Washington and Lee Law Review

Volume 61 | Issue 1 Article 7

Winter 1-1-2004

Pretext in Employment Discrimination Litigation: Mandatory Instructions for Permissible Inferences?

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Table of Contents

I. Introduction 408
II. Development of the *McDonnell Douglas* Framework 413
III. Background of the Circuit Split 417
A. Post-*Hicks* and Pre-*Reeves* Circuit Decisions 417
B. Post-*Reeves* Circuit Decisions 423
C. *Townsend v. Lumbermens Mutual Casualty Co.* 426
IV. Reconciliation of the Circuit Split 429
A. Argument for Mandating the Pretext Instruction 429
B. Argument for Leaving the Pretext Instruction to the Discretion of the Trial Judge 435
V. Conclusion 443

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I. Introduction

In *Reeves v. Sanderson Plumbing Products*,[1] the United States Supreme Court resolved some lingering questions surrounding the role of pretext in a plaintiff's employment discrimination claim,[2] but the federal courts of appeals continue to disagree over whether trial courts must instruct juries on pretext in employment discrimination litigation.[3] Specifically, a circuit split currently exists regarding whether a trial court must instruct the jury that it may, but need not, infer intentional discrimination on the part of the employer if the jury disbelieves the employer's explanation for the employment decision affecting the plaintiff.[4] The Supreme Court has defined this permissible inference as a correct statement of law that, if met, sufficiently supports a jury finding for the plaintiff.[5] Unfortunately, the Court has failed to address the question of

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1. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133 (2000). In *Reeves*, the Supreme Court considered whether a plaintiff's prima facie case, combined with a factfinder's rejection of the employer's nondiscriminatory explanation for its decision, sufficiently supported a finding of intentional discrimination. *Id.* at 140. In this case, the defendant fired a factory supervisor after forty years of employment. *Id.* at 137–38. The plaintiff filed suit under the Age Discrimination in Employment Act of 1967 (ADEA), and the jury returned a verdict in his favor. *Id.* at 138–39. The Fifth Circuit Court of Appeals reversed the judgment based on a lack of affirmative evidence indicating termination because of age. *Id.* at 139–40. The Supreme Court assumed that the *McDonnell Douglas* tripartite formula applied to an ADEA case but did not address the issue directly. *Id.* at 142. The Court concluded that the plaintiff had established a prima facie case by showing that he belonged to a protected class under the ADEA, possessed qualifications for the position of supervisor, lost his job, and was replaced by younger individuals. *Id.* The Court likewise concluded that the defendant had met its burden by producing the nondiscriminatory explanation that the defendant had fired the plaintiff for failing to keep adequate attendance records. *Id.* The Court nevertheless upheld the verdict, stating that if the jury believes the defendant's nondiscriminatory explanation to be false, it may find for the plaintiff without additional proof beyond the prima facie case. *Id.* at 147–48.

2. *See id.* at 140 (describing a conflict among courts of appeals over the minimum proof requirements for plaintiffs in employment discrimination cases).

3. *See* Townsend v. Lumbermens Mut. Cas. Co., 294 F.3d 1232, 1238 (10th Cir. 2002) (noting existence of a circuit split over whether to require jury instruction on pretext in Title VII and related litigation). Issues regarding pretext occasionally arise in cases involving discrimination outside of the employment arena, such as discriminatory practices in housing, but pretext appears most frequently in disputes over discrimination in employment under federal statutes such as Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e (2000)) and the Age Discrimination in Employment Act of 1967 (29 U.S.C. § 621 (2000)).

4. *See Townsend*, 294 F.3d at 1236–37 (discussing Eighth Circuit Court of Appeals' Model Instruction 5.95, which reads as follows: "You may find that plaintiff's race was a motivating factor in defendant's decision to demote or discharge plaintiff if it has been proved by a preponderance of the evidence that defendant's stated reason(s) for its decisions are not the true reasons, but are a 'pretext' to hide discriminatory motivation.").

5. *See generally Reeves*, 530 U.S. 133; St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993).

whether to mandate a pretext instruction.[6] The pretext instruction represents a unique issue because it describes a permissible inference rather than an obligatory inference.[7]

In civil litigation, courts generally follow the rule that a judge need not instruct the jury on permissible inferences because the average trial contains a virtually unlimited number of possible inferences that the jury may draw from any given piece of evidence.[8] A judge's decision to single out a particular inference in a jury instruction could result in undue emphasis on the issue.[9] Instead, courts typically rely on the arguments of counsel to flesh out appropriate permissible inferences.[10] In the context of employment discrimination litigation, however, the permissible inference described in the pretext instruction bears particular significance.[11]

Employment discrimination cases generally present complex litigation problems because they involve sensitive social issues and circumstantial evidence.[12] Employees today enjoy a high degree of protection against racism, sexism, and other forms of discrimination, but may have difficulty proving such claims.[13] Meanwhile, employers often adopt explicit codes of conduct

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6. *See generally Reeves*, 530 U.S. 133; *Hicks*, 509 U.S. 502.

7. *See* Gehring v. Case Corp., 43 F.3d 340, 343 (7th Cir. 1994) (describing the desirability of leaving the pretext issue to argument of counsel rather than including it in jury instructions because it embodies a "permissible, but not an obligatory, inference").

8. *See id.* (stating the basic premise that a judge "need not deliver instructions describing all valid legal principles").

9. *See* Gerrilyn G. Brill, *Instructing the Jury in an Employment Discrimination Case*, 1998 FED. CTS. L. REV. § 4.27, *at* www.fclr.org/1998fedctslrev2.htm ("Singling out a particular inference for instruction by the judge may give it undue emphasis.") (on file with the Washington and Lee Law Review). The Honorable Gerrilyn G. Brill is the Chief United States Magistrate Judge for the Northern District of Georgia.

10. *See Gehring*, 43 F.3d at 343 (describing the general judicial preference of leaving permissible inferences to arguments of counsel).

11. *See* Townsend v. Lumbermens Mut. Cas. Co., 294 F.3d 1232, 1243–44 (10th Cir. 2002) (Henry, J., concurring) (describing how the permissible inference of pretext plays too significant a role in employment discrimination litigation to omit it from the jury instructions).

12. *See, e.g.*, Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 140 (2000) (describing how "'the question facing triers of fact in discrimination cases is both sensitive and difficult,' and that '[t]here will seldom be "eyewitness" testimony as to the employer's mental processes'" (quoting U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 716 (1983))); *see also* Smith v. Borough of Wilkinsburg, 147 F.3d 272, 278 (3d Cir. 1998) (discussing the general perception that "[i]n numerous cases the courts have recognized that an employee bringing such a suit faces difficulties in amassing proof because discrimination 'is often subtle'" (quoting Chipollini v. Spencer Gifts, Inc., 814 F.2d 893, 899 (3d Cir. 1987))).

13. *See* Michael Selmi, *Why are Employment Discrimination Cases So Hard to Win?*, 61 LA. L. REV. 555, 558–61 (2001) (discussing statistical evidence indicating that plaintiffs in employment discrimination cases "generally fare worse than most other kinds of civil

forbidding discrimination in the workplace, but despite such policies, discrimination often finds ways to survive.[14] The delicate and complex balance inherent in employment discrimination litigation therefore requires precise consideration of all aspects of the case, including the proper format of the jury instructions.[15]

In most employment discrimination cases in which issues of pretext arise, the defendant will provide all sorts of seemingly legitimate reasons to justify its behavior while the plaintiff will fight to discredit these justifications and prove that the employer acted based on a discriminatory and impermissible motive.[16] However, the plaintiff will rarely, if ever, ferret out any sort of "smoking gun" or affirmative evidence demonstrating discrimination by the employer.[17] Thus, creating an inference that the employer lied can give rise to the extremely important inference that the employer lied for a particular reason: to cover up a discriminatory purpose.[18] This simple chain of inferences represents the heart of the controversy involving the proposed jury instruction.[19]

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plaintiffs"). Professor Selmi noted a particularly striking statistic regarding resolution of employment discrimination disputes in bench trials: "Plaintiffs in employment cases succeeded on only 18.7 percent of the cases tried before a judge, whereas the success rates for plaintiffs in judge-tried insurance cases was 43.6 percent and 41.8 percent for personal injury cases . . . success rates [in employment cases] are more than fifty percent below the rate of other claims." *Id.* at 560–61.

14. *See* Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 459–460 (2001) (discussing how "[r]acial and gender inequality persists in many places of employment" despite employers' actions in adopting "formal policies prohibiting race and sex discrimination and procedures to enforce those policies").

15. *See Borough of Wilkinsburg*, 147 F.3d at 278 ("In the field of employment discrimination, courts have struggled for decades to develop and refine an evidentiary framework that fairly balances the interests of the employee who challenges her employer's conduct as discriminatory and the interests of the employer faced with such a suit.").

16. *See, e.g.*, *Reeves*, 530 U.S. at 142–43 (discussing burden-shifting framework used in employment discrimination cases). The Court emphasized the importance of giving the plaintiff in these types of cases the "opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination." *Id.* at 143 (quoting Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981)).

17. *See* Sturm, *supra* note 14, at 459–60 ("Smoking guns—the sign on the door that 'Irish need not apply' or the rejection explained by the comment that 'this is no job for a woman'—are largely things of the past.").

18. *See* Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 147 (2000) (describing the impact of finding that an employer's nondiscriminatory explanation is false).

19. *See* Townsend v. Lumbermens Mut. Cas. Co., 294 F.3d 1232, 1237–39 (10th Cir. 2002) (discussing a circuit split over the issue of mandating use of the permissible inference pretext instruction).

In addition to the significance of this particular issue, the sheer volume of employment discrimination cases on the federal docket and the need for national uniformity in the litigation of these disputes necessitates Supreme Court resolution of this circuit split. The number of employment discrimination cases filed in federal court has tripled during the past decade, and discrimination claims currently comprise approximately ten percent of federal cases.[20] These private lawsuits play a vital role in the enforcement of anti-discrimination statutes such as Title VII.[21] If some circuits require a plaintiff-friendly instruction while others do not, then forum-shopping seems inevitable, as trial courts across the country scrutinize employment decisions for compliance with different federal statutes.[22]

However, three United States courts of appeals have decided to require this jury instruction in employment discrimination cases involving a proof pattern described as the *McDonnell Douglas* tripartite formula.[23] The Second, Third, and Tenth Circuits require the instruction at trial.[24] Four other U.S. courts of appeals believe the instruction should not be mandatory.[25] Within this group of four, the Seventh and Eleventh Circuits have decided not to require the instruction, while the First and Eighth Circuits have indicated in dicta that they doubt the necessity of the instruction.[26] Both positions in the circuit split have merit.

Employment discrimination cases involve special burden-shifting formulas explored further in Part II of this Note, and the unique nature of these cases may justify a unique jury instruction.[27] Alternatively, this instruction seems to

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20. Selmi, *supra* note 13, at 558; *see also* Adam Cohen, *Too Old to Work?*, N.Y. TIMES, Mar. 2, 2003, § 6 (Magazine), at 56 (discussing twenty-four percent rise in age-discrimination complaints filed with the Equal Employment Opportunity Commission in the previous two years). In this article, Mr. Cohen stated: "Pick up the paper, and the cases are everywhere." *Id.*

21. Brief of the Equal Employment Opportunity Commission as Amicus Curiae at 1, Townsend v. Lumbermens Mut. Cas. Co., 294 F.3d 1232 (10th Cir. 2002) (No. 00-3055) (citing Alexander v. Gardner-Denver, 415 U.S. 36, 45 (1974)) (on file with the Washington and Lee Law Review).

22. *See* Selmi, *supra* note 13, at 558 (discussing the rapid increase in employment discrimination claims since 1990 "due to expansion of important antidiscrimination laws").

23. *See Townsend*, 294 F.3d at 1241 (indicating that the Tenth Circuit will align itself with the position of the Second and Third Circuits and require the instruction).

24. *Id.*

25. *See id.* at 1238–39 (acknowledging the position of the First, Seventh, Eighth, and Eleventh Circuits not to mandate use of the instruction).

26. *See id.* (acknowledging the position of the First, Seventh, Eighth, and Eleventh Circuits that the instruction constitutes an unnecessary description of a permissible inference).

