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Iv. Civil Rights & Employment Discrimination

tion 1963 is not prejudicial to either creditors or debtors.[83] In addition, methods to curb abuses of the appellate process resulting from a strict interpretation of section 1963 exist within the delegated powers of the appellate courts.[84] If Congress would amend section 1963 to permit a creditor's registration of judgment in a foreign district upon a debtor's failure to file a supersedeas bond, Congress would eradicate the problem of a local debtor who abuses section 1963 by filing frivolous appeals and then removing property from the judgment district without filing a supersedeas bond.[85] Making the debtor's filing of a supersedeas bond a requirement under section 1963 is an inadequate solution to the problem caused by the debtor intent on abusing section 1963 to escape debt obligations.[86] Interpreting section 1963 as requiring a bond raises more complex problems involving a later reversal of the original judgment and the potential for collateral attack on the judgment executed in the foreign district.[87] By ignoring the express language of section 1963, the Fourth Circuit has overstepped judicial bounds in an attempt to solve a problem that proper application of the appellate court's power could resolve more easily.[88]

ROBERT S. PARKER

IV. CIVIL RIGHTS & EMPLOYMENT DISCRIMINATION

A. *Allocation of Burdens of Proof in ADEA Litigation*

The Age Discrimination in Employment Act (ADEA)[1] prohibits employers from discriminating on the basis of age against employees

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[83] *See supra* note 47 (majority of courts find § 1963 constitutional).

[84] *See supra* text accompanying notes 76-81 (methods available to courts to prevent debtors from abusing § 1963).

[85] *Cf.* 33 Fed. R. Serv. 2d (Callaghan) at 1571 (by not requiring supersedeas bond under § 1963, Congress allows debtors to abuse appellate process).

[86] *See infra* text accompanying note 88 (interpreting § 1963 as requiring bond creates problems of later reversal of the cases and collateral attack).

[87] *See* Kaplan v. Hirsh, 91 F.R.D. 106, 109 (D. Md. 1981) (Congress intended § 1963 to apply only to judgment final by appeal since no danger exists of later reversal and collateral attacks are limited).

[88] *Accord* 33 Fed. R. Serv. 2d (Callaghan) at 1576 (Murnaghan, J., dissenting) (if Constitution vested the appellate court with legislative powers, the dissent would concur with the majority).

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[1] 29 U.S.C. §§ 621-634 (1976 & Supp. V 1981). The predecessor of the Age Discrimination in Employment Act (ADEA) was an executive order by President Lyndon Johnson prohibiting age discrimination by government contractors. *See* Exec. Order No. 11,141, 29 Fed. Reg. 2477 (1964) (express policy of federal government is to promote employment decisions

between 40 and 70 years of age.[2] Congress enacted the ADEA to insure that employers make employment decisions on objective evaluations of employees' job performances, rather than on misconceptions about the ability and age of elderly employees.[3] The ADEA provides legal and equitable remedies for employees who have suffered unfavorable employment actions because of age discrimination.[4] An ADEA plaintiff

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on basis of merit rather than age). The ADEA is the product of a 1965 report by the Department of Labor that examined the impact of age discrimination on the working force. *See* U.S. DEPT. OF LABOR, REPORT TO THE CONGRESS ON AGE DISCRIMINATION IN EMPLOYMENT UNDER SECTION 715 OF THE CIVIL RIGHTS ACT OF 1964 18-19 (1965) (older workers denied fifty percent of private job openings because of age discrimination). The Department of Labor's study prompted President Johnson to recommend legislation to prohibit age discrimination. *See* President's Message to Congress Proposing Increases in Social Security Payments and Extending Other Benefits, 3 WEEKLY COMP. OF PRES. DOC. 75, 81 (Jan. 30, 1967) (recommending age discrimination legislation because of serious economic and psychological problems caused by age discrimination). Twenty-three states had laws prohibiting age discrimination at the time of President Johnson's message. *Id.* Congress utilized the experiences of the 23 states that had age discrimination legislation, the President's Message, and the Department of Labor's report to enact legislation prohibiting age discrimination. *See* AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967, H.R. REP. NO. 805, 90th Cong., 1st Sess. 2-4, *reprinted in* 1967 U.S. CODE CONG. & AD. NEWS 2213, 2214-15 (ADEA intended to promote employment of older workers on basis of workers' abilities).

[2] *See* 29 U.S.C. § 623(a)(1) (1976). The ADEA provides that an employer may not refuse to hire, discharge, or discriminate against any individual because of an individual's age. *Id.*; *see* Reeves v. General Foods Corp., 682 F.2d 515, 524-25 (5th Cir. 1982) (age discharge illegal); Spagnuolo v. Whirlpool Corp., 641 F.2d 1109, 1112 (4th Cir.) (age demotion illegal), *cert. denied*, 454 U.S. 560 (1981); Hodgson v. First Fed. Sav. and Loan, 455 F.2d 818, 825 (5th Cir. 1972) (refusal to hire because of age illegal); Hodgson v. Sugar Cane Growers Coop., 5 Empl. Prac. Dec. (CCH) ¶ 8618, at 7813, 5 Fair Employ. Prac. Cas. 1136, 1138 (S.D. Fla. 1973) (forcing harder workload on elderly employee to encourage employee to retire is illegal); Hodgson v. American Hardware Mut. Bus. Co., 329 F. Supp. 225, 229 (D. Minn. 1971) (requiring elderly employee to retire involuntarily is illegal).

Originally the ADEA only protected individuals between the ages of 40 and 65. *See* 29 U.S.C. § 631(a) (1976) (amended by 29 U.S.C. § 631(a) (1976 & Supp. V 1981)). In 1978, Congress raised the upper limit of the protected age bracket to 70 years of age. *See* 29 U.S.C. § 631(a) (1976 & Supp. V 1981); *see also* S.R. REP. NO. 493, 95th Cong., 2nd Sess. 7, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS, 504, 510 (raising age limit of ADEA to 70 protects large number of elderly employees that face mandatory retirement and wish to continue working).

[3] *See* 29 U.S.C. § 621(b) (1976 & Supp. V 1981). The purpose of the ADEA is to promote employment decisions based on ability rather than age and to prohibit arbitrary age discrimination in employment. *Id.*; *see* S. REP. NO. 493, 95th CONG., 2ND SESS. 3, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 504, 506 (Congress enacted ADEA to insure that employees); Rodriguez v. Taylor, 569 F.2d 1231, 1236 (3d Cir. 1977) (Congress intended *see also* Vazquez v. Eastern Air Lines, 579 F.2d 107, 109 (1st Cir. 1978) (Congress enacted ADEA to eradicate misconceptions concerning age and working ability of elderly employees); Rodriguez v. Taylor, 569 F.2d 1231, 1236 (3rd Cir. 1977) (Congress intended ADEA to ensure that employers base employment decisions on performance rather than age), *cert. denied*, 436 U.S. 913 (1978).

[4] *See* 29 U.S.C. § 626(b) (1976) (court can grant any legal or equitable relief appropriate to effectuate ADEA's purpose). The remedies that the ADEA allows courts to award include preliminary and permanent injunctions, reinstatement, promotion, and back

must prove that age was a determining factor in an adverse employment decision.[5] ADEA plaintiffs, however, usually are unable to provide direct evidence of an employer's discriminatory intent.[6] Courts, therefore, permit ADEA plaintiffs to prove discriminatory intent with circumstantial evidence.[7] Generally, to facilitate plaintiffs' ability to prove

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pay. *Id.* A court may also award liquidated damages if a plaintiff proves that an employer willfully violated the Act. *Id.*; *see* Syvock v. Milwaukee Boiler Mfg. Co., 665 F.2d 149, 154 (7th Cir. 1981) (liquidated damages equal back pay and benefits denied elderly employee by employer).

