Circuit also stated that "the plaintiff cannot avert summary judgment if the record is devoid of adequate direct or circumstantial evidence of discriminatory animus on the part of the employer." *Id.* at 843. The plaintiff's evidence, taken as a whole, failed to raise a genuine issue of material fact as to age discrimination, and the district court's grant of summary judgment was affirmed. *Id.* at 849.

144 In Bodenheimer v. PPG Industries, Inc., 5 F.3d 955 (5th Cir. 1993), the Fifth Circuit reviewed the defendant's motion for summary judgment on the plaintiff's age discrimination claim. The court emphasized the *Hicks* requirement that the plaintiff prove intentional discrimination and wrote that "because Bodenheimer would be required to prove at trial, through a preponderance of the evidence, that PPG's proffered reasons are a pretext for age discrimination, he must now produce sufficient evidence to establish that PPG's reasons were pretexts *for age discrimination*." *Id.* at 958. Under this standard, the court considered the plaintiff's evidence insufficient and upheld the district court's dismissal. *Id.* at 959.

material fact regarding pretext. Rather, because the plaintiff must carry at trial the burden of proving discrimination, summary judgment must be granted unless the plaintiff can introduce evidence from which the ultimate finding of discrimination may be inferred. Therefore, a plaintiff must introduce evidence sufficient for the factfinder to conclude reasonably that the employer's decision was wrongfully based on a prohibited factor, such as age. Under this approach, the court does not ignore evidence of pretext, but it determines that the evidence *as a whole* would permit the trier of fact to infer the ultimate burden of discriminatory animus. Yet because evidence of pretext alone may be insufficient, this standard is more difficult for a plaintiff lacking additional evidence to meet.

C. Support for the Majority Standard

1. Textual Support

Courts which support the minority standard most often justify their position with a passage taken from Part II of *Hicks*, which states that once the employer succeeds "in carrying its burden of production, the *McDonnell Douglas* framework—with its presumptions and burdens—is no longer relevant."[145] These courts reason that once the employer produces evidence of a legitimate, nondiscriminatory motive in response to the plaintiff's complaint, only the ultimate issue remains: whether the employer was motivated by discriminatory animus. Unless the available evidence creates a factual dispute on this issue, summary judgment is appropriate.

This interpretation of the sentence taken from *Hicks*, however, is not a proper understanding of the entire passage from which it was taken. The *entire* passage reads:

> If, on the other hand, the defendant has succeeded in carrying its burden of production, the *McDonnell Douglas* framework—with its presumptions and burdens—is no longer relevant. To resurrect it later, after the trier of fact has determined that what was "produced" to meet the burden of production is not credible, flies in the face of our holding in *Burdine* that to rebut the presumption "[t]he defendant need not persuade the court that it was actually motivated by the proffered reasons." The presumption, having fulfilled its role of forcing the defendant to come forward with some response, simply drops out of

145 St. Mary's Honor Center v. Hicks, 113 S. Ct. 2742, 2749 (1993).

> the picture. The defendant's "production" (whatever its persuasive effect) having been made, the trier of fact proceeds to decide the ultimate question: whether plaintiff has proven "that the defendant intentionally discriminated against [him]" because of his race. 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.[146]

The point of this passage is not that the issue of *pretext* is no longer relevant, but that the *mandatory presumption* which arises out of the prima facie case is no longer relevant once it is rebutted by the employer's proffered reasons. Far from ignoring or dismissing step three of the *McDonnell Douglas* framework, the Court emphasizes the crucial role that proof of a prima facie case and pretext may play in proving discrimination.[147] Although the plaintiff's ultimate burden is and always has been to prove discrimination, the *Hicks* opinion allows the plaintiff to accomplish this through the demonstration of pretext. Evidence of pretext, therefore, should permit the plaintiff to defeat the defendant's motion for summary judgment.

2. Support from the Assumptions Underlying the *McDonnell Douglas* Framework

The majority position, with its focus on the evidence of pretext, permits the plaintiff and the court to make use of the assumptions underlying the *McDonnell Douglas* framework. Because employers usually do not act arbitrarily and because it is more likely than not that an employer who conceals its true reason acted out of an impermissible motivation, a showing of pretext can give rise to a finding of intentional discrimination. The minor-

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146 *Id.* (citations omitted).

147 The emphasis the *Hicks* opinion places upon the probative force of the prima facie case echoes the Court's prior holding in *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981). The *Burdine* Court explained that:

> [i]n 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 plainitff to establish a prima facie case. . . . Indeed, there may be some cases where the plaintiff's initial evidence, combined with effective cross-examination of the defendant, will suffice to discredit the defendant's explanation.

Burdine, 450 U.S. at 255 n.10.

ity position, which can be implemented in a manner that requires additional evidence from the plaintiff, essentially ignores the assumptions upon which *McDonnell Douglas* was based. The minority standard for summary judgment wrongly excludes these common-sense considerations from the court's reasoning and, therefore, denies the plaintiff its opportunity to prove discrimination as described in *Hicks*.

3. Interpretation by the EEOC

Furthermore, the majority position is the one accepted by the EEOC. In his preliminary guidance on *Hicks*, Deputy General Counsel James R. Neely, Jr., reasoned that "[s]ince a finder of fact *may* find discrimination based solely on pretext, evidence sufficient to create an issue of fact on that issue is, necessarily, evidence sufficient to create an issue of fact on the ultimate question of discrimination . . . ."[148] Neely emphasized Justice Scalia's footnote four, which specifically states that a finder of fact may infer discrimination solely from evidence of pretext.

In conclusion, summary judgment is inappropriate whenever the plaintiff raises a factual dispute as to pretext because a finding of pretext may sustain a finding of discrimination. Courts that apply the minority standard wrongly interpret the holding of *Hicks* and deny plaintiffs the opportunity for a factfinder to infer discrimination from their evidence. The proper focus at summary judgment, therefore, is on the evidence of pretext.

VI. CONCLUSION

The holding of *St. Mary's Honor Center v. Hicks* must be understood against the background of the assumptions which gave rise to *McDonnell Douglas* and its progeny. Because it is reasonable to assume that an employer's false explanation conceals a discriminatory motive, *McDonnell Douglas* permits an inferential bridge to connect a showing of pretext and a finding of discrimination. A permissive inference understanding of *Hicks* does not alter this reasoning and allows the factfinder to draw its own conclusion from the evidence presented by the plaintiff. By adopting the majority standard in evaluating summary judgment motions, courts act in a manner consistent with the holding of *Hicks* and allow

148 Neely, *supra* note 84, at 5.

plaintiffs the opportunity to convince a factfinder that discrimination is the proper inference to be drawn from their evidence.

Jody H. Odell

On, April 21, 1994, Edward J. Murphy, the John N. Matthews Professor of Law, announced his retirement from the Notre Dame Law School faculty. Professor Murphy has taught more students than any professor in the history of the Law School.

Professor Murphy received his B.S. and LL.B from the University of Illinois. Admitted to the Illinois Bar in 1951, he spent three years in private practice in Springfield, Illinois. From 1954 through 1957, he clerked for Justice H.B. Hershey of the Illinois Supreme Court. Professor Murphy came to Notre Dame in 1957. He served as Acting Dean in 1971 and directed the Notre Dame Summer Program in Japan in 1974. He has taught Contracts, Jurisprudence, Negotiable Instruments, and Remedies. He is the co-author of Studies in Contract Law, now in its fourth edition, and Sales and Credit Transactions Handbook.

The students of the Law School are forever grateful to Professor Murphy for his guidance, friendship, and inspiration.