27. *See id.* at 1243 (Henry, J., concurring) (describing the unique and important nature of the permissible inference embodied in the pretext instruction).

involve nothing more than a common sense conclusion that if the employer lies, the lie most likely represents an attempt to hide an illegal motive.[28] Singling out this particular chain of logic in the instruction may distract the jury from the ultimate question of intentional discrimination, especially if plaintiff's counsel has repeatedly emphasized the inference of pretext throughout the course of the trial.[29] This Note explores the development of the circuit split in the context of recent Supreme Court opinions and examines the merits of both sides of the debate.

Ultimately, this Note supports the position of the First, Seventh, Eighth, and Eleventh Circuits and contends that the decision to issue the instruction should lie within the discretion of the trial judge.[30] Although the pretext instruction represents a correct statement of law, and the judge may usefully grant the instruction in many cases, failure to do so does not rise to the level of reversible error.[31] Jurors will likely intuitively understand that a false explanation by the employer probably represents an attempt to conceal a discriminatory motive.[32] In addition, not all employment discrimination cases merit an instruction on pretext.[33]

Understanding the debate over the instruction first requires background knowledge regarding the format of a typical employment discrimination trial. Therefore, Part II of this Note describes the proof structure the Supreme Court developed to litigate these types of claims.[34] In outlining the correct proof

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28. *See* Brill, *supra* note 9, at § 4.27. Judge Brill stated:

> [I]t is likely that a jury will understand, without being told by the judge, that if an employer is lying about its real reason for its employment actions, it may be trying to cover up an unlawful reason, and that unlawful reason may be the discriminatory reason asserted by the plaintiff.

Id. Judge Brill added: "A judge need not instruct a jury on something that jurors can glean from everyday experience and that is likely to be argued by the lawyers." *Id.*

29. *See* Townsend v. Lumbermens Mut. Cas. Co., 294 F.3d 1232, 1248 (10th Cir. 2002) (Brorby, J., dissenting) (arguing that educating the jury on permissible inferences "can be easily accomplished by counsel").

30. *See id.* at 1238–39 (discussing the position of the First, Seventh, Eighth, and Eleventh Circuits that the instruction constitutes an unnecessary description of a permissible inference).

31. *See* Gehring v. Case Corp., 43 F.3d 340, 343 (7th Cir. 1994) (declining to find reversible error on the part of the trial court for failing to grant pretext instruction); *see also* Moore v. Robertson Fire Prot. Dist., 249 F.3d 786, 789–91 (8th Cir. 2001) (describing how the trial court "properly exercised its discretion in declining to submit a pretext instruction").

32. *See* Brill, *supra* note 9, at § 4.27 (discussing how jurors will likely understand, on their own, the possible pretextual significance of a false explanation by the defendant employer).

33. *See Moore*, 249 F.3d at 790 (stating how the lack of evidence regarding pretext did not merit a jury instruction on the issue).

34. *See infra* Part II (discussing evolution of the *McDonnell Douglas* tripartite formula).

structure for these types of cases, the Supreme Court does not address the question of appropriate jury instructions, but much of the Court's other analysis provides helpful insight into the debate at the heart of this circuit split.[35] Part III outlines the development of the circuit split and highlights key portions of the analysis in each opinion,[36] while Part IV provides an in-depth discussion and criticism of both positions.[37] Finally, in Part V, this Note concludes that mandating use of this instruction constitutes an unnecessary restriction on the discretion of the trial court.[38]

II. Development of the McDonnell Douglas *Framework*

In the past few decades, starting with *McDonnell Douglas Corp. v. Green*,[39] the Supreme Court has developed a specific evidentiary framework for litigating issues of discriminatory treatment in employment.[40] In *McDonnell*

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35. *See generally* Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133 (2000); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993).

36. *See infra* Part III (discussing development of circuit split).

37. *See infra* Part IV (evaluating merits of both sides of circuit split).

38. *See infra* Part V (concluding that the trial court should retain discretion over formulation of jury instructions in employment discrimination cases).

39. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). In *McDonnell Douglas*, the Supreme Court addressed the issue of how to formulate an appropriate burden-shifting proof structure in cases arising under Title VII of the Civil Rights Act of 1964. *Id.* at 793–94. The plaintiff, a black man actively involved in the civil rights movement, worked as a mechanic and technician for the McDonnell Douglas Corporation (MDC) from 1956 until MDC fired him in 1964. *Id.* at 794. In 1965, the plaintiff re-applied for a position as a mechanic, but MDC denied him re-employment based on his prior participation in disruptive civil rights activities targeting the employment practices of MDC. *Id.* at 796. He then filed suit against the corporation. *Id.* at 797. The trial court dismissed his action, but the Eighth Circuit Court of Appeals remanded. *Id.* The Supreme Court granted certiorari "to clarify the standards governing the disposition of an action challenging employment discrimination." *Id.* at 798. The Court began its analysis by noting the primary factual conflict between the plaintiff's allegations of racially discriminatory hiring practices and the defendant's asserted justification that the plaintiff had illegally participated in certain civil rights activities specifically targeting the corporation. *Id.* at 801. The Court then outlined a framework for evaluating these claims. *Id.* at 802. First, according to the Court, the plaintiff had the burden to allege a prima facie case of racial discrimination by demonstrating that he belonged to a protected class, possessed qualifications for an available job, and was denied employment. *Id.* The burden of going forward then shifted to the defendant to provide a legitimate and nondiscriminatory reason for refusing to hire the plaintiff. *Id.* at 802–03. In the third and final step, the plaintiff must receive a fair opportunity to prove that the employer's asserted nondiscriminatory motive represented a pretext for discrimination. *Id.* at 804. The Court concluded that the first two parts of the framework had been fulfilled and remanded the case for consideration of the third step. *Id.* at 807.

40. *See id* at 802–03 (outlining burden-shifting evidence structure in Title VII litigation).

Douglas, the Court outlined a tripartite scheme for presentation of evidence in Title VII litigation.[41] First, the burden rests on the plaintiff to establish a prima facie case of discrimination, which the plaintiff can accomplish by showing, for example, that he belongs to a protected class, possessed qualifications for an employment position, and experienced an adverse employment decision, such as being fired or rejected from an available job.[42] Second, after the plaintiff has established a prima facie case, the burden of production shifts to the defendant employer to provide a neutral, nondiscriminatory reason for the decision.[43] Third, the plaintiff must receive the opportunity to prove that the defendant employer's explanation constituted a pretext for prohibited discrimination.[44]

Courts have refined and clarified this framework since *McDonnell Douglas*, but it has retained its essential tripartite form.[45] In the past decade, legal disputes regarding this framework have centered primarily on the third part of this test, and federal courts at all levels have wrestled with various problems involving the issue of pretext and its role in the proof structure.[46] Two recent Supreme Court cases have ironed out some, but not all, of the disagreement.[47]

In 1993, the Court issued its opinion in *St. Mary's Honor Center v. Hicks*,[48] a five to four decision that attempted to clarify some of the issues

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41. *See id.* at 802–04 (outlining evidentiary framework for Title VII litigation).

42. *Id.* at 802.

43. *Id.* at 802–03.

44. *Id.* at 804.

45. *See* Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 142–43 (2000) (outlining tripartite framework established in *McDonnell Douglas*).

46. *See* Townsend v. Lumbermens Mut. Cas. Co., 294 F.3d 1232, 1240 (10th Cir. 2002) (describing Supreme Court's recent resolution of circuit split over "pretext-plus" theory).

47. *See generally Reeves*, 530 U.S. 133 (resolving circuit split over "pretext-plus" theory by holding that factfinder's rejection of employer's nondiscriminatory explanation is sufficient, without additional evidence beyond the prima facie case, to support finding for plaintiff); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993) (clarifying *McDonnell Douglas* tripartite formula and explaining nature of respective evidentiary burdens on plaintiff and defendant).

48. St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993). In *Hicks*, a correctional facility fired a black man from his job as a supervisor. *Id.* at 504–05. He sued, arguing that the facility discharged him because of his race. *Id.* at 505. After a bench trial, the trial judge found for the defendant despite concluding that the defendant's nondiscriminatory explanation was false. *Id.* at 508. The judge believed the plaintiff had ultimately failed to prove that racial discrimination represented the true cause of his dismissal. *Id.* at 508. The Eighth Circuit Court of Appeals reversed the judgment, holding that a finding of pretext requires judgment for the plaintiff as a matter of law. *Id.* at 508–09. The Supreme Court reversed the Court of Appeals, holding that, even though a finding of pretext would support a judgment for the plaintiff, it does not compel such a judgment. *Id.* at 509–11.

surrounding the role of pretext in the *McDonnell Douglas* framework.[49] In *Hicks*, the Court considered the basic question of whether a plaintiff deserved judgment as a matter of law if the trier of fact disbelieved the employer's nondiscriminatory explanation.[50] This question focuses primarily on what pretext means in the context of the tripartite formula.[51] The Court first defined "pretext" in the framework as actually meaning "pretext for discrimination," a distinction that significantly affected the application of the entire framework.[52] The Court then divided "pretext for discrimination" into two parts.[53] To demonstrate pretext, the plaintiff must have "shown *both* that the reason was false, *and* that discrimination was the real reason."[54] However the Court emphasized the permissibility of inferring the ultimate fact of discrimination solely from a false explanation by the defendant employer.[55] Although proof of a false explanation by the defendant may therefore help significantly in proving the employer lied to conceal a discriminatory motive, and sufficiently supports a judgment for the plaintiff, it cannot, by itself, *compel* a finding for the plaintiff.[56]

While *Hicks* eliminated some of the confusion regarding the application of pretext to defendants in employment discrimination litigation, a dispute continued over the role of pretext in the plaintiff's burden of proof.[57] In *Reeves*, the Supreme Court unanimously resolved a circuit split involving the "pretext-plus" theory.[58] The pretext-plus theory required additional evidence

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49. *See id.* at 504 (explaining grant of certiorari to consider whether the rejection of an employer's nondiscriminatory explanation by the factfinder compels judgment for the plaintiff).

50. *Id.*

51. *See id.* at 515–16 (discussing the meaning of pretext in the proof structure).

52. *See id.* (describing the difference between "pretext" and "pretext for discrimination").

53. *Id.* at 515.

54. *Id.*

55. *See id.* at 511 ("[R]ejection of the defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination.").

56. *See id.* at 517 ("[P]roving the employer's reason false becomes part of (and often considerably assists) the greater enterprise of proving that the real reason was intentional discrimination."). However, the Court also stated:

> [T]he Court of Appeals' holding that rejection of the defendant's proffered reasons *compels* judgment for the plaintiff disregards the fundamental principle of Rule 301 that a presumption does not shift the burden of proof, and ignores our repeated admonition that the Title VII plaintiff at all times bears the "ultimate burden of persuasion."

Id. at 511.

57. *See* Townsend v. Lumbermens Mut. Cas. Co., 294 F.3d 1232, 1240 (10th Cir. 2002) (describing Supreme Court's recent resolution of a circuit split over the "pretext-plus" theory).

58. *See* Reeves v. Sanderson Plumbing Prods. Inc., 530 U.S. 133, 140 (2000) (describing

beyond the prima facie case, rather than a mere rejection of the defendant's nondiscriminatory explanation, to uphold a verdict for the plaintiff.[59] This conclusion ignored the Court's statement in *Hicks* that a plaintiff's prima facie case combined with rejection of the defendant's explanation "will *permit* the trier of fact to infer the ultimate fact of intentional discrimination" without additional proof.[60]

The Supreme Court clarified this principle in *Reeves* by eliminating any further use of the pretext-plus standard.[61] The Court emphasized the permissibility of inferring intentional discrimination from a false explanation by the defendant and added that, in many cases, this inference will constitute the natural assumption.[62] Two grounds justify this principle. First, under evidence law, a trier of fact is "entitled to consider a party's dishonesty about a material fact as 'affirmative evidence of guilt.'"[63] Second, in the circumstances of an employment dispute, "once the employer's justification has been eliminated, discrimination may well be the most likely alternative explanation, especially since the employer is in the best position to put forth the actual reason for its decision."[64]

Although *Reeves* firmly established the role of pretext in the overall *McDonnell Douglas* framework, the courts of appeals remain divided on the issue of whether to require jury instructions about pretext.[65] The Supreme Court should resolve this circuit split before it grows beyond the current four to three division. Part III of this Note explores the development of this circuit split in the context of opinions handed down both before and after *Reeves*.[66]

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the conflict among the courts of appeals over minimum proof requirements for plaintiffs in employment discrimination cases).