[5] *See* 29 U.S.C. 623(a)(1) (1976) (employer cannot discharge or demote plaintiff because of plaintiff's age). The majority of courts hold that a plaintiff proves a violation of the ADEA by demonstrating that the plaintiff's age was a determining factor in an adverse employment decision. *See* Spagnuolo v. Whirlpool Corp., 641 F.2d 1109, 1112 (4th Cir.) (plaintiff proves ADEA violation by showing age was determining factor in employment decision), *cert. denied*, 454 U.S. 860 (1981); Geller v. Markham, 635 F.2d 1027, 1035 (2d Cir. 1980) (plaintiff must show age was determining factor by proving that plaintiff's age made difference in employment action), *cert. denied*, 451 U.S. 445 (1981); *see also* S. REP. No. 723, 90th Cong., 1st Sess. 7 (1967) (purpose of ADEA is to insure that age is not determining factor in employment decisions). *But see* Reed v. Shell Oil Co., 14 Fair Empl. Prac. Case (BNA) 875, 878 (S.D. Ohio 1977) (employer violates ADEA by showing age was one factor in employment decision); Coates v. National Cash Register, 433 F. Supp. 655, 660 (W.D. Va. 1977) (plaintiff proves ADEA violation by showing age was one reason for adverse employment decision). An employer can avoid liability in an ADEA action by proving one of the statutory defenses included in the Act. *See* 29 U.S.C. 623(f) (1976 & Supp. V 1981) (statutory defenses). For example, the ADEA allows an employer to demote or discharge an elderly employee for good cause. *See id.* § 623(f)(3) (1976 & Supp. V 1981); *see also* Houser v. Sears, Roebuck & Co., 627 F.2d 756, 759 (5th Cir. 1980) (loss of confidence in employee); Simmons v. McGuffey Nursing Home, 619 F.2d 369, 371 (5th Cir. 1980) (poor work performance and strained relations with stockholders); Kerwood v. Mortgage Bankers Ass'n, 494 F. Supp. 1298, 1309 (D.D.C. 1980) (inability to adjust to new superior's zeal); Peterson v. Colonial Stores, 18 Fair Empl. Prac. Cas. (BNA) 725, 726 (N.D. Ga. 1978) (pilot drinking between flights); Bittar v. Air Canada, 10 Fair Empl. Prac. Cas. (BNA) 1136, 1136-37 (S.D. Fla. 1974) (derelection of duty). *See generally* Note, *Striking a Balance Between The Interests of Public Safety and The Rights of Older Workers; The Age BFOQ Defense*, 39 WASH. & LEE L. REV. 1371, 1371-95 (1982) (examination of bonafide occupational qualification exception to ADEA). An employer can also avoid liability in an ADEA action by simply showing that age was not a factor in a plaintiff's discharge or demotion. *See* Laugesen v. Anaconda Co., 510 F.2d 307, 313 (6th Cir. 1975) (discharge of elderly employee as part of reduction in work force does not violate ADEA). Generally, courts will not examine the correctness of a employment decision as long as age is not a factor in the decision. *See* Parcinski v. Outlet Co., 673 F.2d 34, 36 (2d Cir. 1982) (ADEA does not authorize courts to judge wisdom of corporation's business decisions); Kephart v. Institute of Gas Technology, 630 F.2d 1217, 1223 (7th Cir. 1980) (Congress did not intend ADEA to be vehicle for judicial review of business decisions), *cert. denied*, 450 U.S. 959 (1981).

[6] *See* Stock v. Horsman Dolls, Inc., 27 Empl. Prac. Dec. (CCH) ¶ 32,275, at 22,922, 27 Fair Empl. Prac. Cas. (BNA) 1423, 1425 (D.S.C. 1981) (ADEA plaintiffs rarely present direct evidence of age discrimination).

[7] *See* Reeves v. General Foods Corp., 682 F.2d 515, 524-25 (5th Cir. 1982) (plaintiff relied on evidence showing that defendant tended to discriminate against elderly employees); Geller v. Markham, 635 F.2d 1027, 1033 (2d Cir. 1980) (plaintiff relied on statistics to prove discriminatory intent), *cert. denied*, 451 U.S. 445 (1981); Marshall v. Goodyear Tire & Rubber Co., 554 F.2d 730, 733-34 (5th Cir. 1977) (plaintiff used evidence indicating that employer discriminated against others in plaintiff's age group).

discriminatory intent with circumstantial evidence, courts allocate burdens of proof between plaintiffs and defendants.[8] Courts use proof schemes to allocate the burdens of proof in ADEA cases in order to narrow the issue into whether an employer's explanation for an employment action or a plaintiff's claim of age discrimination is the true reason for the employment action.[9] The proof scheme used by the Fourth Circuit in *Lovelace v. Sherwin-Williams Co.*,[10] and by the majority of other courts,[11] is ineffective because the proof scheme does not narrow the dispositive issue in ADEA cases.[12] Because the United States Supreme Court has not formulated a proof scheme dictating the evidentiary burdens on plaintiffs and defendants in ADEA actions,[13] lower courts have been unable to achieve consistent allocation of burdens of proof in ADEA actions.[14]

The majority of courts use a three-stage proof scheme to allocate the burdens of production and persuasion in ADEA cases.[15] A burden of pro-

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[8] *See* Rodriguez v. Taylor, 569 F.2d 1231, 1239 (3d Cir. 1977) (courts enforce ADEA by means of evidentiary rules that facilitate plaintiffs' proof of employers' discriminatory purpose), *cert. denied*, 436 U.S. 913 (1978); *see also* Belton, *Burdens of Pleading and Proof in Discrimination Cases: Toward a Theory of Procedural Justice*, 34 VAND. L. REV. 1205, 1208 (1981) (courts recognize that proper allocation of burdens of proof is necessary to effectuate discrimination legislation because of difficulties that plaintiffs' have in producing direct evidence).

[9] *See* Cline v. Roadway, 689 F.2d 481, 485 (4th Cir. 1982) (purpose of proof scheme is to narrow motivational issue in ADEA cases); *see also* Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 255 n.8 (1981) (proof scheme sharpens inquiry into elusive question of intentional discrimination).

[10] 681 F.2d 230 (4th Cir. 1982).

[11] *See infra* notes 15-21 and accompanying text (explanation of three-stage proof scheme that majority of courts use in ADEA cases).

[12] *See infra* text accompanying notes 135-143 (ADEA proof scheme does not focus inquiry into whether discriminatory intent motivated employer to treat plaintiff unfavorably).

[13] *See* Blakeboro, *Allocation of Proof in ADEA Cases: A Critique of the Prima Facie Approach*, 4 INDUS. REL. L.J. 90, 98 (1980) (Supreme Court has not decided how ADEA plaintiffs prove discriminatory intent with circumstantial evidence). The Supreme Court primarily has addressed procedural issues in the few ADEA cases the Court has decided. *See* Oscar-Meyer Co. v. Evans, 441 U.S. 750, 757 (1979) (plaintiff must exhaust administrative remedies before instituting ADEA action in federal court); Lorillard v. Pons, 434 U.S. 575, 585 (1978) (jury trial available in ADEA actions). *But see* United Air Lines v. McMann, 434 U.S. 192, 195 (1977) (ADEA does not invalidate bonafide retirement plans instituted before Congress enacted ADEA).

[14] *See* Marshall v. Goodyear Tire & Rubber Co., 554 F.2d 730, 735 (5th Cir. 1977) (lower court opinions evidence considerable confusion about allocation of evidentiary burdens in ADEA cases); Note *Civil Rights—Use of Direct Evidence to Establish A Prima Facie Case of Age Discrimination Under the ADEA Obviates Need to Make Independent Showing of Pretext*—Spagnuolo v. Whirlpool Corp., 17 WAKE FOREST L. REV. 59, 59 (1981) (confusion exists about how courts should allocate burdens of proof in ADEA cases).

[15] *See* Golomb v. Prudential Ins. Co. of Am., 688 F.2d 547, 551 (7th Cir. 1982) (proof scheme helps ADEA plaintiff show that plaintiff suffered unfavorable treatment because of plaintiff's age); Douglas v. Anderson, 656 F.2d 528, 531-33 (9th Cir. 1981) (proof scheme enables plaintiff to prove discriminatory motive with circumstantial evidence); Loeb v. Tex-

duction places an obligation on a party to present sufficient evidence to raise a genuine issue of fact.[16] A burden of persuasion places an obligation on a party to prove a fact at issue.[17] The majority of courts using the three-stage proof scheme require plaintiffs to establish a prima facie case of age discrimination.[18] A prima facie case of age discrimination consists of facts that, absent a contrary explanation by an employer, allow a trier of fact to infer that an employer treated a plaintiff unfavorably because of the plaintiff's age.[19] When a plaintiff establishes a prima facie

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tron, Inc., 600 F.2d 1003, 1014-15 (1st Cir. 1979) (allocation of evidentiary burdens assists ADEA plaintiff in proving employer's discriminatory intent).

[16] *See* Douglas v. Anderson, 656 F.2d 528, 533 (9th Cir. 1981) (party carries production burden by raising question of fact for resolution by trier of fact). A party that has the burden of production on an element at issue must introduce sufficient evidence to allow a trier of fact to act upon the element. *Id.*; *see* Belton, *supra* note 8, at 1216 (party carries production burden by introducing enough evidence to preclude directed verdict). If a party fails to carry the burden of production on an element, then a judge must remove the element from the trier of fact's consideration. *Id.*

[17] *See* Smith & Leggette, *Recent Issues in Litigation Under the Age Discrimination in Employment Act*, 41 OHIO STATE L.J. 349, 374 (1980). The burden of persuasion allocates the risk of loss if a trier of fact cannot reach a conclusion about an element at issue. *Id.* If a trier of fact can decide an issue in either the plaintiff's favor or the defendant's favor, then the trier of fact must decide against the party with the burden of persuasion. *Id.*

[18] *See* Reeves v. General Foods Corp., 682 F.2d 515, 520 (5th Cir. 1982) (ADEA plaintiff must simply establish prima facie case); Douglas v. Anderson, 656 F.2d 528, 533 n.5 (9th Cir. 1981) (ADEA plaintiff need only produce evidence of elements of prima facie case); Rodriguez v. Taylor, 569 F.2d 1231, 1239 (3d Cir. 1977) (ADEA plaintiff carries production burden by presenting prima facie case), *cert. denied*, 463 U.S. 193 (1978). *But see* Halsell v. Kimberly-Clark Corp., 683 F.2d 285, 290 (8th Cir. 1982) (ADEA plaintiff has burden of proving prima facie case by preponderance of evidence). The majority of courts require an ADEA plaintiff to prove a prima facie case of age discrimination by showing that the plaintiff was between 40 and 70 years of age, that the plaintiff possessed minimal qualifications for a job that the plaintiff sought, that an employer chose not to employ the plaintiff, and that the employer filled the job position with someone else. *See* Garner v. Boorstin, 690 F.2d 1034, 1035 (D.C. Cir. 1982) (most courts require ADEA plaintiffs to establish prima facie case of age discrimination by proving four elements); Halsell v. Kimberly-Clark Corp., 683 F.2d 285, 289 (8th Cir. 1982) (most circuit courts require ADEA plaintiffs to prove four criteria for prima facie case). The majority of courts recognize, however, that the elements that a plaintiff must prove to establish a prima facie case of age discrimination vary according to the facts of each case. *See* Moses v. Falstaff Brewing Corp., 550 F.2d 1113, 1114 (8th Cir. 1977) (proof necessary to establish prima facie case is different in each ADEA case); *see also* Equal Employment Opportunity Comm. v. Trans World Airlines, Inc., 544 F. Supp. 1187, 1218-19 (S.D.N.Y. 1982) (court establishes different types of prima facie cases for members of class alleging age discrimination).