59. *See Townsend*, 294 F.3d at 1240–41 (describing the circuit split over the "pretext-plus" theory).

60. *See* St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 510–11 (1993) (clarifying the *McDonnell Douglas* tripartite formula and explaining the nature of the respective evidentiary burdens on plaintiff and defendant).

61. *See Reeves*, 530 U.S. at 146–47 (describing the impact of finding that an employer's nondiscriminatory explanation is false).

62. *Id.* at 147.

63. *Id.* (quoting Wright v. West, 505 U.S. 277, 296 (1992)).

64. *Id.*

65. *See* Townsend v. Lumbermens Mut. Cas. Co., 294 F.3d 1232, 1237–40 (10th Cir. 2002) (describing the circuit split).

66. *See infra* Part III (discussing the evolution of the circuit split).

III. Background of the Circuit Split

The circuit split hinges on the necessity of instructing a jury that it may infer intentional discrimination if it disbelieves a defendant employer's explanation for its actions.[67] While this instruction contains a correct statement of the law, courts differ as to its necessity.[68] Although three circuits have issued opinions mandating use of the instruction, and four have rejected this requirement, the seven opinions together reflect a certain range in degree of necessity rather than bright line disagreement.[69] This Part explores the seven opinions in chronological order, outlining the development of the split relative to the Supreme Court's decisions in *Hicks* and *Reeves*.

A. *Post-*Hicks *and Pre-*Reeves *Circuit Decisions*

One year after the Supreme Court decided *Hicks*, the Second Circuit became the first appellate court to mandate use of the pretext instruction.[70] In *Cabrera v. Jakabovitz*,[71] the Second Circuit addressed the inherent difficulties

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67. *See Townsend*, 294 F.3d at 1237–40 (describing the differences in opinion among the circuits regarding whether to require this instruction).

68. *Id.*

69. *See id.* (discussing the positions of each court of appeals in the circuit split over pretext instruction).

70. *See* Cabrera v. Jakabovitz, 24 F.3d 372, 382 (2d Cir. 1994) (stating the requirement that the trial court must instruct the jury on pretext). The Second Circuit stated in dicta that the trial judge must instruct the jury on two points:

> (1) [I]t is the plaintiff's burden to persuade the jurors by a preponderance of the evidence that the apartment (or job) was denied because of race (or, in other cases, because of some other legally invalid reason), [and] (2) the jury is entitled to infer, but need not infer, that this burden has been met if they find that the four facts previously set forth have been established and they disbelieve the defendant's explanation.

Id.

71. Cabrera v. Jakabovitz, 24 F.3d 372 (2d Cir. 1994). In *Cabrera*, the Second Circuit addressed several issues regarding the proper form of jury instructions in discrimination cases, including the role of pretext in such instructions. *Id.* at 377. The plaintiffs included a non-profit organization called the Open Housing Center (OHC) and several minority "testers" who engaged in investigations of landlords and realtors in the New York City area regarding an illegal form of housing discrimination known as "racial steering." *Id.* at 377–78. Specifically, the OHC investigated the operations of AM Realty and two of its landlord clients. *Id.* at 378. The investigation spawned a lawsuit against AM Realty and the landlords for housing discrimination, and the jury returned a verdict for the plaintiffs. *Id.* at 379. In its analysis, the Second Circuit first emphasized the importance of providing the jury with clear and simple instructions regarding the applicable law, and expressed disfavor towards the use of the technical legal phrases contained in the *McDonnell Douglas* framework. *Id.* at 380–81. The

involved in adapting the complex *McDonnell Douglas* framework to a set of comprehensible jury instructions.[72] The court expressly criticized jury instructions that contain technical legal terminology transposed directly from the *McDonnell Douglas* formula because those types of intricate instructions create a distinct risk of confusing or misleading the jurors.[73] In this case, the jury instructions included phrases such as "prima facie case" and references to the respective "burdens" borne by plaintiff and defendant.[74] While the court criticized the use of this legal diction, it did not find reversible error by the trial court for giving the instructions, and emphasized the rule that the jury "must be told what legal principles to apply depending on the different ways it might view the evidence."[75]

The Second Circuit used *Cabrera* to distill two essential principles from the Supreme Court's decisions in *McDonnell Douglas* and *Hicks*.[76] In accordance with its earlier emphasis on simplicity, the court stated the following:

> [T]he jury needs to be told two things: (1) it is the plaintiff's burden to persuade the jurors by a preponderance of the evidence that the apartment (or job) was denied because of race (or, in other cases, because of some other legally invalid reason), [and] (2) the jury is entitled to infer, but need not infer, that this burden has been met if they find that the four facts previously set forth have been established and they disbelieve the defendant's explanation.[77]

Although the court mandated use of this pretext instruction, it also stated that "the jury need not be told anything about a defendant's burden of

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court specifically rejected the use of terminology such as "prima facie case" or "burden" shifting in jury instructions but mandated use of the pretext instruction. *Id.* at 381–82. The court carefully noted, however, that "[u]nder McDonnell Douglas, the defendant does not bear the burden of establishing that race was not a factor in his or her decision. Instead, the plaintiff always bears the ultimate burden of proving discrimination." *Id.* at 383.

72. *See id.* at 380–81 (describing the high risk of confusing the jury with intricate instructions involving the *McDonnell Douglas* framework).

73. *See id.* (describing the tendency of lawyers to request, and judges to grant, jury instructions based on language used by "appellate courts in the context of bench trials," which may unnecessarily complicate legal issues in the minds of jurors).

74. *See id.* at 381 (criticizing use of unfamiliar terms in jury instructions that may cause unnecessary confusion in deliberations).

75. *Id.* at 380.

76. *See id.* at 382 (summarizing the key elements of the jury's role in these types of discrimination cases).

77. *Id.* (citations omitted).

production," to avoid the risk of jurors confusing the burden of production with the plaintiff's burden of persuasion.[78]

The rationale for requiring the instruction on pretext in *Cabrera* stemmed directly from language the Supreme Court used in *Hicks*.[79] In fact, the footnote in the section of *Cabrera* in which the Second Circuit mandated use of the pretext instruction cited directly to the following language from *Hicks*: "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."[80] The Second Circuit apparently interpreted *Hicks* as providing enough emphasis on this aspect of the *McDonnell Douglas* framework to warrant a mandatory instruction on pretext in discrimination litigation.[81]

The Seventh Circuit did not read *Hicks* in this manner when addressing virtually the same issue, however, and declined to require use of the instruction.[82] In *Gehring v. Case Corporation*,[83] the Seventh Circuit addressed the question of appropriate jury instructions in an employment discrimination

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78. *Id.* at 381–82.

79. *See id.* at 382 n.9 (citing explicit language in *Hicks* that discussed the minimum standard that can support a finding of intentional discrimination).

80. *Id.* (quoting St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 511 (1993)).

81. *See id.* at 382 (requiring an instruction based on the analysis of pretext found in *Hicks*).

82. *See* Gehring v. Case Corp., 43 F.3d 340, 343 (7th Cir. 1994) (refusing to find reversible error when the trial court failed to instruct the jury on pretext in a case arising under the ADEA).

83. *Id.* In *Gehring*, the Seventh Circuit considered the issue of whether the trial court committed reversible error by failing to instruct the jury on pretext. *Id.* at 343. Case Corporation, the defendant employer, fired the plaintiff, Dale Gehring, during a reduction in its work force. *Id.* at 342. Case decided to eliminate three of five cost accountant positions at one of its Wisconsin plants; management chose Gehring as one of the three. *Id.* Gehring sued, alleging that the corporation fired him because of his age and therefore unlawfully discriminated against him under the ADEA. *Id.* Gehring was fifty-two years old at the time he lost his job. *Id.* Case justified its decision on the grounds that Gehring had developed a poor attitude towards working at the plant due to an earlier demotion. *Id.* The jury believed this explanation and returned a verdict for Case. *Id.* Gehring appealed the decision, arguing, in part, that the trial court erred in refusing to instruct the jury "that if it did not believe the employer's explanation for its decisions, it may infer that the employer is trying to cover up age discrimination." *Id.* at 343. Writing for the Seventh Circuit, Judge Easterbrook reasoned that, while the proposed instruction contained "a correct statement of the law," the trial court did not err in refusing to include this statement because "a judge need not deliver instructions describing all valid legal principles." *Id.* Judge Easterbrook emphasized the lack of necessity involved when the proposed instruction depicts a permissible inference and stated the proposition that a trial court "may and usually should" leave such inferences "to the argument of counsel." *Id.*

case arising under the Age Discrimination in Employment Act (ADEA).[84] In this case, unlike *Cabrera*, the plaintiff lost at trial, appealed, and argued that the trial court erred in failing to instruct the jury that it could infer discrimination if it did not believe the defendant's explanation.[85] The Seventh Circuit noted that, under *Hicks*, this instruction contains a "correct statement of the law" but declined the opportunity to mandate use of this principle.[86] The court justified its reasoning with the following statement:

> [A] judge need not deliver instructions describing all valid legal principles. Especially not when the principle in question describes a permissible, but not an obligatory, inference. Many an inference is permissible. Rather than describing each, the judge may and usually should leave the subject to the argument of counsel.[87]

This description of the relationship between permissible inferences and jury instructions describes the basic position taken by appellate courts that have declined to require the use of the pretext instruction in discrimination cases.[88]

In *Gehring*, the Seventh Circuit also referred to the lack of harm suffered by a plaintiff who does not receive this instruction, stating that "Gehring's lawyer asked the jury to draw this inference; neither judge nor defense counsel so much as hinted that any legal obstacle stood in the way. Instructions on the topic were unnecessary."[89] The court clearly understood the law under *Hicks* in the same manner as the Second Circuit in *Cabrera* yet chose not to require the instruction.[90] In an interesting parallel to *Cabrera*, however, the Seventh Circuit also emphasized the importance of clarity and simplicity in jury instructions for discrimination claims.[91]

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84. *See id.* at 343 (discussing the plaintiff's arguments targeting the trial court's instructions to the jury).

85. *See id.* (discussing Gehring's request that the trial court instruct the jury on pretext).

86. *See id.* (stating that the discussion of permissible inferences should usually be left to the argument of counsel).

87. *Id.*

88. *See* Townsend v. Lumbermens Mut. Cas. Co., 294 F.3d 1232, 1238–39 (10th Cir. 2002) (summarizing the position of the four circuits that have deemed the instruction unnecessary).

89. Gehring v. Case Corp., 43 F.3d 340, 343 (7th Cir. 1994).

90. *See id.* (citing *Hicks* for the proposition that a jury may infer discrimination if it disbelieves the employer's explanation for its decision).

91. *See id.* at 344 (describing the importance of avoiding complex terms such as "determining factor" when instructing a jury on a discrimination claim). Judge Easterbrook stated that "it is especially important to write instructions that are as clear and simple as possible. When the legal issue is complex, simplicity of language is vital." *Id.*

The Third Circuit weighed in as the next federal court of appeals to address this issue, and it expressly aligned itself with the position of the Second Circuit in *Cabrera* mandating use of this instruction.[92] In *Smith v. Borough of Wilkinsburg*,[93] the Third Circuit addressed an issue virtually identical to that considered by the Seventh Circuit in *Gehring* yet reached the opposite conclusion.[94] The plaintiff, whose claim arose under the ADEA, argued on appeal that the trial court had committed reversible error in refusing to instruct the jury on pretext.[95] The Third Circuit agreed, and described the serious difficulties plaintiffs face when trying to prove an employment discrimination claim.[96] The court discussed the *McDonnell Douglas* tripartite formula and

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92. *See* Smith v. Borough of Wilkinsburg, 147 F.3d 272, 280 (3d Cir. 1998) (joining the Second Circuit in requiring the instruction). The Third Circuit stated its decision in the following terms:

> [We] join the Second Circuit in holding that the jurors must be instructed that they are entitled to infer, but need not, that the plaintiff's ultimate burden of demonstrating intentional discrimination by a preponderance of the evidence can be met if they find that the facts needed to make up the prima facie case have been established and they disbelieve the employer's explanation for its decision.