[19] *See* Douglas v. Anderson, 656 F.2d 528, 531 (9th Cir. 1981) (proof of prima facie case of age discrimination establishes inference of unlawful discrimination); *see also* Furnco Constr. Corp. v. Waters, 438 U.S. 567, 576 (1977). In *Furnco*, the Supreme Court reversed a lower court decision because the lower court equated a prima facie showing with a finding of fact about an employer's discriminatory intent. *Id.* The Supreme Court held that a prima facie case is not the same thing as a finding that discriminatory intent motivated an employer. *Id.* The *Furnco* Court stated that proof of a prima facie case raises an inference of discrimination because the disputed employment action, unless otherwise explained, is more likely

case of age discrimination, the majority of courts hold that a burden of production shifts to the defendant to rebut the plaintiff's prima facie case by establishing a legitimate, nondiscriminatory reason for the challenged employment action.[20] All courts that use the three-stage proof scheme hold that if the defendant carries the rebuttal burden, then the plaintiff must prove by a preponderance of the evidence that the defendant's explanation for the employment action is actually a pretext for age discrimination.[21]

The three-stage proof scheme that courts use when ADEA plaintiffs rely on circumstantial evidence to prove an employer's discriminatory intent is an adaptation of the proof guidelines that the Supreme Court developed for cases involving Title VII of the Civil Rights Act of 1964 (Title VII).[22] Title VII prohibits employment discrimination on the basis

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than not based upon consideration of impermissible factors. *Id.* at 577; *see* Belton, *supra* note 8, at 1222 (inference is conclusion that trier of fact can reasonably draw from facts).

[20] *See* Cline v. Roadway, 689 F.2d 481, 485 (4th Cir. 1982) (ADEA defendant's burden to dispell prima facie case is relatively light burden of production); Parcinski v. Outlet Co., 673 F.2d 34, 36 (2d Cir. 1982) (employer only has to present legitimate reason for employment action to discharge production burden); Haring v. CPC Int'l, Inc., 664 F.2d 1234, 1237 (5th Cir. 1981) (ADEA defendant's burden is to offer nondiscriminatory reason for employment action). *But see* Moses v. Falstaff Brewing Corp., 550 F.2d 1113, 1114 (8th Cir. 1977) (employer has burden of proof to justify action on basis other than age); Marshall v. Arlene Knitwear, Inc., 454 F. Supp. 715, 728 (E.D.N.Y. 1978) (defendant has burden of proving existence of nondiscriminatory reason for challenged employment action), *modified*, 605 F.2d 1369 (2d Cir. 1979).

[21] *See* Kephart v. Institute of Gas Technology, 630 F.2d 1217, 1222 (7th Cir. 1980) (plaintiff has burden of proving that employer's explanation is pretext for discrimination), *cert. denied*, 450 U.S. 959 (1981); Smithers v. Bailar, 629 F.2d 892, 898 (3d Cir. 1980) (plaintiff proves pretext by showing age was determinative factor in employer's employment decision).

[22] *See* 42 U.S.C. §§ 2000e-2000e-17 (1976 & Supp. IV 1980). Title VII of the Civil Rights Act of 1964 (Title VII) prohibits employment discrimination on the basis of race, color, sex, religion, or national origin. *See id.* § 2000e-2(a) (1976 & Supp. IV 1980). A plaintiff in a Title VII action may sue for damages under either the disparate impact theory of discrimination or the disparate treatment theory of discrimination. *See* International Bhd. of Teamsters v. United States, 431 U.S. 324, 325 n.15 (1977) (comparing disparate impact and disparate treatment theories of Title VII discrimination). A disparate impact claim involves facially neutral employment practices that effectively treat one class of employees more harshly than any other class of employees. *Id.* A disparate treatment claim, however, involves an employer intentionally treating one class of employees less favorably than other classes because of the employees' race, color, religion, sex or national origin. *Id.* A major difference between the disparate impact theory and the disparate treatment theory is that proof of discriminatory motive is necessary in a disparate treatment claim, while proof of discriminatory motive is unnecessary in a disparate impact claim. *Id. Compare* Griggs v. Duke Power Co., 401 U.S. 424, 431-32 (1971) (absence of discriminatory intent does not absolve employer from liability under disparate impact theory) *with* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-06 (1973) (plaintiff must prove employer motivated by discriminatory intent in disparate treatment case). Under both the disparate treatment theory and the disparate impact theory, a Title VII defendant must produce a legitimate, nondiscriminatory reason for the challenged employment action in order to dispell a plaintiff's prima facie case of discrimination. *See Fourth Circuit Review—Standards of Proof in Title VII Litigation*, 38 WASH. & LEE L. REV. 645, 646 nn.7-8 (1981) (Title VII defendant has

of race, sex, color, religion, or national origin.[23] The majority of courts reason that the Title VII proof guidelines are appropriate in ADEA litigation because the language of the ADEA is almost identical to the language of Title VII.[24] The majority of courts also reason that the Title VII proof guidelines are appropriate in ADEA cases because of the similar evidentiary difficulties that plaintiffs encounter in both ADEA cases and Title VII cases.[25]

The Supreme Court first addressed the allocation of proof in a Title VII case in *McDonnell Douglas Corp. v. Green*.[26] In *McDonnell Douglas*, the Court stated that a Title VII plaintiff that relies on circumstantial evidence to prove an employer's discriminatory intent must first establish a prima facie case of discrimination.[27] The *McDonnell Douglas*

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burden of production to rebut both disparate treatment and disparate impact claims). A majority of courts hold that the Supreme Court's proof guidelines for both Title VII disparate treatment and disparate impact cases are adaptable to ADEA cases. *See* Geller v. Markham, 635 F.2d 1027, 1032 (2d Cir. 1980) (disparate impact), *cert. denied*, 451 U.S. 455 (1981); Loeb v. Textron, Inc., 600 F.2d 1003, 1014-15 (1st Cir. 1979) (disparate treatment); Marshall v. Goodyear Tire & Rubber Co., 554 F.2d 730, 735 (5th Cir. 1977) (disparate treatment). *But see* Lindsey v. Southwestern Bell Tel. Co., 546 F.2d 1123, 1124, 1124 n.3 (5th Cir. 1977) (applicability of Title VII proof guidelines in ADEA actions remains unclear); Laugesen v. Anaconda Co., 510 F.2d 307, 311 (6th Cir. 1975) (courts should not apply Title VII proof guidelines automatically to ADEA jury trials).

[23] *See* 42 U.S.C. § 2000e-2(a) (1976 & Supp. IV 1980) (unlawful employment practice to discriminate against employee because of employee's race, gender, color, religion, or national origin); H.R. REP. No. 914, 88th Cong., 2d Sess. 10, *reprinted in* 1964 U.S. CODE CONG. & AD. NEWS 2391, 2401 (Congress enacted Title VII to eliminate arbitrary discrimination in workplace).

[24] *See* 29 U.S.C. 623(a)(1) (1976) (unlawful employment practice to discriminate against an employee because of employee's age); 42 U.S.C. § 2000e-2(a) (1976 & Supp. IV 1980) (unlawful employment practice to discriminate against an employee because of employee's race, gender, color, religion, or national origin); *see also* Lorillard v. Pons, 434 U.S. 575, 584 (1978) (Congress derived ADEA directly from Title VII).

[25] *See* Loeb v. Textron, Inc., 600 F.2d 1003, 1015 (1st Cir. 1979) (plaintiffs in both Title VII and ADEA cases usually are unable to produce direct evidence of discriminatory intent). *Compare* Gates v. Georgia-Pacific Corp., 326 F. Supp. 397, 398-99 (D. Or. 1970) (direct evidence of discriminatory intent in Title VII case is virtually impossible to produce), *aff'd*, 492 F.2d 292 (9th Cir. 1974) *with* Stock v. Horsman Dolls, Inc., 27 Empl. Prac. Dec. (CCH) ¶ 32,275 at 22,922, 27 Fair Empl. Prac. Cas. (BNA) 1423, 1425 (D.S.C. 1981) (ADEA plaintiffs rarely present direct evidence of discriminatory motivation).

[26] 411 U.S. 792 (1973).

[27] *Id.* at 802. In *McDonnell Douglas Corp. v. Green*, the Supreme Court established proof guidelines for Title VII disparate treatment cases. *Id.* at 802-06. The *McDonnell Douglas* Court said that a plaintiff in a race discrimination case must first prove a prima facie case of discrimination by showing that the plaintiff was a member of a minority race, that the plaintiff sought a job for which plaintiff possessed sufficient qualifications, that the employer chose not to employ the plaintiff despite the plaintiff's qualifications, and that after the employer rejected the plaintiff, the position remained available to others with similar qualifications. *Id.* at 802. If the plaintiff establishes a prima facie case of race discrimination, then the employer must rebut the plaintiff's prima facie case by articulating a legitimate, nondiscriminatory reason for the disputed employment action. *Id.* at 802-03. The *McDonnell Douglas* Court stated that if a defendant produces a legitimate, non-

Court determined that the plaintiff proved a prima facie case of race discrimination by showing that the plaintiff was of a minority race, that the plaintiff possessed sufficient qualifications for the desired job, and that the defendant refused to employ the plaintiff despite the plaintiff's qualifications.[28] The *McDonnell Douglas* Court stated that proof of a prima facie case shifts a burden of production to the defendant to provide a legitimate, nondiscriminatory reason for treating the plaintiff unfavorably.[29] The Court held that once a defendant provides a nondiscriminatory explanation for the employment action, then the plaintiff must prove by a preponderance of the evidence that the defendant's explanation is actually a pretext for discrimination.[30]

In subsequent Title VII cases the Supreme Court reaffirmed the *McDonnell Douglas* proof guidelines.[31] Lower courts, however, applied the *McDonnell Douglas* proof guidelines inconsistently[32] because the Court did not provide a clear explanation of how a Title VII defendant rebuts a plaintiff's prima facie case of discrimination.[33] The majority of the circuit courts held that a Title VII defendant rebuts a plaintiff's prima facie case by simply producing a legitimate, nondiscriminatory reason for the challenged employment action.[34] A minority of circuit

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discriminatory explanation for the employment action, then the plaintiff must show that the employer's reason for the adverse employment action is a pretext for discrimination. *Id.* at 804; *see* International Bhd. of Teamsters v. United States, 432 U.S. 333, 358 (1977) (*McDonnell Douglas* proof guidelines are flexible).

[28] *See* 411 U.S. at 802. In *McDonnell Douglas*, the Court stated that the elements of a prima facie case will vary according to the circumstances of each case. *Id.* at 802 n.13.

[29] *See id.* at 802-03 (respondent's participation in unlawful activities against defendant constituted legitimate reason for defendant's refusal to hire).

[30] *See id.* at 803 (lower court must afford plaintiff opportunity to prove defendant's explanation is pretext for discrimination).

[31] *See* Board of Trustees of Keene State College v. Sweeney, 439 U.S. 24, 24-25 (1978) (lower court misapplied *McDonnell Douglas* by requiring defendant to prove nondiscriminatory reason for employment action); Furnco Constr. Corp. v. Waters, 438 U.S. 567, 575 (1978) (*McDonnell Douglas* proof guidelines govern Title VII disparate treatment cases).

[32] *See Fourth Circuit Review—Allocation of Burdens of Proof and Persuasion in Disparate Treatment Case of Title VII Litigation*, 39 WASH. & LEE L. REV. 637, 639 (1982) (lower courts have applied Title VII proof guidelines inconsistently); *infra* notes 34-35 and accompanying text (lower courts' inconsistent application of *McDonnell Douglas* proof guidelines).

[33] *See* Loeb v. Textron, Inc., 600 F.2d 1003, 1012 (1st Cir. 1979) (Supreme Court created confusion about defendant's burden under *McDonnell Douglas*). *Compare* Board of Trustees of Keene State College v. Sweeney, 439 U.S. 24, 25 n.2 (1978) (Title VII defendant rebuts plaintiff's prima facie case by producing evidence of nondiscriminatory reason for employment action) *with* Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978) (defendant rebuts plaintiff's prima facie case by proving nondiscriminatory reason for employment decision).

[34] *See* Wright v. National Archives and Records Serv., 609 F.2d 702, 715-16 (4th Cir. 1979) (Title VII defendant rebuts plaintiff's prima facie case by producing nondiscriminatory reason for employment action); Powell v. Syracuse Univ., 580 F.2d 1150, 1156 (2d Cir.) (employer rebuts plaintiff's prima facie case by articulating nondiscriminatory reason for

courts held that a Title VII defendant rebuts a prima facie case by proving a legitimate, nondiscriminatory reason for the challenged employment action.[35] In *Texas Department of Community Affairs v. Burdine*,[36] the Supreme Court resolved the differences between the circuit courts about a Title VII defendant's rebuttal burden and held that a Title VII defendant's rebuttal burden is a burden of production.[37]

In determining the proper evidentiary standard for a Title VII defendant, the *Burdine* Court clarified the proof guidelines for a Title VII bench trial.[38] The *Burdine* Court modified the *McDonnell Douglas* proof guidelines by stating that a plaintiff's initial burden of proving a prima facie case amounts to a burden of persuasion that the plaintiff meets by a preponderance of the evidence.[39] The *Burdine* Court expanded the *McDonnell Douglas* proof guidelines and held that proof of a prima facie case of discrimination creates a mandatory, rebuttable presumption of discrimination.[40] A rebuttable presumption of discrimination compels

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employment action), *cert. denied*, 439 U.S. 984 (1978); Harper v. Trans World Airlines, Inc., 525 F.2d 409, 411 (8th Cir. 1975) (employer has burden of presenting acceptable and legitimate business reasons for challenged employment practice).

[35] *See* Turner v. Texas Instruments, Inc., 555 F.2d 1251, 1255 (5th Cir. 1977) (employer bears burden of proving that nondiscriminatory reason motivated employment action); Ostapowicz v. Johnson Bronze Co., 541 F.2d 394, 399 (3d Cir. 1976) (employer must prove nondiscriminatory reason for employment action), *cert. denied*, 429 U.S. 1041 (1977); Randolph v. United States Elevator Corp., 452 F. Supp. 1120, 1124 (S.D. Fla. 1978) (defendant's rebuttal burden in Title VII case is burden of persuasion).

[36] 450 U.S. 248 (1981).

[37] *See id.* at 254 (Title VII defendant only bears burden of producing nondiscriminatory reason for defendant's employment action). In *Burdine*, a female employee of the Texas Department of Community Affairs (TDCA) claimed that TDCA failed to promote her, and subsequently fired her, because she was a woman. *Id.* at 251. The Fifth Circuit held that TDCA violated Title VII because TDCA did not prove a legitimate, nondiscriminatory reason for Burdine's termination. *See* Burdine v. Texas Dept. of Community Affairs, 608 F.2d 563, 567-68 (5th Cir. 1979) (Title VII defendant's rebuttal burden is burden of persuasion), *vacated*, 450 U.S. 248 (1981). On appeal from the Fifth Circuit, the Supreme Court determined that the Fifth Circuit misconstrued *McDonnell Douglas* in determining the evidentiary burden required for the rebuttal of a prima facie case of gender discrimination. 450 U.S. at 256. The *Burdine* Court held that a Title VII defendant rebuts a prima facie case of discrimination by producing a legitimate, nondiscriminatory reason for the disputed employment action. *Id.* at 259-60.

[38] *See* Reeves v. General Foods Corp., 682 F.2d 515, 520-22 (5th Cir. 1982) (*Burdine* Court clarified proper application of *McDonnell Douglas* proof guidelines).

[39] *See* 450 U.S. at 252-53. The *Burdine* Court's holding that a plaintiff must prove a prima facie case by a preponderance of the evidence is inconsistent with the Court's earlier Title VII cases. *See* Furnco Constr. Corp. v. Waters, 438 U.S. 567, 576 (1977) (plaintiff establishes prima facie case by showing elements of prima face case); *see also* Board of Trustees of Keene State College v. Sweeney, 439 U.S. 24, 25 (1978) (Stevens, J., dissenting) (plaintiff in Title VII action bears initial burden of presenting evidence sufficient to establish prima facie case of discrimination).