Id.

93. Smith v. Borough of Wilkinsburg, 147 F.3d 272 (3d Cir. 1998). In this case, the Borough Council failed to renew the employment contract of Edward C. Smith for the position of Manager of the Borough of Wilkinsburg, Pennsylvania but invited him to reapply for the job. *Id.* at 275. Smith, who was sixty-one years old, indicated his desire to retain the position, but he did not submit an application in writing until after the Council hired a new, thirty-seven year old manager. *Id.* Smith sued the Borough, alleging that he had not been re-hired because of his age in violation of the ADEA, and at trial adduced evidence indicating improved fiscal status of the Borough during his employment. *Id.* The Borough countered with testimony of inadequate job performance by Smith. *Id.* The trial court rejected Smith's proposed instruction on pretext, and the jury returned a verdict for the Borough. *Id.* Smith appealed on the sole ground that the trial court had erred in refusing to give this instruction. *Id.* The Third Circuit agreed. *Id.* at 281. In its reasoning, the Third Circuit emphasized "the pivotal role played by pretext in the ultimate decision of discrimination vel non" and expressly adopted the position of the Second Circuit articulated in *Cabrera*. *Id.* at 279–80. The court vacated the jury verdict and remanded the case for a new trial. *Id.* at 281.

94. *See id.* at 274 (describing the plaintiff's argument on appeal that the trial court committed reversible error by refusing "to instruct the jury that it could infer intentional discrimination if it disbelieved the Borough's asserted reasons for not renewing Smith's contract").

95. *Id.* at 275.

96. *See id.* at 278 (describing the complexity of discrimination claims and the enormous obstacles blocking plaintiffs seeking to prevail in these claims). The court included plaintiff-friendly language in its background description, stating: "Discrimination victims often come to the legal process without witnesses and with little direct evidence indicating the precise nature of the wrongs they have suffered." *Id.* (quoting Sheridan v. E.I. DuPont de Nemours & Co., 100 F.3d 1061, 1071 (3d Cir. 1996) (en banc) (quoting Jackson v. Univ. of Pittsburgh, 826 F.2d 230, 236 (3d Cir. 1987))).

focused, in particular, on "the pivotal role played by pretext in the ultimate decision of discrimination," concluding that the focus of a trial conducted under this formula will invariably be the truthfulness of the defendant's explanation.[97] Upon reaching this conclusion, the Third Circuit explicitly stated that it joined the Second Circuit in requiring the jury instruction on pretext.[98] Justification for this position came primarily from concern that all of the federal judiciary's "carefully honed language will have been an exercise in irrelevance" if the jury does not receive clear instructions regarding permissible inferences based on pretext.[99]

The Eleventh Circuit considered this issue in the intervening month between oral argument in *Reeves* and the Supreme Court's decision in that case.[100] In *Palmer v. Board of Regents*,[101] the Eleventh Circuit considered the question of whether the plaintiff experienced prejudice because of the trial court's failure to instruct the jury on pretext.[102] Striking an interesting

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97. *Id.* at 278–79.

98. *See id.* at 280 (aligning itself with the position taken by the Second Circuit). The court explained its position by stating:

> We join the Second Circuit in holding that the jurors must be instructed that they are entitled to infer, but need not, that the plaintiff's ultimate burden of demonstrating intentional discrimination by a preponderance of the evidence can be met if they find that the facts needed to make up the prima facie case have been established and they disbelieve the employer's explanation for its decision.

Id.

99. *Id.*

100. *See* Palmer v. Bd. of Regents, 208 F.3d 969, 975 (11th Cir. 2000) (declining to find reversible error in an employment discrimination case when the trial court failed to instruct the jury on pretext).

101. Palmer v. Bd. of Regents, 208 F.3d 969 (11th Cir. 2000). In *Palmer*, the Eleventh Circuit addressed the issue of whether a trial court committed reversible error in failing to provide the jury with a proposed instruction on pretext. *Id.* at 972–73. Judy Palmer, an assistant professor at Kennesaw State University, applied for two different permanent positions at the university during the 1994–95 academic year. *Id.* at 971. The university chose her as a finalist for both positions but, in each case, hired a different applicant. *Id.* at 971–72. Palmer sued, alleging that the university failed to select her because she was Jewish. *Id.* at 972. The trial court rejected Palmer's proposed jury instruction on pretext, the jury returned a verdict for the university, and Palmer appealed. *Id.* at 972–73. The Eleventh Circuit discussed the important role of pretext in the *McDonnell Douglas* formula and cited both the Second Circuit's opinion in *Cabrera* and the Third Circuit's opinion in *Borough of Wilkinsburg* with approval, but ultimately found a lack of error by the trial court. *Id.* at 974–75. The Eleventh Circuit reasoned that a consideration of the jury instructions as a whole revealed no prejudice to the plaintiff. *Id.* at 975. The Eleventh Circuit concluded by suggesting that the Committee on Pattern Jury Instructions of the District Judges Association of the Eleventh Circuit "revisit the pattern jury instruction on this issue to consider whether any improvements in clarity might be warranted." *Id.*

102. *See id.* at 975 (discussing Palmer's proposed instruction at trial and the appellate

compromise on the issue, the Eleventh Circuit cited both the Second Circuit's decision in *Cabrera* and the Third Circuit's decision in *Borough of Wilkinsburg* with approval, yet ultimately decided that the trial court had not erred in refusing to give the instruction.[103] The court noted the important role of pretext in a discrimination case litigated under the *McDonnell Douglas* framework, but upon consideration of the jury instructions as a whole, the court found the missing pretext language non-prejudicial to the plaintiff.[104] However, the court ended its opinion by suggesting that the Committee on Pattern Jury Instructions of the District Judges Association of the Eleventh Circuit examine the issue to decide whether "any improvements in clarity might be warranted."[105]

*B. Post-*Reeves *Circuit Decisions*

At the time of the Supreme Court's decision in *Reeves*, the circuits had already split two versus two regarding the necessity of this instruction, yet the Court did not mention the issue in its analysis.[106] Nor did *Reeves* end the controversy, which has continued to develop along relatively even lines.[107] In *Reeves*, the Court examined the appropriateness of entering judgment as a matter of law for an employer despite a jury verdict for the employee.[108] The instructions the trial court gave did not incite controversy in this case, and a detailed analysis of their content would have constituted mere dicta.[109] While *Reeves* provided additional clarity regarding the role of pretext in claims arising

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standard of review when examining jury instructions).

103. *See id.* at 974–75 (citing excerpts from Second and Third Circuit opinions, including the Third Circuit's statement in *Borough of Wilkinsburg* that "[i]t is difficult to understand what end is served by reversing the grant of summary judgment for the employer on the ground that the jury is entitled to infer discrimination from pretext . . . if the jurors are never informed that they may do so" (quoting Smith v. Borough of Wilkinsburg, 147 F.3d 272, 279 (3d Cir. 1998))).

104. *See id.* (agreeing that an instruction on the permissible inference of discrimination based on disbelief of the employer's explanation represents a correct statement of law but finding sufficient fairness in the challenged jury instructions as a whole).

105. *Id.* at 975.

106. *See generally* Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133 (2000) (analyzing an employment discrimination case under the *McDonnell Douglas* formula without commenting on the circuit split or the necessity of including the instruction).

107. *See* Townsend v. Lumbermens Mut. Cas. Co., 294 F.3d 1232, 1237–39 (10th Cir. 2002) (summarizing the development of the circuit split).

108. *See Reeves*, 530 U.S. at 139–40 (examining a decision by the Fifth Circuit to enter judgment against an employee despite a jury verdict to the contrary).

109. *Id.*

under federal discrimination law, the federal courts of appeals have continued to disagree on the necessity of an instruction on pretext.[110] This ongoing conflict reflects, in part, the proposition that *Reeves* may provide a plausible reading in support of either side of the circuit split, a possibility explored further in Part IV of this Note.[111] However, the dual support provided by *Reeves* indicates the need for additional clarity from the Supreme Court on this matter.

The next two circuits to touch on the issue of pretext in jury instructions for discrimination cases did not formally address whether the instruction warranted mandatory use, but both courts expressed doubt regarding its necessity.[112] In *Fite v. Digital Equipment Corp.*,[113] the First Circuit briefly addressed the plaintiff's claim of error regarding the trial court's refusal to instruct the jury on pretext.[114] The court opined that "[w]hile permitted, we doubt that such an explanation is compulsory, even if properly requested" but

110. *See Townsend*, 294 F.3d at 1237–40 (discussing positions taken by each U.S. Court of Appeals in the circuit split over jury instructions on pretext).

111. *See infra* Part IV (evaluating the merits of both sides of the circuit split).

112. *See* Fite v. Digital Equip. Corp., 232 F.3d 3, 7 (1st Cir. 2000) (expressing "doubt that such an explanation is compulsory" but declining to rule on the issue for procedural reasons); *see also* Moore v. Robertson Fire Prot. Dist., 249 F.3d 786, 790 n.9 (8th Cir. 2001) (recognizing the circuit split on the pretext issue and stating that "[w]e do not express any view as to whether it ever would be reversible error for a trial court to fail to give a pretext instruction, though we tend to doubt it").

113. Fite v. Digital Equip. Corp., 232 F.3d 3 (1st Cir. 2000). In *Fite*, the First Circuit reviewed the trial court's decision to dismiss the plaintiff's Massachusetts discrimination claims as well as the trial court's choice of jury instructions regarding the plaintiff's federal discrimination claims. *Id.* at 6–7. Digital Equipment Corporation (DEC) employed plaintiff David Fite for twenty years before firing him in 1994 after an eight-year decline in his job performance. *Id.* at 4. Beginning in 1991, Fite filed at least two complaints with the Equal Employment Opportunity Commission (EEOC), alleging that DEC had discriminated against him because of his age (fifty-three in 1991) and disability (cocaine addiction) through DEC's failure to consider him for other job openings. *Id.* at 5. In support of his complaints, Fite provided his attorney with two incriminating emails by DEC management. *Id.* DEC, upon notice by the EEOC, determined that Fite had fabricated the emails and fired him based on the forgery. *Id.* Fite then sued DEC for discrimination based on his age and disability. *Id.* The trial court dismissed his state-law discrimination claims and the jury found for DEC regarding Fite's federal discrimination claims. *Id.* On appeal, the First Circuit reasoned that, because the applicable Massachusetts state law mirrored federal discrimination law, the dismissal of the state-law claims, even if erroneous, constituted harmless error because of the jury finding for DEC under the federal claims. *Id.* at 6. The court addressed Fite's claims of error in the jury instructions only in passing because of Fite's failure to properly preserve these claims at trial. *Id.* at 7.

114. *See id.* at 7 (mentioning, but declining to rule upon, plaintiff's argument that "the jury should have been told affirmatively that a *prima facie* case, coupled with a finding of pretext, would permit the jury to infer discrimination").

declined to rule on the issue because of the plaintiff's failure to preserve the claim at trial.[115]

In *Moore v. Robertson Fire Protection District*,[116] the plaintiff properly preserved the claim of error, but the Eighth Circuit refused to find an abuse of discretion by the trial court for failing to instruct the jury on pretext.[117] The court based its reasoning on two primary factors. First, a lack of a factual dispute regarding pretext during the trial indicated that the district court "properly exercised its discretion in declining to submit a pretext instruction."[118] Second, plaintiff's counsel had argued thoroughly during both opening and closing statements that "the explanations given by the Fire District were a pretext for race discrimination."[119] In addition, the court stated that "[w]e do not express any view as to whether it ever would be reversible error for a trial court to fail to give a pretext instruction, though we tend to doubt it."[120] The Eighth Circuit noted the existence of the circuit split on this issue, however, and conservatively left open the question of "whether there are any circumstances that would require such an instruction."[121]

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115. *Id.*

116. Moore v. Robertson Fire Prot. Dist., 249 F.3d 786 (8th Cir. 2001). In *Moore*, the Eighth Circuit addressed the issue of whether the trial court committed reversible error in refusing to give a jury instruction on pretext. *Id.* at 788–89. In 1998, the Robertson Fire Protection District (RFPD) placed a help-wanted advertisement to seek applicants for a vacant fire chief position. *Id.* at 788. The RFPD interviewed several of the applicants but did not select Moore for an interview. *Id.* After Moore discovered that the RFPD had ultimately hired a white male "who did not meet many of the requirements placed in the ad," he filed suit against the RFPD, alleging racial discrimination under Title VII. *Id.* at 787–88. At trial, the jury found for the RFPD, and Moore appealed the judgment. *Id.* at 787. On appeal, Moore argued that the trial judge's failure to instruct the jury on pretext "impermissibly prevented the jury from considering whether the Fire District's reasons for not interviewing and hiring him were a pretext for race discrimination." *Id.* at 789. The Eighth Circuit first noted that "Moore introduced scant evidence of pretext" during the trial. *Id.* at 790. The court reasoned that the lack of a factual question regarding pretext supported the conclusion that the trial court had not abused its discretion in refusing to grant the instruction. *Id.* The Eighth Circuit also noted that "although the District Court elected not to submit a pretext instruction, it in no way prevented Moore from presenting his pretext arguments to the jury," and according to the record, Moore in fact did make this argument several times during the trial. *Id.* at 791.

117. *See id.* at 790 ("Given the state of the evidence, which provides little to create a fact issue on pretext, the District Court properly exercised its discretion in declining to submit a pretext instruction.").

118. *Id.*

119. *Id.* at 791.

120. *See id.* at 790 n.9 (reserving judgment on whether circumstances exist that would warrant the mandatory use of the pretext instruction).

121. *Id.*

C. Townsend v. Lumbermens Mutual Casualty Co.

In *Townsend v. Lumbermens Mutual Casualty Co.*,[122] the Tenth Circuit squarely addressed the growing circuit split, provided the most recent and in-depth analysis of the issue, and decided to mandate use of the instruction in a sharply split decision.[123] *Townsend* involved an African-American man who sued his former employer for rapidly demoting and then firing him after a decade-long employment relationship.[124] The litigation focused primarily on the issue of whether the defendant insurance company provided a truthful reason for firing Townsend, because he presented impeachment evidence that questioned the veracity of the defendant's explanation.[125] Despite the question of fact surrounding this evidence, the trial court refused to grant Townsend's request to instruct the jury that "if it did not believe Kemper's explanation, it could take this as evidence that Kemper's true motive for terminating him was discriminatory and could on this basis conclude—though it need not do so—that Kemper terminated Townsend for a discriminatory reason."[126] On appeal,

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122. Townsend v. Lumbermens Mut. Cas. Co., 294 F.3d 1232 (10th Cir. 2002). In *Townsend*, the Tenth Circuit analyzed the issue of whether the trial court committed reversible error by failing to instruct the jury that it could infer discrimination if it disbelieved the defendant employer's explanation. *Id.* at 1236. The plaintiff, Townsend, worked for Lumbermens Mutual Casualty Company (LMCC) from 1986 until 1997. *Id.* at 1234–36. In his final year with LMCC, however, Townsend's relationship with the company soured. *Id.* In February of 1997, LMCC presented Townsend with the options of resignation or demotion based on his allegedly deficient performance as a "personal lines unit manager." *Id.* at 1235. Townsend chose demotion to a non-management position. *Id.* Townsend's supervisor terminated him in November of 1997 and Townsend filed suit against LMCC, alleging racial discrimination under Title VII. *Id.* at 1236. At trial, the parties disputed the motives behind Townsend's termination, and the jury ultimately returned a verdict for LMCC. *Id.* at 1233. On appeal, Townsend argued for a new trial based primarily on the trial court's failure to provide the jury with his requested instruction on pretext. *Id.* at 1236. After citing and discussing each opinion in the circuit split, the Tenth Circuit decided to mandate use of the instruction. *Id.* at 1241. The court based its analysis on the reasoning the Second and Third Circuits provided in *Cabrera* and *Borough of Wilkinsburg* and ultimately found most persuasive the Supreme Court's emphasis on the pretext standard in *Reeves*. *Id.* at 1237–40. Senior Circuit Judge Brorby dissented, however, stating that arguments of counsel provided extensive coverage of the pretext principle and therefore rendered a jury instruction on the subject unnecessary. *Id.* at 1244–48 (Brorby, J., dissenting).

123. *See id.* at 1241 (mandating the use of the instruction).

124. *See id.* at 1234–36 (summarizing the factual background of the dispute).

125. *See id.* at 1235–36 (discussing the admission of a false statement by an LMCC employee and testimony by an LMCC employee indicating that the company created an artificial reason to justify Townsend's termination).

126. *Id.* at 1236.

Townsend argued primarily that this failure to instruct the jury on pretext constituted reversible error.[127]

The Tenth Circuit provided a detailed analysis of this argument, starting with an examination of the existing circuit split on this issue.[128] The court cited the Second and Third Circuits' opinions in *Cabrera* and *Borough of Wilkinsburg* extensively and with approval, but noted the different points of view expressed by the First, Seventh, Eighth, and Eleventh Circuits.[129] Ultimately, however, "and perhaps most significantly," the Tenth Circuit noted that "the Supreme Court in *Hicks* and *Reeves* cleared away a circuit split over the so-called 'pretext-plus' theory which said that a jury's rejection of an employer's proffered explanation could not, by itself, suffice to show discriminatory motive."[130] The court indicated that two Supreme Court opinions had attempted to iron out the difficulties that federal courts have experienced in grappling with these issues, and concluded:

> This is a difficult matter for courts, and would certainly be difficult for a jury. We consider the danger too great that a jury might make the same assumption that the Fifth Circuit did in *Reeves*. Therefore, we hold that in cases such as this, a trial court must instruct jurors that if they disbelieve an employer's proffered explanation they may—but need not—infer that the employer's true motive was discriminatory.[131]

The Tenth Circuit, however, seemed to leave itself some wiggle room by adding the following:

> We do not hold that a pretext instruction is always required, but rather that it is required where, as here, a rational finder of fact could reasonably find the defendant's explanation false and could "infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose."[132]

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127. *See id.* ("Townsend first contends that it was reversible error for the district court not to instruct the jury that it could infer intentional discrimination if it found that Kemper's explanation was pretextual.").

128. *See id.* at 1237–39 (considering each opinion that other circuits have published addressing the issue of requiring jury instructions on pretext in discrimination litigation).

129. *Id.*

130. *Id.* at 1240.

131. *Id.* at 1241.

132. *See id.* (quoting Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 134 (2000)). The court also quoted *Reeves* as "suggesting that there may be situations in which 'no rational factfinder could conclude that discrimination had occurred' but declining to 'resolve all such circumstances.'" *Id.* (quoting *Reeves*, 530 U.S. at 134–35).

This caveat relied on language the Supreme Court used in *Reeves* to outline circumstances that could entitle a defendant employer to judgment as a matter of law. The Tenth Circuit effectively imported this language for use as a standard in determining when failure to give a requested jury instruction on pretext would constitute reversible error.[133] As a practical matter, this transposition seems to result in the following rule: If the employer is not entitled to judgment as a matter of law, the trial court must instruct the jury on pretext. Or, even more simply, if the case goes to the jury, so must the instruction. Rather than leave room for argument, therefore, this rule seems to remove all discretion from the hands of the trial judge regarding the jury instruction on pretext when the employer does not receive judgment as a matter of law. The Tenth Circuit then applied its new standard to the facts of the case before it and determined that, because of "a sharp conflict in the evidence" regarding the defendant employer's motive, "the jury needed guidance by the requested pretext instruction."[134] Accordingly, the court reversed the judgment and awarded Townsend a new trial.[135]

Senior Judge Brorby dissented.[136] He agreed that the pretext standard represented a correct statement of the law, but argued that the district court did not commit reversible error in failing to instruct on the issue.[137] He based this argument primarily on the distinction between obligatory and permissible inferences.[138] In a given trial, he stated, the limited number of possible obligatory inferences and their inherent "clear-cut" nature create "little danger" of "unfair bias in favor of the party requesting the instruction."[139] Permissible inferences, on the other hand, "are not clear-cut" and could dilute or cloud jury instructions because of the unlimited number of permissible inferences in a given trial.[140] He concluded that the plaintiff's counsel had argued on pretext

133. *Compare Reeves*, 530 U.S. at 148–49 (discussing factors and circumstances that could lead to judgment as a matter of law for a defendant employer), *with* Townsend v. Lumbermens Mut. Cas. Co., 294 F.3d 1232, 1242 (10th Cir. 2002) (discussing circumstances in which the standard outlined in *Reeves* requires reversal of an erroneous jury instruction).

134. *Townsend*, 294 F.3d at 1242.

135. *Id.* at 1243.

136. *Id.* at 1244 (Brorby, J., dissenting).

137. *Id.* (Brorby, J., dissenting).

138. *See id.* (Brorby, J., dissenting) ("When, as here, the requested instruction concerns permissible rather than obligatory inferences to be drawn from the evidence, I see little need for a jury instruction.").

139. *Id.* at 1245–46 (Brorby, J., dissenting).

140. *Id.* (Brorby, J., dissenting).

throughout the trial and therefore little danger existed regarding juror confusion or ignorance of the law.[141]

IV. Reconciliation of the Circuit Split

As the preceding discussion of decisions by the courts of appeals has indicated, strong arguments support both sides of the circuit split.[142] On the one hand, the pretext question probably represents the most important issue in many employment discrimination cases, and therefore the court should instruct the jury on the applicable standard of law regarding this issue.[143] Alternatively, if the jury believes that the defendant employer has provided a false explanation for its actions, the jury will likely infer on its own that the employer has lied to cover up a discriminatory purpose,[144] especially if plaintiff's counsel has hammered upon this argument.[145] In that case, the instruction seems unnecessary. This Note examines the merits of these arguments in the following two subparts, beginning with the argument in support of mandating the instruction on pretext.

A. Argument for Mandating the Pretext Instruction

The argument for mandating the description of this inference in jury instructions proceeds in three logical steps. First, "it is a principle of evidence law that the jury is entitled to treat a party's dishonesty about a material fact as evidence of culpability."[146] Second, the Supreme Court has developed this "commonsense principle"[147] into a particular permissible inference that

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141. *Id.* at 1246–48 (Brorby, J., dissenting).

142. *See supra* Part III (discussing the development of the circuit split).

143. *See* Smith v. Borough of Wilkinsburg, 147 F.3d 272, 279 (3d Cir. 1998) (describing the "pivotal role played by pretext in the ultimate decision of discrimination *vel non*" in an opinion that mandated use of the jury instruction on pretext).

144. *See* Brill, *supra* note 9, at § 4.27 ("[I]t is likely that a jury will understand, without being told by the judge, that if an employer is lying about its real reason for its employment actions, it may be trying to cover up an unlawful reason, and that unlawful reason may be the discriminatory reason asserted by the plaintiff.").

145. *See id.* ("A judge need not instruct a jury on something that jurors can glean from everyday experience and that is likely to be argued by the lawyers." (citing Gehring v. Case Corp., 43 F.3d 340, 343 (7th Cir. 1994))).

146. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 154 (2000) (Ginsburg, J., concurring).

147. *Id.* (Ginsburg, J., concurring).

represents a vital part of the *McDonnell Douglas* framework used to litigate employment discrimination disputes.[148] Finally, as Judge Henry noted in his concurrence to *Townsend*, "while . . . it cannot be true that a district court need instruct on every permissive inference available to a jury—the instruction here describes a particular permissive inference that many jurors might otherwise assume improper."[149]

The general standard for instructing a jury may provide useful guidance for developing this argument further. In considering whether to mandate use of a pretext instruction in employment discrimination cases, the Third Circuit began by stating:

> It is black letter law that "[i]t is the inescapable duty of the trial judge to instruct the jurors, fully and correctly, on the applicable law of the case, and to guide, direct, and assist them toward an intelligent understanding of the legal and factual issues involved in their search for the truth."[150]

This statement also reflects the typical standard of review the courts of appeals use in examining jury instructions:

> To determine whether the jury was adequately instructed on the applicable law, we review the instructions in their entirety de novo to determine whether the jury was misled in any way. The instructions as a whole need not be flawless, but we must be satisfied that, upon hearing the instructions, the jury understood the issues to be resolved and its duty to resolve them.[151]

Generally, however, "[r]eversal is only warranted if the failure to give the instruction resulted in prejudicial harm to the requesting party."[152]

Therefore, in order for the jury instruction on pretext to warrant mandatory use in employment discrimination trials, the pretext question must, at a minimum, represent a correct statement of the law and, in addition, omission of the instruction must result in prejudicial error to the plaintiff.[153] Conducting

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148. *See id.* at 147 ("[O]nce the employer's justification has been eliminated, discrimination may well be the most likely alternative explanation, especially since the employer is in the best position to put forth the actual reason for its decision.").