[40] *See* 450 U.S. at 254 & 254 n.9 (establishment of prima facie case creates mandatory presumption that employer unlawfully discriminated against employee). A mandatory, rebuttable presumption requires a trier of fact to draw certain inferences from the facts

a trier of fact to draw an inference of discrimination from the plaintiff's prima facie case.[41] The *Burdine* Court stated that the rebuttable presumption shifts a burden of production to the defendant.[42] The Court determined that the defendant carries the burden of production and rebuts the presumption of discrimination by producing a legitimate, nondiscriminatory reason for the challenged employment action.[43]

The *Burdine* Court found that the defendant carries the burden of production by introducing just enough evidence to raise a genuine issue of material fact about whether discriminatory intent motivated the defendant to treat the plaintiff unfavorably.[44] The *Burdine* Court determined that if the defendant rebuts the presumption by carrying the burden of production, then the presumption disappears and the legally mandatory inference of discrimination that arises from the plaintiff's prima facie case no longer exists.[45] The Supreme Court stated that once the defendant rebuts the presumption, then the plaintiff must have an opportunity to persuade the trier of fact that the defendant's explanation of the challenged employment action is actually a pretext for

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that constitute a plaintiff's prima facie case. *See* Mendez, *Presumptions of Discriminatory Motive in Title VII Disparate Treatment Cases*, 32 STAN. L. REV. 1129, 1141 n.67 (1980). A presumption operates to shift a burden of production to the defendant. *Id.* at 1244; *see infra* note 42 (effect of presumption on defendant's burden of proof).

[41] *See* 450 U.S. at 255 n.10 (presumption amounts to legally mandatory inference of discrimination).

[42] *See id.* at 254-55 & 255 n.8 (presumption shifts production burden to defendant). There are two theories about the effect of a mandatory presumption on the opposing party's burden of proof. *See* Belton, *supra* note 8, at 1268-69 (comparison of theories). The "bursting bubble" theory states that a presumption of discrimination shifts a burden of production to the opponent to rebut the presumption by presenting evidence contrary to the presumed fact. *Id.* at 1268. If the opponent carries the burden of production, then the presumption disappears and the trier of fact must disregard whatever role the presumption had in the trial. *Id.* The second theory states that a presumption shifts both a burden of production and a burden of persuasion to the opposing party to rebut the presumed fact. *Id.* In *Burdine*, the Supreme Court adopted the "bursting bubble" theory. *See* 250 U.S. at 255 nn.8 & 10 (presumption only shifts production burden); *see also* FED. R. EVID. 301 (presumption only shifts burden of production to opposing party).

[43] 250 U.S. at 260.

[44] *See id.* at 254. In *Burdine*, the Court determined that a defendant carries the burden of production by introducing a clear and reasonably specific explanation for the challenged employment action. *Id.* at 255.

[45] *Id.* at 255 n.10 (presumption drops from case once defendant produces nondiscriminatory explanation for employment action). In *Burdine*, the Court determined that once a defendant rebuts a presumption of discrimination, then the evidence that the plaintiff introduced to create the presumption loses all inferential value. *Id.* The *Burdine* Court found that a defendant's rebuttal of plaintiff's presumption of discrimination does not preclude the plaintiff from using the evidence that plaintiff introduced to prove a prima facie case to show that the defendant's explanation of an employment action is a pretext for discrimination. *Id.* The Court stated that in certain cases, the combination of a plaintiff's initial evidence and effective cross-examination of the defendant may suffice to allow a jury to infer that the defendant's explanation of the challenged employment decision is a pretext for discrimination. *Id.*

discrimination.[46] The Court explained that a plaintiff proves that a defendant's explanation is actually a pretext for discrimination either by showing that a discriminatory reason motivated the employer to treat the plaintiff unfavorably or by proving that the defendant's explanation of the employment action is unworthy of credence.[47] The *Burdine* Court acknowledged that the ultimate burden of proving that a defendant intentionally discriminated against a plaintiff remains with the plaintiff throughout the trial.[48]

The *Burdine* Court only addressed the allocation of proof for Title VII bench trials.[49] The majority of courts, however, utilize the *Burdine* presumption of discrimination in ADEA jury trials.[50] Courts that apply Title VII proof guidelines to ADEA jury trials usually rely on the First Circuit's decision in *Loeb v. Textron, Inc.*[51] Although the First Circuit decided *Loeb* before *Burdine*, the *Loeb* court was the first court to adopt the Supreme Court's proof guidelines for Title VII bench trials to an ADEA jury trial.[52] The *Loeb* court stated that similarities in the aims and purposes of Title VII and the ADEA allow courts to use the same process for allocating the burdens of production and persuasion in both ADEA and Title VII actions.[53] The *Loeb* court determined that the *McDonnell Douglas* proof guidelines are an orderly way to evaluate the

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[46] *Id.* at 256.

[47] *Id.*

[48] *Id.* at 253; *see* FED. R. EVID. 301 (presumption does not shift burden of persuasion from plaintiff); 9 J. WIGMORE, EVIDENCE § 2489 (3d ed. 1940 & Supp. 1980) (burden of persuasion never shifts).

[49] *See* 450 U.S. at 250 (narrow question in *Burdine* was defendant's evidentiary burden in Title VII bench trial).

[50] *See* Garner v. Boorstin, 690 F.2d 1033, 1035 (D.C. Cir. 1982) (*Burdine* analysis governs ADEA cases); Halsell v. Kimberly-Clark Corp., 683 F.2d 285, 289 (8th Cir. 1982) (*Burdine* presumption applies in ADEA case even though *Burdine* involved claim of gender discrimination); Douglas v. Anderson, 656 F.2d 528, 531 (9th Cir. 1981) (*Burdine* standards apply to litigation of claims arising under ADEA).

[51] 600 F.2d 1003 (1st Cir. 1979); *see* Halsell v. Kimberly-Clark Corp., 683 F.2d 285, 290 (8th Cir. 1982) (court used *Loeb* court's adaptation of *McDonnell Douglas* proof guidelines to allocate evidentiary burdens in ADEA case); Goodman v. Heublein, Inc., 645 F.2d 127, 130 (2d Cir. 1980) (court utilized *Loeb* court's guidelines for jury instructions in ADEA case).

[52] *See* Comment, *Adapting Title VII Principles to Age Discrimination in Employment Jury Trial*, 14 SUFFOLK U. L. REV. 263, 268 (1980) (*Loeb* court was first court to use *McDonnell Douglas* proof guidelines in ADEA jury trial).

[53] *See* 600 F.2d at 1015. In *Loeb*, the First Circuit rejected Textron's argument that Congress' refusal to amend Title VII to include age discrimination indicates that Congress intended courts to subject ADEA cases to different proof guidelines than Title VII cases. *Id.* The *Loeb* court instead stated that the similarities between the ADEA and Title VII suggest that Congress intended courts in ADEA cases to use Title VII proof guidelines. *Id. But see* Brodin, *The Standard of Causation in the Mixed-Motive Title VII Action: A Social Policy Perspective*, 82 COLUM. L. REV. 292, 310 n.80 (1982) (because Congress patterned ADEA after Title VII does not mean that same evidentiary burdens apply in both ADEA and Title VII cases).

evidence in ADEA jury trials.[54] The *Loeb* court held that a judge in an ADEA jury trial can use the *McDonnell Douglas* proof guidelines to present the important factual issues to the jury.[55]

The *Loeb* court recognized, however, that the *McDonnell Douglas* proof guidelines are flexible, and stated that a judge must modify the *McDonnell Douglas* proof guidelines to suit the facts of each particular case.[56] For example, the *Loeb* court stated that a judge should not require an ADEA plaintiff that relies on direct evidence of discriminatory intent to prove the elements of a prima facie case.[57] The *Loeb* court also stated that a judge should require an ADEA plaintiff that relies on circumstantial evidence of discriminatory intent to establish a prima facie case by demonstrating that the plaintiff's job performance met an employer's legitimate expectations.[58] The *Loeb* court held that regardless of whether an ADEA plaintiff relies on direct or circumstantial evidence, a judge should instruct the jury that the plaintiff demonstrates a violation of the ADEA by proving that but for the employer's discriminatory motive, the plaintiff would not have suffered the unfavorable employment action.[59]

The Fourth Circuit relied on the *Loeb* court's adaptation of the *McDonnell Douglas* proof guidelines to ADEA jury trials to allocate the burdens of production in *Lovelace*.[60] In *Lovelace*, Sherwin-Williams demoted Wilbur Lovelace, a fifty-five year old manager of a Sherwin-Williams store in Asheville, North Carolina to a salesman.[61] Sherwin-Williams claimed that Lovelace's demotion was due to Lovelace's declining performance as store manager.[62] After Sherwin-Williams replaced

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[54] *See* 600 F.2d at 1016 (*McDonnell Douglas* proof guidelines give judges method for allocating burdens of production and persuasion in ADEA cases).

[55] *See id.* at 1016-17 (*McDonnell Douglas* proof guidelines are useful for creating jury instructions in ADEA trial).

[56] *See id.* at 1018-20 (*Loeb* court offered directions for application of *McDonnell Douglas* proof guidelines to different factual situations).

[57] *See id.* at 1018 (court should not use *McDonnell Douglas* proof guidelines if plaintiff relies on direct evidence of discriminatory intent because *McDonnell Douglas* proof guidelines may divert jury from important proof issues).

[58] *See id.* at 1014. In *Loeb*, the First Circuit modified the *McDonnell Douglas* prima facie case and required the plaintiff to establish a prima facie case by proving that the plaintiff was in the age group protected by the ADEA, that the plaintiff's job performance met the employer's legitimate expectations, that the employer fired the plaintiff, and that the employer sought someone else to do the plaintiff's job. *Id.*

[59] *Id.* at 1019.

[60] 681 F.2d 230 (4th Cir. 1982).

[61] *Id.* at 235.

[62] *See id.* at 244. In *Lovelace*, Sherwin-Williams relied on the Asheville store's sales records from the period 1970 to 1978 to show that Lovelace's job performance declined after 1977. *Id.* at 235. The sales records indicated that the Asheville store's profits increased every year between 1970 and 1973. *Id.* The Asheville store's sales records also indicated that the store's profits decreased significantly every year between 1974 and 1978. *Id.* The sales records showed that by 1978 the Asheville store's profits-to-inventory ratio and sales-

Lovelace with a forty-nine year old former manager of another Sherwin-Williams store, Lovelace sued Sherwin-Williams for violating the ADEA.[63] A jury determined that Sherwin-Williams discriminated against Lovelace because of Lovelace's age.[64] The district court judge, however, granted Sherwin-Williams' motion for judgment notwithstanding the verdict because Lovelace's evidence was insufficient to support a reasonable inference of discriminatory intent.[65] Lovelace appealed the district court's judgment to the Fourth Circuit.[66]

On appeal, the Fourth Circuit affirmed the judgment notwithstanding the verdict.[67] The Fourth Circuit stated that a judgment notwithstanding the verdict is proper in an ADEA jury trial if there is no reasonable probability that a jury could infer from a plaintiff's evidence that an employer treated the plaintiff unfavorably because of the plaintiff's age.[68] The Fourth Circuit examined Lovelace's circumstantial evidence both with and without the benefit of the *Burdine* presumption

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to-profit ratio was the lowest of 29 similarly-sized Sherwin-Williams stores. *Id.* To support the company's position that Lovelace's job performance was no longer satisfactory, the Sherwin-Williams management introduced a 1978 job appraisal that ranked Lovelace last among store managers in the Asheville district. *Id.* at 236. Sherwin-Williams also claimed that serious problems in supervision, housekeeping, and merchandizing, as well as widespread employee dissatisfaction, existed in the Asheville store while Lovelace was store manager. *Id.*

[63] *Id.* at 234.

[64] *Id.*

[65] *Id.* at 235. A court should grant a judgment notwithstanding the verdict if the court believes a directed verdict was proper at the close of the parties' evidence. *See* FED. R. CIV. P. 50(b); *see also* 9 C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE: CIVIL § 2521, at 537 (1971) (motion for directed verdict allows court to decide whether any question of fact exists); Cooper, *Directions for Directed Verdicts: A Compass for Federal Courts*, 55 MINN. L. REV. 903, 903 (1971) (standard for directed verdict and standard for judgment notwithstanding verdict are identical). When evaluating a motion for a directed verdict, a court should view the evidence in the light most favorable to the party opposing the motion. *See* Galloway v. United States, 319 U.S. 372, 396 (1943). The Federal Rules of Civil Procedure do not state if there is a proper standard for granting a judgment notwithstanding the verdict. *See* FED. R. CIV. P. 50(b); *see also* Wright & Miller, *supra*, § 2524, at 545-46 (courts adopt varying standards for judgment notwithstanding verdicts). The Second Circuit states that a directed verdict is proper if a reasonable man could reach but one conclusion upon the evidence presented. *See* Simblest v. Maynard, 427 F.2d 1, 4 (2d Cir. 1970) (district court properly granted judgment notwithstanding verdict because witnesses' testimonies did not support jury's decision). The Fifth Circuit holds that a court should not grant a judgment notwithstanding the verdict if there is substantial evidence opposing the motion. *See* Boeing Co. v. Shipman, 411 F.2d 365, 374-75 (5th Cir. 1969). The Fourth Circuit has expressed inconsistent standards for granting a judgment notwithstanding the verdict. *See* 681 F.2d at 243; *see also infra* note 100 and accompanying text (*Lovelace* court stated that judgment notwithstanding verdict is proper if there is no reasonable probability that evidence supports jury's decisions).

[66] 681 F.2d at 235.

[67] *Id.*

[68] *Id.* at 242; *see infra* note 100 (discussion of *Lovelace* court's standard for judgment notwithstanding verdict).

of discrimination to determine if a jury reasonably could infer that Sherwin-Williams demoted Lovelace because of Lovelace's age.[69]

Lovelace's evidence consisted of Sherwin-Williams' business records indicating that the Asheville store was profitable while Lovelace was store manager.[70] Lovelace's evidence also included a 1977 job performance appraisal by Sherwin-Williams management that gave Lovelace the third highest of four possible ratings.[71] Lovelace testified that in mid-1977 Sherwin-Williams management began visiting the Asheville store more often, apparently to collect support for Lovelace's eventual demotion.[72] Assessing Lovelace's evidence without the *Burdine* presumption of discrimination, the Fourth Circuit determined that Lovelace's evidence indicated only a possibility that Sherwin-Williams demoted Lovelace because of Lovelace's age.[73] The Fourth Circuit held that Lovelace's circumstantial evidence, independent of the *Burdine* presumption of discrimination, could not support a reasonable inference that discriminatory intent motivated Sherwin-Williams to demote Lovelace.[74]

The Fourth Circuit also assessed Lovelace's evidence with the benefit of the *Burdine* presumption of discrimination.[75] The Fourth Circuit required Lovelace to prove a prima facie case by demonstrating that Lovelace's job performance met Sherwin-Williams' legitimate expectations and by demonstrating that Sherwin-Williams replaced Lovelace with another employee.[76] The *Lovelace* court doubted whether Lovelace established the satisfactory performance element of the prima facie case because two years separated Lovelace's proof of satisfactory performance

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[69] *See* 681 F.2d at 242-46 (ADEA plaintiff may prove discriminatory intent with *Burdine* presumption or without *Burdine* presumption).

[70] *See id.* at 242-43. In *Lovelace*, the plaintiff introduced at trial the Asheville store's profit records for the period between 1970 and 1978 to show that Lovelace's job performance met Sherwin-Williams' reasonable expectations. *Id.* at 243 (Asheville store showed profit in eight of nine years between 1970 and 1978); *see supra* note 62 (Asheville store's sales records).

[71] 681 F.2d at 235.

[72] *Id.* In *Lovelace*, the plaintiff testified that a Sherwin-Williams district manager began visiting the store more often in 1977 and complained about problems that did not exist. *Id.* Lovelace testified that Sherwin-Williams management created a morale problem among the store's employees by discussing the store's problems with the employees. *Id.* Lovelace also testified that the management began finding more fault with Lovelace's performance as store manager in order to provide support for Lovelace's demotion. *Id.* The Sherwin-Williams management testified, however, that management began visiting Lovelace's store more often in an attempt to discover the source of the store's downward profit trend. *Id.* at 235-36.

[73] *See id* at 243 (Lovelace's evidence indicated that age was one possible reason for Lovelace's demotion).

[74] *Id.*

[75] *See id.* at 244-46 (*Lovelace* court invoked *Burdine* presumption).

[76] *Id.* at 239.

and Lovelace's demotion.[77] The Fourth Circuit assumed for purposes of the appeal, however, that Lovelace proved a prima facie case of age discrimination and examined Sherwin-Williams' evidence to determine if Sherwin-Williams rebutted Lovelace's prima facie case.[78] Sherwin-Williams' evidence indicated that Sherwin-Williams demoted Lovelace because Lovelace's job performance declined after 1977 and because Lovelace refused to enact corrective action that the Sherwin-Williams management believed would remedy the problems of the Asheville store.[79] The Fourth Circuit stated that Sherwin-Williams' evidence indicated a legitimate, nondiscriminatory reason for Lovelace's demotion.[80] The Fourth Circuit found, therefore, that Sherwin-Williams carried a burden of production and dispelled the probative force of the presumption arising from Lovelace's prima facie case of age discrimination.[81] The Fourth Circuit rejected Lovelace's claim that Sherwin-Williams' explanation for Lovelace's demotion was a pretext for discrimination because Lovelace did not introduce sufficient evidence to show that Sherwin-Williams' explanation was a pretext for discrimination.[82] The *Lovelace* court held that the district court correctly granted the judgment notwithstanding the verdict because Lovelace's circumstantial evidence, unaided by any presumptive force, did not support a

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[77] *See* 681 F.2d at 244. In *Lovelace*, the Fourth Circuit stated that it was questionable whether Lovelace proved that, at the time of demotion, Lovelace's job performance met Sherwin-Williams' legitimate expectations. *Id.* The Fourth Circuit stated that in order to prove a prima facie case of age discrimination, an ADEA plaintiff must show that the plaintiff's job performance continued to meet the employer's legitimate expectations up to the date of the challenged employment action. *Id.* The Fourth Circuit held that the credibility of a prima facie case decreases as the time between the last proven satisfactory performance and the challenged employment action lengthens. *Id.* The Fourth Circuit determined, however, that solely for purposes of Lovelace's appeal, the Fourth Circuit would assume that Lovelace possessed the requisite qualifications. *Id.*

[78] *Id.* at 244.

[79] *See supra* note 62 and accompanying text (discussion of Sherwin-Williams' reasons for Lovelace's demotion).

[80] 681 F.2d at 244.