149. Townsend v. Lumbermens Mut. Cas. Co., 294 F.3d 1232, 1243 (10th Cir. 2002) (Henry, J., concurring).

150. Smith v. Borough of Wilkinsburg, 147 F.3d 272, 278 (3d Cir. 1998) (quoting 9A CHARLES A. WRIGHT & ARTHUR MILLER, FEDERAL PRACTICE AND PROCEDURE § 2556, at 438 (2d ed. 1995)).

151. *Townsend*, 294 F.3d at 1237 (quoting Medlock v. Ortho Biotech, Inc., 164 F.3d 545, 552 (10th Cir. 1999) and Sanjuan v. IBP, Inc., 160 F.3d 1291, 1300 (10th Cir. 1998)).

152. Palmer v. Bd. of Regents, 208 F.3d 969, 973 (11th Cir. 2000) (citing Roberts & Schaefer Co. v. Hardaway Co., 152 F.3d 1283, 1295 (11th Cir. 1998)).

153. *Id.*

this analysis in the abstract without specific facts to use for guidance seems difficult. Thus, an examination of *Hicks* and *Reeves* may yet again prove helpful.

The emphasis on the pretext question in *Hicks* and *Reeves* presents the strongest support for requiring the pretext instruction.[154] These two Supreme Court opinions have clearly established the proposition that pretext does not represent merely one random permissible inference in an employment discrimination case, but instead constitutes a specific and highly likely permissible inference that generally plays a central role in determining the outcome of this type of case.[155] Furthermore, if a question of fact exists regarding pretext, then the trial court may not grant the employer judgment as a matter of law.[156] Although the Supreme Court has not examined the proper relationship between pretext and jury instructions, one could logically conclude that a court must include pretext in any statement to the jury regarding the correct application of law in an employment discrimination case.[157]

Reeves, as both a unanimous decision and the most recent Supreme Court opinion in the area of employment discrimination, represents the best source for determining the correct weight a court should give the issue of pretext in the resolution of an employment discrimination dispute.[158] The role of pretext in the applicable law will help determine the possibility of prejudice to a plaintiff who fails to receive an instruction on the issue. In *Reeves*, the Supreme Court made several important points regarding the relationship between pretext and the plaintiff's case of intentional discrimination. First, the Court noted that, throughout the case and after the framework disappears, "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated

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154. *See generally* Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133 (2000); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993).

155. *See Reeves*, 530 U.S. at 147 (discussing the role of pretext as perhaps the most persuasive form of circumstantial evidence in employment discrimination cases); *Hicks*, 509 U.S. at 517 (describing how pretext "often considerably assists" proving intentional discrimination).

156. *See Reeves*, 530 U.S. at 153–54 (reversing a judgment as a matter of law for the defendant employer because sufficient evidence of pretext existed to support a finding of intentional discrimination).

157. *See, e.g.*, Townsend v. Lumbermens Mut. Cas. Co., 294 F.3d 1232, 1241 (10th Cir. 2002) (reasoning that pretext constitutes a vital issue in employment discrimination cases and must be described in jury instructions).

158. *See Reeves*, 530 U.S. at 137 (resolving the issue of "whether a defendant is entitled to judgment as a matter of law when the plaintiff's case consists exclusively of a prima facie case of discrimination and sufficient evidence for the trier of fact to disbelieve the defendant's legitimate, nondiscriminatory explanation for its action").

against the plaintiff remains at all times with the plaintiff."[159] The Court described this burden of persuasion in language that initially seems to require more than a showing of pretext by the plaintiff: "It is not enough . . . to *dis*believe the employer; the factfinder must *believe* the plaintiff's explanation of intentional discrimination."[160] The Court, however, went on to elaborate upon the method by which a plaintiff may use pretext to convince the jury of intentional discrimination.[161] While a finding of untruthfulness by the defendant employer does not compel judgment for the plaintiff,[162] the Court has repeatedly emphasized that "it is *permissible* for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer's explanation."[163]

In addition, the Court described this particular inference as representing not only a permissible conclusion but a highly probable one.[164] The Court stated:

> Proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive . . . . Moreover, once the employer's justification has been eliminated, discrimination may well be the most likely alternative explanation, especially since the employer is in the best position to put forth the actual reason for its decision.[165]

The probability that a false explanation by the defendant employer means the employer "is dissembling to cover up a discriminatory purpose,"[166] combined with the vital role pretext plays in employment discrimination cases, seems to elevate this particular inference to a status somewhere above the given

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159. *See id.* at 143 (quoting Tex. Dept. of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981)).

160. *See id.* at 147 (quoting St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 519 (1993)).

161. *See id.* at 147–48 (discussing the practical and probable link between pretext and intentional discrimination).

162. *See, e.g.*, *Hicks*, 509 U.S. at 524 ("That the employer's proffered reason is unpersuasive, or even obviously contrived, does not necessarily establish that the plaintiff's proffered reason of race is correct.").

163. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 147 (2000).

164. *See id.* at 148 ("[W]hen 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 with *some* reason, based his decision on an impermissible consideration." (quoting Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978))).

165. *Id.* at 147.

166. *Id.*

multitude of permissible inferences present in an average trial.[167] Perhaps the unique nature of this inference warrants unique treatment in jury instructions.

This final step in the proof process represents the crux of the argument to mandate use of the pretext instruction. This step relies on the assumption that, in the absence of the instruction, a jury might not understand the legality of finding for the plaintiff based solely on the falsity of the defendant's explanation.[168] In other words, unless the court gives the instruction, "a jury might make the same assumption that the Fifth Circuit did in *Reeves*" and assume that the plaintiff must provide additional affirmative evidence beyond a showing of pretext in order to prevail.[169] The concern that the jury could misunderstand the law governing employment discrimination seems logical, especially after examining a sample instruction that lacks any reference to pretext, such as the one given by the district court in *Townsend*:

> In order for plaintiff to recover on [his Title VII] claim, he must prove by the preponderance of the evidence that defendant intentionally discriminated against plaintiff, that is, plaintiff's race must be proven to have been a motivating factor in defendant's decision regarding plaintiff's demotion.[170]

It seems entirely plausible, if not probable, that "a rational juror might very well have interpreted such an instruction to require affirmative proof of discriminatory intent."[171] Omission of the pretext instruction therefore creates the possibility that a jury could find for the defendant "because it believe[s] that the plaintiff could not prevail without affirmative evidence that his race was a motivating factor in the challenged employment actions."[172] The risk of this erroneous interpretation, which would clearly prejudice the plaintiff, may justify mandating use of the instruction as a prophylactic measure.[173]

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167. *See* Gehring v. Case Corp., 43 F.3d 340, 343 (7th Cir. 1994) ("[A] judge need not deliver instructions describing all valid legal principles. Especially not when the principle in question describes a permissible, but not an obligatory, inference. Many an inference is permissible.").

168. *See* Townsend v. Lumbermens Mut. Cas. Co., 294 F.3d 1232, 1243 (10th Cir. 2002) (Henry, J., concurring) (discussing the possibility that a jury might assume a plaintiff "could not prevail for having failed to offer any credible evidence directly suggesting a discriminatory animus").

169. *Id.* at 1241.

170. *Id.* at 1243 (Henry, J., concurring).

171. *Id.* (Henry, J., concurring).

172. Brief of the Equal Employment Opportunity Commission as Amicus Curiae at 10, Townsend v. Lumbermens Mut. Cas. Co., 294 F.3d 1232 (10th Cir. 2002) (No. 00-3055) (on file with the Washington and Lee Law Review).

173. *See id.* at 11–19 (arguing that trial courts must instruct juries on pretext to prevent

One should not read the rationale behind requiring the pretext instruction as revealing a lack of faith in the ability of jurors, however. While the heart of this permissible inference contains the "common sense notion" that an employer who lies about motivation likely lies to cover up an illegal motive, a logical step beyond common sense seems necessary to reach the legal premise that this inference alone may support a finding for the plaintiff.[174] In fact, the Supreme Court addressed pretext *twice* in the past decade in order to sort out disputes among the courts of appeals regarding the issue.[175] That jurors may need a bit of clarification on the issue in their instructions does not seem unreasonable.

As one commentator recently indicated, the difficulty inherent in resolving employment discrimination cases stems from the impossibility of defining "intentional discrimination."[176] Both *Hicks* and *Reeves* assert that "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff."[177] Neither case, however, provides a specific definition of the elusive concept of intentional discrimination, but instead each case presents analysis of one particular means by which a plaintiff may prove intentional discrimination: pretext.[178] This reading of *Hicks* and *Reeves* provides additional support to the

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erroneous interpretation of federal employment discrimination law).

174. *See* Smith v. Borough of Wilkinsburg, 147 F.3d 272, 280 (3d Cir. 1998) (suggesting jurors will not know that pretext is enough to support a finding for the plaintiff). The court explained:

> Although the inference of discrimination arising from pretext is grounded in the common sense notion that any party's false testimony may be taken as evidence of its having fabricated its case, this does not mean that the jury will know without being told that its disbelief in the employer's proffered reason may be evidence that, coupled with evidence establishing plaintiff's prima facie case, will support a finding of intentional discrimination . . . . If it is to be assumed that jurors have ordinary intelligence, it may not be assumed that they are students of the law.

Id. at 281 (citation omitted).

175. *See id.* (discussing how "the answer to the question of whether a jury is allowed to infer discrimination from pretext eluded many of the federal courts of this country for a substantial period of time").

176. *See* John Valery White, *The Irrational Turn in Employment Discrimination Law: Slouching Toward a Unified Approach to Civil Rights Law*, 53 MERCER L. REV. 709, 749 (2002) ("[E]veryone speaks vaguely about what intentional discrimination is supposed to be. There is a reason for this; the concept is *undefinable* because no one really knows how to define the underlying categories.").

177. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 143 (2000) (quoting Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981)); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 518 (1993) (same).

178. *See* White, *supra* note 176, at 757 ("The hoopla about pretext is only a vehicle for the Court to emphasize the substantive approach to proving discrimination and for obscuring the

argument that a jury must receive an instruction on pretext rather than an instruction limited to the ultimate question of whether the plaintiff has proven intentional discrimination.[179] At the very least, an instruction on pretext provides the jury with some concrete method to define "intentional discrimination" in a legal context and should help corral unfounded speculation regarding the correct legal standard.[180] Without the instruction, jurors, like so many federal courts, may conclude that a plaintiff cannot prevail based on pretext alone.[181]

B. Argument for Leaving the Pretext Instruction to the Discretion of the Trial Judge

The argument against requiring the pretext instruction proceeds in two basic steps. First, the argument begins with the principle that a judge need not instruct the jury on permissible inferences.[182] Second, the argument proceeds with an attack on the merits of the argument for mandating its use and demonstrates a lack of compelling reasons for this special treatment. Upon discrediting these reasons, the general premise that a judge need not instruct the jury on permissible inferences continues to apply.[183] Because the pretext instruction consists of a correct statement of applicable law, it may be appropriate in many circumstances, but the decision of whether to include it seems best left to the discretion of the trial judge.[184] In addition, by mandating

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absence of a definition thereof.").

179. *See Borough of Wilkinsburg*, 147 F.3d at 280 ("If the district courts are not required to instruct the jurors that they may use . . . their rejection of the reasons offered by the employer for the employment decision to conclude that the employer intentionally discriminated, then all our carefully honed language will have been an exercise in irrelevance.").

180. *See id.* ("Without a charge on pretext, the course of the jury's deliberations will depend on whether the jurors are smart enough or intuitive enough to realize that inferences of discrimination may be drawn from . . . the pretextual nature of the employer's proffered reasons for its actions."). The court added: "It does not denigrate the intelligence of our jurors to suggest that they need some instruction in the permissibility of drawing that inference." *Id.*

181. *See* Townsend v. Lumbermens Mut. Cas. Co., 294 F.3d 1232, 1241 (10th Cir. 2002) (mandating the use of the pretext instruction to avoid the risk that jurors would reach the same erroneous conclusion as federal courts regarding the correct role of pretext in employment discrimination litigation).