[81] *Id.* In *Lovelace*, the Fourth circuit stated that Sherwin-Williams easily carried the burden of production to rebut Lovelace's prima facie case by introducing admissible evidence that was not intrinsically unworthy of acceptance and that indicated a legitimate reason for the employment action. *See id.* (Sherwin-Williams' evidence indicated that Lovelace's demotion was reasonable business decision).

[82] *Id.* at 245. In *Lovelace*, the Fourth Circuit determined that Lovelace's age was only one of a number of possible reasons for Lovelace's demotion. *Id.* The *Lovelace* court stated that the essential facts supporting Sherwin-Williams' explanation for Lovelace's demotion remained unrefuted despite Lovelace's opportunity to show that Sherwin-Williams' explanation was actually a pretext for discrimination. *Id.* The *Lovelace* court refused to give any probative force to Lovelace's opinion that his performance remained satisfactory because Lovelace's opinion lacked objective corroboration. *Id.*; *see* Equal Employment Opportunity Comm. v. Trans World Airlines, Inc., 544 F. Supp. 1187, 1220 (S.D.N.Y. 1982) (plaintiff's testimony carries little weight as evidence of job performance).

reasonable inference that Lovelace's age was a determining factor in Sherwin-Williams' decision to demote Lovelace.[83]

In rejecting Lovelace's claim of age discrimination, the Fourth Circuit formulated a proof scheme for an ADEA jury trial by modifying the *Loeb* court's analysis to incorporate the *Burdine* Court's clarification of the *McDonnell Douglas* proof guidelines.[84] The Fourth Circuit determined that the dispositive motivational issue in an ADEA case is whether an employer treated the plaintiff unfavorably because of the plaintiff's age.[85] The Fourth Circuit acknowledged that a plaintiff retains throughout the trial the ultimate burden of persuading the trier of fact by a preponderance of the evidence that discriminatory intent motivated the employer to treat the plaintiff unfavorably.[86] The Fourth Circuit stated that an ADEA plaintiff that relies on circumstantial evidence to demonstrate an employer's discriminatory motivation has the initial burden of producing evidence to support a prima facie case of age discrimination.[87] The *Lovelace* court utilized the *Loeb* court's modification of the *McDonnell Douglas* elements of a prima facie case and found that the plaintiff carries the initial burden of production by showing that the plaintiff's job performance met an employer's legitimate expectations and by showing that after the plaintiff suffered an adverse employment action, the employer sought someone else to do the same job.[88] The Fourth Circuit relied upon *Burdine* and held that proof of a prima facie case of age discrimination establishes a mandatory, rebuttable presumption of discrimination and shifts a burden of production to the defendant.[89]

The *Lovelace* court characterized an ADEA defendant's rebuttal burden as mild and determined that a defendant carries the burden of production and rebuts the plaintiff's presumption of discrimination by producing a nondiscriminatory explanation for the challenged employ-

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[83] 681 F.2d at 246.

[84] *Id.* at 238 n.7 & 239-40 (*Lovelace* court was first Fourth Circuit panel to utilize *Burdine* opinion in ADEA case). In *Lovelace*, the Fourth Circuit stated that the *Burdine* presumption is applicable to ADEA jury trials because of the similar remedial purposes of the ADEA and Title VII and the comparable difficulty of proving discriminatory intent under both Title VII and the ADEA. *Id.* at 239. The *Lovelace* court implied that the Supreme Court in *Burdine* had recognized that the same proof guidelines are applicable in both ADEA and Title VII cases by citing *Loeb* approvingly. *Id.*; *see* 450 U.S. at 252 n.4 (*Loeb* court correctly applied *McDonnell Douglas* proof guidelines).

[85] 681 F.2d at 239; *see supra* text accompanying note 5 (employee must prove age was determining factor in adverse employment action to prove violation of ADEA).

[86] 681 F.2d at 240.

[87] *See id.* at 244 (ADEA plaintiff has burden of production to establish prima facie case of age discrimination).

[88] *Id.* at 239; *see supra* note 58 and accompanying text (*Loeb* court's modification of *McDonnell Douglas* proof guidelines).

[89] 681 F.2d at 239; *see supra* notes 40-45 and accompanying text (explanation of *Burdine* presumption).

ment action.[90] The *Lovelace* court followed *Burdine* and stated that a defendant's explanation suffices to carry the burden of production if the explanation is legitimate and is not intrinsically unworthy of acceptance.[91] The Fourth Circuit utilized the *Burdine* Court's explanation of a rebuttable presumption of discrimination and determined that a defendant destroys completely the probative force of a presumption of age discrimination by carrying the burden of production.[92] The Fourth Circuit stated that by carrying the burden of production, a defendant narrows the dispositive motivational issue to a new level of specificity.[93] The Fourth Circuit defined the narrow motivational issue as whether the employer would not have treated the plaintiff unfavorably in the absence of the employer's discrimination on account of the plaintiff's age.[94] The *Lovelace* court held that the burden of producing evidence on the narrow motivational issue shifts back to the plaintiff.[95]

The *Lovelace* court found that the plaintiff carries the burden of production on the recasted motivational issue by introducing evidence that demonstrates that the defendant's explanation for the challenged employment action is a pretext for discrimination.[96] The *Lovelace* court relied upon *Burdine* and determined that the plaintiff shows that the defendant's explanation is a pretext for discrimination either by producing evidence that attacks the credibility of the defendant's explanation or by demonstrating that a discriminatory motive is a more likely explanation for the challenged employment action than is the defendant's explanation.[97] The *Lovelace* court stated that a plaintiff can carry the reacquired burden of production by introducing new evidence to show that the defendant's explanation for the challenged employment action is a pretext for discrimination or by relying on the evidence that the plaintiff introduced to establish the prima facie case.[98] The Fourth Circuit

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[90] *See* 681 F.2d at 244 (defendant's rebuttal burden is modest).

[91] *Id.*

[92] *Id.* In *Lovelace*, the Fourth Circuit stated that if a defendant carries the burden of production, then the defendant dispells completely the probative force of the presumption of discrimination. *Id.* Should the defendant fail to carry the burden of production, then the presumption requires a court to submit the dispositive motivational issue to the jury with an instruction in the plaintiff's favor subject only to a credibility determination. *Id.*; *see* 450 U.S. at 254 (court must enter judgment in favor of plaintiff if defendant does not rebut presumption because no issue of fact remains in case).

[93] 681 F.2d at 239.

[94] *Id.* at 240.

[95] *Id.*

[96] *Id.*

[97] *Id.*; *see supra* note 47 and accompanying text (*Burdine* Court's explanation of how Title VII plaintiff demonstrates that defendant's reasons for employment action are pretext for discrimination).

[98] 681 F.2d at 241. *Compare id.* at 240 (plaintiff may use initial evidence to support inference of intentional discrimination) *with* 450 U.S. at 255 n.10 (plaintiff may combine initial evidence with evidence introduced during cross-examination to show that defendant's explanation is pretext for discrimination).

held that should a plaintiff carry the reacquired burden of production, then a judge must submit the case to the jury under instructions defining the recasted motivational issue as whether the decision to demote the plaintiff would not have been made but for the defendant's motive to discriminate against the plaintiff because of the plaintiff's age.[99] If the plaintiff fails to carry the reacquired burden of production, however, a judge should grant a motion for directed verdict or judgment notwithstanding the verdict.[100]

Although the Fourth Circuit in *Lovelace* relied on Title VII precedent to establish a proof scheme for an ADEA case, the Fourth Circuit did not consider whether there are fundamental differences between age discrimination and Title VII discrimination that necessitate different proof guidelines for ADEA cases.[101] In *Massachusetts Board of Retirement v. Murgia*,[102] the Supreme Court acknowledged that age discrimination differs significantly from the types of discrimination prohibited by Title VII.[103] The *Murgia* Court determined that elderly employees have not suffered a history of bigotry, unlike the persons protected by Title VII.[104] The *Murgia* Court found that blacks and other racial minorities have experienced employment discrimination because of prejudices that have nothing to do with the minorities' abilities to work while elderly

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[99] 681 F.2d at 241.

[100] *Id.* at 240. The *Lovelace* court determined that the purpose of a judgment notwithstanding the verdict is to insure that a jury's inference of causation is within the realm of reasonable probability. *Id.* at 241. The Fourth Circuit noted that the danger of a jury drawing an inference of causation on the basis of a possibility, rather than a probability, is especially great in an ADEA jury trial because of the usual unavailability of direct evidence of discriminatory intent and because of the strong possibility of a jury reacting out of sympathy for an ADEA plaintiff. *Id.* at 243. The Fourth Circuit held that a judge must grant a judgment notwithstanding the verdict if there is no reasonable probability that a jury could infer causation from the plaintiff's circumstantial evidence. *Id.* at 243.

[101] *See id.* at 238-39 (Title VII proof scheme is appropriate for application in ADEA litigation).

[102] 427 U.S. 307 (1976).