182. *See* Gehring v. Case Corp., 43 F.3d 340, 343 (7th Cir. 1994) ("Many an inference is permissible. Rather than describing each, the judge may and usually should leave the subject to the argument of counsel.").

183. *Id.*

184. *See id.* ("This is a correct statement of the law, but a judge need not deliver instructions describing all valid legal principles." (citing St. Mary's Honor Ctr. v. Hicks, 509

use of the pretext instruction, courts risk placing undue emphasis on this inference at the expense of the numerous other permissible inferences possible in an employment discrimination dispute.[185] The argument against mandating use of the pretext instruction thus begins with the premise that instructions on permissible inferences ordinarily fall within the discretion of the trial court and, absent a strong showing of necessity or possible prejudice, the trial court should retain its "broad discretion in the formulation of jury instructions."[186]

The core of the argument for mandating the pretext instruction relies on the assumption that, in the absence of the instruction, the plaintiff will suffer prejudice because the jury will fail to understand the legality of inferring intentional discrimination from disbelief of the employer's explanation.[187] As discussed in Part IV.A, courts have derived support for this assumption from two primary sources.[188] First, the Supreme Court's analysis in *Reeves* and *Hicks* places enormous emphasis on the pivotal role played by pretext in employment discrimination litigation.[189] Second, courts have expressed anxiety that a jury may not realize its legal entitlement to infer discrimination from pretext without an explicit instruction on the matter.[190] In support of this second premise, courts have noted the considerable difficulties federal judges experienced during the past several decades in trying to discern the correct role of pretext in these cases.[191]

U.S. 502, 511 (1993)).

185. *See* Brill, *supra* note 9, at § 4.27 ("Singling out a particular inference for instruction by the judge may give it undue emphasis.").

186. Moore v. Robertson Fire Prot. Dist., 249 F.3d 786, 789 (8th Cir. 2000) ("It is well established that district courts are entrusted with broad discretion in the formulation of jury instructions."). In this case, the Eighth Circuit concluded that "the District Court did not abuse its broad discretion by declining to give an instruction on pretext" because the plaintiff had introduced only "scant evidence" on the pretext issue. *Id.* at 789–90.

187. *See supra* notes 168–75 and accompanying text (discussing the argument that a jury will remain unaware of the correct legal standard in employment discrimination litigation in the absence of an instruction on pretext).

188. *See supra* Part IV.A (arguing for mandatory use of the pretext instruction).

189. *See generally* Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133 (2000); *Hicks*, 509 U.S. 502.

190. *See* Smith v. Borough of Wilkinsburg, 147 F.3d 272, 280 (3d Cir. 1998) (stating that although pretext is "grounded in the common sense notion that any party's false testimony may be taken as evidence of its having fabricated its case, this does not mean that the jury will know without being told that its disbelief . . . will support a finding of intentional discrimination") (citing Sheridan v. E.I. DuPont de Nemours & Co., 100 F.3d 1061, 1069 (3d Cir. 1996) (en banc)).

191. *See* Townsend v. Lumbermens Mut. Cas. Co., 294 F.3d 1232, 1240–41 (10th Cir. 2002) (discussing how two Supreme Court opinions were necessary to iron out the disagreement among the federal courts regarding the correct role of pretext in employment discrimination

These arguments for mandating the instruction have distinct weaknesses. In response to the first premise, *Hicks* and *Reeves* arguably support a reading against mandating use of the instruction despite extensive analysis in both cases on the issue of pretext.[192] Although *Hicks* involved a bench trial, the Court repeatedly emphasized a point that weighs heavily on this discussion: "The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff."[193] Similarly, in *Reeves*, the Court stated that "[t]he ultimate question is whether the employer intentionally discriminated, and proof that 'the employer's proffered reason is unpersuasive, or even obviously contrived, does not *necessarily* establish that the plaintiff's proffered reason . . . is correct.'"[194] Therefore, these cases arguably support the conclusion that the jury instructions should focus on the ultimate question of intentional discrimination and should not necessarily direct the jury's attention to the question of whether or not the employer has told the truth.[195] Instead, the veracity of the defendant's explanation should merely play a role, albeit often a primary role, in determining the existence of intentional discrimination.[196]

Moreover, both *Hicks* and *Reeves* indicate the importance of *not* providing special treatment to cases involving the *McDonnell Douglas* framework as opposed to other types of civil litigation. In *Hicks*, the Court noted that "the *McDonnell Douglas* methodology was 'never intended to be rigid, mechanized, or ritualistic.'"[197] Justice Scalia concluded the majority opinion with the following language:

> [T]he question facing triers of fact in discrimination cases is both sensitive and difficult. The prohibitions against discrimination contained in the Civil

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cases).

192. *See generally Reeves*, 530 U.S. 133; St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993).

193. *Hicks*, 509 U.S. at 507 (quoting Tex. Dept. of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981)).

194. *See Reeves*, 530 U.S. at 146–47 (quoting *Hicks*, 509 U.S. at 524) (emphasis added).

195. *See* Moore v. Robertson Fire Prot. Dist., 249 F.3d 786, 789 (8th Cir. 2001) (reasoning that the trial court presented the "proper legal standard" to the jury in submitting an instruction on the ultimate question of discrimination without including an instruction on pretext).

196. *See* Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 147 (2000) ("In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose."). The Court added: "Moreover, once the employer's justification has been eliminated, discrimination may well be the most likely alternative explanation, especially since the employer is in the best position to put forth the actual reason for its decision." *Id.*

197. *See Hicks*, 509 U.S. at 519 (quoting U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 715 (1983) (quoting Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978))).

> Rights Act of 1964 reflect an important national policy. There will seldom be "eyewitness" testimony as to the employer's mental processes. But none of this means that trial courts or reviewing courts should treat discrimination differently from other ultimate questions of fact.[198]

The Court quoted approvingly from this passage in the *Reeves* opinion as well.[199] To some degree, this language seems at odds with the elaborate measures taken by the Court to establish pretext as the cornerstone of employment discrimination litigation.[200] Nevertheless, if discrimination litigation merits no special treatment, one could reasonably conclude that instructions on pretext, like other permissible inferences in civil litigation, properly fall within the discretion of the trial court.[201] Mandatory use of the pretext instruction certainly constitutes special treatment.

Finally, the Court's brief look at the jury instructions in *Reeves* is noteworthy.[202] In this case the jury found for the plaintiff without receiving clear instructions on the permissible inference of pretext.[203] Nevertheless, the Court mentioned the trial court's jury instructions with seeming approval in the following discussion:

> The District Court plainly informed the jury that petitioner was required to show "by a preponderance of the evidence that his age was a determining and motivating factor in the decision of [respondent] to terminate him." The court instructed the jury that, to show that respondent's explanation was a pretext for discrimination, petitioner had to demonstrate "1, that the stated reasons were not the real reasons for [petitioner's] discharge; *and* 2, that age discrimination was the real reason for [petitioner's] discharge."[204]

While the Court did not provide an in-depth analysis of this instruction, and therefore this passage should not receive undue emphasis, it seems relevant for two primary reasons. First, steps one and two of this instruction are reminiscent of the erroneous pretext-plus standard explicitly discarded in

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198. *See id.* at 524 (quoting *Aikens*, 460 U.S. at 716).

199. *See Reeves*, 530 U.S. at 148 ("[W]e have reiterated that trial courts should not 'treat discrimination differently from other ultimate questions of fact.'" (quoting St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 524 (1993) (quoting *Aikens*, 460 U.S. at 716))).

200. *See id.* at 147 (discussing the role of pretext as perhaps the most persuasive form of circumstantial evidence in an employment discrimination dispute).

201. *See* Gehring v. Case Corp., 43 F.3d 340, 343 (7th Cir. 1994) (discussing the desirability of leaving descriptions of pretext to the argument of counsel rather than including those descriptions in jury instructions).

202. *See* Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 153–54 (2000) (discussing jury instructions given at trial).

203. *See id.* at 139 (discussing the jury verdict for plaintiff at trial).

204. *Id.* at 153 (citations omitted).

Reeves itself and certainly do not approach the specificity of the pretext instruction required in the Second, Third, and Tenth Circuits.[205] Second, based on this instruction, the jury returned a verdict for the plaintiff.[206] That fact alone leads into a critique of the second part of the argument for mandating use of the pretext instruction.

Of the three circuits that have required the pretext instruction, the two most recent opinions, from the Third and the Tenth Circuits, have relied heavily on the assumption that, without the instruction, a jury might never realize the legal possibility of inferring discrimination from pretext.[207] The Third Circuit garnered support for this belief from the difficulties experienced by federal courts in addressing this very issue:

> In light of the decades it has taken for the courts to shape and refine the *McDonnell Douglas* standard into its present form and the inordinate amount of ink that has been spilled over the question of how a jury may use its finding of pretext, it would be disingenuous to argue that it is nothing more than a matter of common sense. Indeed, the answer to the question of whether a jury is allowed to infer discrimination from pretext eluded many of the federal courts of this country for a substantial period of time.[208]

The Tenth Circuit relied upon similar logic in emphasizing the risk that the jury "might make the same assumption that the Fifth Circuit did in *Reeves*" unless the jury receives an instruction on pretext.[209] Judge Henry, who concurred in the Tenth Circuit's opinion in *Townsend*, emphasized the same conclusion.[210] He reasoned that if a juror had concluded the plaintiff could not prevail without satisfying a pretext-plus standard, "that juror would stand in lofty—or at least legal—company: until quite recently,

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205. *Compare Reeves*, 530 U.S. at 146–47 (discussing the erroneous belief that a plaintiff must adduce evidence in addition to pretext in order to prevail) *with* Townsend v. Lumbermens Mut. Cas. Co., 294 F.3d 1232, 1241 (10th Cir. 2002) (holding that "a trial court must instruct jurors that if they disbelieve an employer's proffered explanation they may—but need not—infer that the employer's true motive was discriminatory").

206. *See Reeves*, 530 U.S. at 139 (discussing jury verdict for the plaintiff at trial).

207. *See Townsend*, 294 F.3d at 1241 (discussing the danger that a jury might believe that "the plaintiff could not prevail without affirmative evidence" in the absence of a pretext instruction (quoting Brief of the Equal Employment Opportunity Commission as Amicus Curiae, *supra* note 172, at 10)); Smith v. Borough of Wilkinsburg, 147 F.3d 272, 280–81 (3d Cir. 1998) (discussing whether "jurors are smart enough or intuitive enough to realize that inferences of discrimination" may be drawn from a finding of pretext).

208. *Borough of Wilkinsburg*, 147 F.3d at 280–81.

209. *Townsend*, 294 F.3d at 1241.

210. *See id.* at 1243–44 (Henry, J., concurring) (discussing the risk that jurors will make the same mistake of many federal courts and fail to realize the legality of inferring discrimination from pretext).

many federal courts had adopted just such an interpretation regarding the impermissibility of such an inference."[211] While this reasoning seems logical, and undoubtedly comforts the judicial ego, it does not present a compelling justification for requiring the instruction.[212]

In his dissent to *Townsend*, Judge Brorby dismissed the reasoning behind this assumption as unpersuasive: "While the question of how much weight should be given to evidence of pretext in discrimination cases has proven thorny for legal professionals, I doubt the jury viewed this case as anything more than a trial to decide which party was telling the truth."[213] It therefore seems logical that jurors with no knowledge of the complicated legal history surrounding pretext will focus on credibility without regard to fine shades of law. This view gains additional credence upon consideration of arguments of counsel at trial. If the plaintiff's counsel tells the jury, repeatedly, that the defendant employer has lied to cover up a discriminatory motive, the jury will certainly understand the importance of this possible lie.[214] After all, the law on pretext has been built on the "commonsense principle" that evidence of dishonesty often translates into evidence of liability.[215] At the very least, it seems logical to conclude that a

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211. *Id.* at 1243 (Henry, J., concurring).

212. *See id.* at 1247 (Brorby, J., dissenting) (discussing the practical view that jurors without legal training had most likely viewed the dispute as nothing "more than a trial to decide which party was telling the truth").

213. *Id.* (Brorby, J., dissenting). Judge Brorby cited the following language from the Supreme Court regarding the difference between legal reasoning and common-sense logic:

> Jurors do not sit in solitary isolation booths parsing instructions for subtle shades of meaning in the same way that lawyers might. Differences among them in interpretation of instructions may be thrashed out in the deliberative process, with commonsense understanding of the instructions in the light of all that has taken place at the trial likely to prevail over technical hairsplitting.

Id. (Brorby, J., dissenting) (quoting Boyde v. California, 494 U.S. 370, 380–81 (1990)).

214. *See* Moore v. Robertson Fire Prot. Dist., 249 F.3d 786, 791 (8th Cir. 2001) (discussing the arguments presented by plaintiff's counsel regarding pretext). The Eighth Circuit stated:

> Finally, although the District Court elected not to submit a pretext instruction, it in no way prevented Moore from presenting his pretext arguments to the jury. In both opening and closing statements, Moore repeatedly argued to the jury that the explanations given by the Fire District were a pretext for race discrimination. If the jury had accepted Moore's pretext arguments it would have been required to find in his favor under the instructions provided by the District Court. Therefore, even if there were instructional error, Moore incurred no prejudice.

Id.

215. *See* Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 154 (2000) (Ginsburg, J., concurring) (discussing a basic principle "of evidence law that the jury is entitled to treat a party's dishonesty about a material fact as evidence of culpability").

trial court's failure to instruct the jury on pretext will not prejudice the plaintiff as long as plaintiff's counsel receives ample opportunity to argue the issue.[216]

In addition, a possible risk of undue emphasis exists if the judge singles out the pretext instruction to the expense of other permissible inferences in an employment discrimination dispute.[217] For example, in addition to pretext, "a plaintiff may argue that an inference of discrimination may be drawn from stray remarks in the work place, disparate treatment of other employees, or statistics on the composition of the workforce."[218] Similarly, "a defendant may argue that an inference of no discrimination should be drawn from the fact that the decisionmaker is the same race or sex as the plaintiff, or that the decisionmaker had been the one who hired the plaintiff shortly before the adverse action was taken."[219]

Although these inferences probably do not carry as much persuasive weight as an inference of pretext,[220] they merit consideration nevertheless, and the trial judge should not shortchange or neglect these other inferences at the expense of an explicit jury instruction on the permissible inference of pretext.[221] Jury instructions in employment discrimination cases should strive for clarity and should focus primarily on the ultimate question of intentional discrimination.[222] The trial judge may provide useful guidance

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216. *See Moore*, 249 F.3d at 791 (discussing how the failure to instruct on pretext did not prejudice the plaintiff because plaintiff's counsel freely argued on pretext throughout the trial); *see also* Gehring v. Case Corp., 43 F.3d 340, 343 (7th Cir. 1994) ("Gehring's lawyer asked the jury to draw this inference; neither judge nor defense counsel so much as hinted that any legal obstacle stood in the way. Instructions on the topic were unnecessary.").

217. *See* Brill, *supra* note 9, at § 4.27 (discussing several different permissible inferences found in an average employment discrimination case and the risk of unduly emphasizing the pretext instruction).

218. *Id.*

219. *Id.*

220. *See Reeves*, 530 U.S. at 147 ("Proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive." (citing St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 517 (1993)); *see also* Smith v. Borough of Wilkinsburg, 147 F.3d 272, 279 (3d Cir. 1998) (discussing the "pivotal role played by pretext in the ultimate decision of discrimination *vel non*").

221. *See* Townsend v. Lumbermens Mut. Cas. Co., 294 F.3d 1232, 1246 (10th Cir. 2002) (Brorby, J., dissenting) ("In some instances, a facially neutral permissive inference instruction might draw unwarranted attention to a small portion of the evidence presented at trial or mislead the jury as to the applicable law.").

222. *See* Gehring v. Case Corp., 43 F.3d 340, 344 (7th Cir. 1994) ("[I]t is especially important to write instructions that are as clear and simple as possible. When the legal issue is complex, simplicity of language is vital."); *see also Townsend*, 294 F.3d at 1246 (Brorby, J., dissenting) ("Rather than merely restating counsel's argument, jury instructions should be a

on relevant inferences, but this guidance should not overwhelm otherwise clear and simple instructions directed towards intentional discrimination.[223]

While courts cannot forget the complicated legal history surrounding pretext, jurors lack these unpleasant memories.[224] In *Hicks* and *Reeves*, the Supreme Court sought to clarify pretext issues for federal courts, not for juries.[225] A jury will likely understand the common sense foundation for pretext on its own, especially after hearing argument on the issue from the plaintiff's counsel.[226] Absent any truly persuasive reasons for requiring the pretext instruction, the general premise that a judge need not instruct the jury on permissible inferences continues to apply.[227] Based on this premise, combined with the potential risk of undue emphasis, this Note favors leaving the decision within the discretion of the trial court.[228]

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neutral statement of the law.").

223. *See* Achor v. Riverside Golf Club, 117 F.3d 339, 340–41 (7th Cir. 1997) (discussing the importance of clear and concrete jury instructions in employment discrimination cases). Judge Easterbrook, writing for the Seventh Circuit, stated:

> A judge might usefully direct the jury's attention to some issues that support an inference one way or the other, such as whether the managers made remarks implying antipathy to older workers, or the age of a person's replacement, but factors that support an inference of discriminatory intent are [not] necessary.

Id. at 341 (citing generally St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993)).

224. *See* Brill, *supra* note 9, at § 4.27 ("[I]t is likely that a jury will understand, without being told by the judge, that if an employer is lying about its real reason for its employment actions, it may be trying to cover up an unlawful reason, and that unlawful reason may be the discriminatory reason asserted by the plaintiff.").

225. *See* Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 137 (2000) (addressing the question of entering judgment as a matter of law in an employment discrimination case); *Hicks*, 509 U.S. at 504 (addressing the question of the correct role of a finding of pretext in entering judgment as a matter of law for plaintiff).

226. *See Gehring*, 43 F.3d at 343 ("Gehring's lawyer asked the jury to draw this inference; neither judge nor defense counsel so much as hinted that any legal obstacle stood in the way. Instructions on the topic were unnecessary.").

227. *See id.* (discussing the desirability of leaving descriptions of permissible inferences to the argument of counsel).

228. *See* Townsend v. Lumbermens Mut. Cas. Co., 294 F.3d 1232, 1246 (10th Cir. 2002) (Brorby, J., dissenting) ("[A] trial court should, after considering counsels' arguments and all that has taken place at trial, be able to refuse to offer a permissive inference instruction."); *see also* Moore v. Robertson Fire Prot. Dist., 249 F.3d 786, 790 (8th Cir. 2001) ("Given the state of the evidence, which provides little to create a fact issue on pretext, the District Court properly exercised its discretion in declining to submit a pretext instruction."); Brill, *supra* note 9, at § 4.27 ("A judge need not instruct a jury on something that jurors can glean from everyday experience and that is likely to be argued by the lawyers.").

V. Conclusion

Two Supreme Court opinions in the past decade have devoted substantial analysis to the role of pretext in entering judgment as a matter of law for both plaintiffs and defendants in employment discrimination litigation.[229] Despite this extensive analysis, neither case addresses the question of appropriate jury instructions in these types of cases.[230] Although federal courts have struggled with the appropriate legal role of pretext, that jurors will experience identical difficulties does not seem intuitively obvious.[231] Plaintiffs' counsel, as a rule, harp on the issue for the benefit of juries, and evidence that the employer has lied should weigh heavily in jury deliberations regardless of the instruction provided.[232]

In addition, numerous courts have indicated the importance of instructing the jury simply and clearly in employment discrimination litigation.[233] This laudable goal easily becomes quite difficult because of the legalistic terminology of the *McDonnell Douglas* framework and the variety of possible permissible inferences surrounding circumstantial evidence in these types of cases.[234] The trial court stands in the best position to evaluate evidence in the context of legal complexities inherent in employment discrimination litigation and to provide appropriate jury instructions adapted to the circumstances in

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229. *See Reeves*, 530 U.S. at 137 (addressing the question of whether a defendant employer may receive judgment as a matter of law despite evidence of pretext); *Hicks*, 509 U.S. at 504 (addressing the question of whether a plaintiff must receive judgment as a matter of law upon a finding of false explanation by a defendant employer).

230. *Id.*

231. *Supra* notes 213–16 and accompanying text.

232. *See* Brill, *supra* note 9, at § 4.27 (discussing the premise that judges need not instruct jurors on concepts that jurors have learned through life experiences (citing Gehring v. Case Corp., 43 F.3d 340, 343 (7th Cir. 1994)).

233. *See, e.g.*, Gehring v. Case Corp., 43 F.3d 340, 343–45 (7th Cir. 1994) (discussing the importance of clear and simple jury instructions in employment discrimination cases); Cabrera v. Jakabovitz, 24 F.3d 372, 380 (2d Cir. 1994) ("Much of the difficulty in this case arises from the fact that language used by appellate courts to formulate burdens of proof and production in the context of bench trials has been imported uncritically into jury charges.").

234. *See* Brill, *supra* note 9, at § 1.3 ("It is difficult to draft clear and accurate instructions in discrimination cases."). Judge Brill added:

> Through statutory changes and numerous Supreme Court decisions refining the law, the area has become exceedingly (and unnecessarily) complex . . . . Because so much is at stake and the issues are so complex, judges and attorneys must put a great deal of time and effort into drafting accurate and understandable jury instructions and verdict forms.

Id. at §§ 1.3–1.5.

each individual trial.[235] While including an instruction on pretext may often provide helpful legal guidance, and should undoubtedly merit careful consideration, the prudent and conservative path leads to the conclusion that this decision falls within the discretion of the trial court.[236]

The ever-increasing volume of employment discrimination cases on the federal docket and the split among the United States Courts of Appeals regarding jury instructions on pretext necessitate swift resolution of this issue by the Supreme Court.[237] In *Hicks* and *Reeves*, the Court firmly established pretext as a question for the jury.[238] Now the time has come to establish a clear standard for instructing juries in employment discrimination litigation. Ideally, the standard should emphasize the ultimate question of intentional discrimination while leaving discretion in the hands of the trial judge to mold instructions to each particular case.[239] Simplicity is paramount. Judge Easterbrook, writing for the Seventh Circuit in *Gehring*, described the best approach to formulating jury instructions in employment discrimination cases:

> We do not want to tie the judge's hands; language works best if it responds to the nature of the precise dispute between the parties. But we urge every district judge to take a red pencil to arcane, cabalistic, inscrutable, ambiguous, and unnecessary words. The closer the instructions come to the jurors' everyday language, the more likely the jurors are to apply them correctly.[240]

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235. *See* Townsend v. Lumbermens Mut. Cas. Co., 294 F.3d 1232, 1246 (10th Cir. 2002) (Brorby, J., dissenting) (discussing the importance of allowing the trial judge to retain discretion regarding proper formulation of jury instructions); *see also* Brill, *supra* note 9, at § 5.1 (describing the necessity of careful consideration of the many issues that must go into jury instructions in employment discrimination cases). For example, Judge Brill expressed the possibility of giving an instruction on pretext to balance a "business judgment" instruction given on behalf of the defendant. *Id.* at §§ 4.27–4.32. A business judgment instruction generally "informs the jury that [the defendant] cannot be found liable for exercising its business judgment, even if the jury disagrees with the manner in which it did so, as long as its reasons were not discriminatory." *Id.* at § 4.29.

236. *See* Moore v. Robertson Fire Prot. Dist., 249 F.3d 786, 790–91 (8th Cir. 2001) (describing the proper exercise of discretion by the trial court in refusing to grant pretext instruction because of the limited evidence of pretext adduced at trial).

237. *See supra* notes 20–26 and accompanying text (discussing the enormous volume of employment discrimination cases on the federal docket and describing the circuit split).

238. *See generally* Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133 (2000); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993).

239. *See Townsend*, 232 F.3d at 1246 (Brorby, J., dissenting) ("Rather than merely restating counsel's argument, jury instructions should be a neutral statement of the law . . . . Therefore, a trial court should, after considering counsels' arguments and all that has taken place at trial, be able to refuse to offer a permissive inference instruction.").

240. Gehring v. Case Corp., 43 F.3d 340, 345 (7th Cir. 1994).