[103] *See id.* at 313. In upholding a Massachusetts law requiring police officers to retire at age 50, the Supreme Court in *Murgia* determined that the class of elderly employees is not a suspect class for purposes of equal protection under the Constitution because the class has not experienced a history of purposeful, unequal treatment. *Id.* The *Murgia* Court stated that a legislative enactment that adversely affects a non-suspect class is constitutional if a rational relationship exists between the enactment and the legislature's aims. *Id.* at 313-14. The Supreme Court reasoned that since physical capacity generally declines with age, the Massachusetts law was constitutional because the law was rationally related to the state's interest in maintaining an effective police force. *Id.* at 314-16. The *Murgia* Court distinguished the class of elderly employees from the class of persons protected by Title VII and held that the minorities protected by Title VII deserve greater constitutional protection than elderly employees because the minorities protected by Title VII are a suspect class that has experienced a history of purposeful, unequal treatment. *Id.* at 313; *see* Frontiero v. Richardson, 411 U.S. 677, 688 (1973) (classifications affecting minorities protected by Title VII are inherently suspect and are subject to strict judicial scrutiny).

[104] 427 U.S. at 313.

employees have experienced employment discrimination because of stereotyped characteristics about the employees' abilities to work.[105] The *Murgia* Court recognized that aging is a process that affects everyone in society.[106] Generally, lower courts state that age discrimination differs significantly from Title VII discrimination since the bigotry that characterizes Title VII discrimination is usually not present with age discrimination.[107] The majority of courts, however, hold that the differences between age discrimination and Title VII discrimination do not require courts to alter the Title VII proof guidelines in ADEA cases.[108] A minority of courts hold that the *McDonnell Douglas* proof guidelines are inapplicable in ADEA actions unless courts modify the guidelines to reflect the fundamental differences between age discrimination and Title VII discrimination.[109]

The legislative history of the ADEA indicates that Congress

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[105] *Id.*

[106] *See id.* at 313-14 (age potentially affects everyone in society).

[107] *See* Syvock v. Milwaukee Boiler Mfg. Co., 665 F.2d 149, 155 (7th Cir. 1981) (age discrimination results from unconscious assumptions about elderly employees' abilities to perform); Vazquez v. Eastern Air Lines, Inc., 579 F.2d 107, 112 (1st Cir. 1978) (age discrimination results from unwarranted conclusions about effects of aging on productivity); *see also* Marshall v. Arlene Knitwear, Inc., 454 F. Supp. 715, 728 (E.D.N.Y. 1978) (age discrimination is often more subtle than Title VII discrimination), *modified*, 608 F.2d 1369 (2d Cir. 1979); Note, *The Cost of Growing Old: Business Necessity and the Age Discrimination in Employment Act*, 88 YALE L.J. 565, 579 (1979) (stereotyped assumptions about elderly employees' productivity are difficult to detect because assumptions are inherently related to other judgments about employment).

[108] *See supra* note 50 and accompanying text (majority of courts use Title VII proof guidelines in ADEA cases). One major distinction between Title VII actions and ADEA actions is that Title VII actions usually involve refusals to hire while ADEA actions usually involve discharges. *See* 600 F.2d at 1013 (court modifies prima facie case elements for discharge case). The majority of courts accommodate the factual variances between Title VII cases and ADEA cases by modifying the elements of the *McDonnell Douglas* prima facie case to suit the facts of each case rather than by altering the proof guidelines. *See* Parcinski v. Outlet Co., 672 F.2d 34, 37 (2d Cir. 1982) (termination); Riley v. University of Lowell, 651 F.2d 822, 825 (1st Cir. 1981) (denied promotion); Sutton v. Atlantic Richfield, 646 F.2d 407, 411-12 (9th Cir. 1981) (involuntary retirement).

[109] *See* Laugesen v. Anaconda Co., 510 F.2d 307, 312 (6th Cir. 1975) (inappropriate to use *McDonnell Douglas* proof guidelines in ADEA action because of differences between age discrimination and Title VII discrimination); Williams v. City & County of San Francisco, 483 F. Supp. 335, 344 (N.D. Cal. 1979) (fact that age is progressive condition presents clear impediment to adoption of Title VII case law to ADEA cases), *rev'd on other grounds*, 685 F.2d 450 (1982); Marshall v. Hills Bros., 432 F. Supp. 1320, 1325 (N.D. Cal. 1977) (significant differences between Title VII discrimination and age discrimination require courts to use different requirements for prima facie cases in ADEA actions than in Title VII actions); Mastie v. Great Lakes Steel Corp., 424 F. Supp. 1299, 1306 (E.D. Mich. 1976) (courts must treat ADEA cases differently from Title VII cases because of lack of widespread age discrimination). *See generally* Note, *The Age Discrimination In Employment Act Of 1967*, 90 HARV. L. REV. 380, 388-99, 411 (1976) (courts should avoid automatic application of Title VII proof guidelines in ADEA cases because age discrimination is less obvious than Title VII discrimination).

recognized that there are fundamental differences between age discrimination and Title VII discrimination.[110] Unlike race discrimination, Congress believed that age discrimination could occur simply from an unconscious application of stereotyped notions of ability rather than from a deliberate desire to remove elderly employees from the work force.[111] To afford elderly employees protection from intentional age discrimination, Congress provided that courts in ADEA actions can award liquidated damages to plaintiffs that prove willful violations of the act.[112] Liquidated damages compensate a plaintiff for the nonpecuniary losses, such as back pay and benefits, that arise out of an employer's willful violation of the ADEA.[113] Congress subsequently amended the ADEA to grant plaintiffs seeking liquidated damages the right to a jury trial.[114] Congress, however, has not granted a right to a

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[110] *See* 113 CONG. REC. H34,752 (1967) (remarks of Rep. Dwyer) (invidious hostility that permeates Title VII discrimination is not present in age discrimination); 113 CONG. REC. H 34,742 (1967) (remarks of Rep. Burke) (arbitrary nature of age discrimination is not present with Title VII discrimination); 113 CONG. REC. H31,254 (1967) (remarks of Rep. Javits) (age discrimination is completely arbitrary while Title VII discrimination results from bigotry); *see also Age Discrimination in Employment Hearings on H.R. 13054 Before the General Subcommittee in Labor of the Committee on Education and Labor: House of Representatives*, 90th Cong., 1st Sess. 13 (1967) (statement of Willard Wirtz, Secretary of Labor) (age discrimination is entirely different from Title VII discrimination because bigotry that characterizes Title VII discrimination does not effect age discrimination). *See generally* Lorillard v. Pons, 434 U.S. 575, 585 n.14 (1978) (different remedial and procedural provisions under ADEA and Title VII suggest that Congress had different intentions when Congress enacted ADEA).

[111] *See* 113 CONG. REC. H34,742 (1967) (remarks of Rep. Burke) (age discrimination arises because of erroneous assumptions that employers make about effects of age on performance); *see also* Syvock v. Milwaukee Boiler Mfg. Co., 665 F.2d 149, 155 (7th Cir. 1981) (Congress believed non-willful age discrimination toward employees was possible).

[112] *See* 29 U.S.C. § 626(b) (1976) (liquidated damages are available only in cases of willful violations of ADEA). To prove willfulness under the ADEA, an ADEA plaintiff must show that a defendant's actions were knowing and voluntary, and that the defendant knew or should have known that defendant's actions violated the act. *See* Syvock v. Milwaukee Boiler Mfg. Co., 665 F.2d 149, 156, 156 n.10 (7th Cir. 1981) (standard for willfulness focuses on defendant's state of mind).

[113] *See* Syvock v. Milwaukee Boiler Mfg. Co., 665 F.2d 149, 154 (7th Cir. 1981) (liquidated damages equal back pay and benefits that employer denied to plaintiff).

[114] *See* 29 U.S.C. 626(c)(2) (Supp. V 1981) (jury trial is available to plaintiffs seeking monetary damages arising from ADEA violations); *see also* Lorillard v. Pons, 434 U.S. 575, 585 (1977). In *Lorillard*, the Supreme Court held that the ADEA provides a jury trial right to plaintiffs seeking unpaid minimum wages or overtime compensation. *Id.* The Court reasoned that Congress evidenced an intention to provide a right to a jury trial by empowering courts to award legal relief for ADEA violations since the seventh amendment guarantees a jury trial right to persons seeking legal relief. *See id.* at 583; *see also* U.S. CONST. amend. VII (jury trial available for persons seeking legal relief); 29 U.S.C. § 626(b) (1976) (courts can award legal relief to ADEA claimants). Congress specifically amended the ADEA after *Lorillard* to insure that plaintiffs seeking liquidated damages have a right to a jury trial. *See* H.R. REP. NO. 950, 95th Cong., 2d Sess. 14, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 504, 535 (ADEA plaintiffs seeking liquidated damages have jury trial right).

jury trial to Title VII plaintiffs.[115] Almost all courts hold that a jury trial is unavailable to Title VII plaintiffs seeking damages because Title VII allows courts to award only equitable damages.[116] The principle distinction, therefore, between Title VII and the ADEA is that the ADEA expressly provides for jury trials while Title VII does not provide for jury trials.[117] The presence of juries in ADEA actions introduces an important procedural consideration that does not exist in Title VII bench trials since judges that use the *McDonnell Douglas* proof guidelines in ADEA jury trials must develop clear instructions to aid jurors in determining how to draw an inference of discrimination from a plaintiff's circumstantial evidence.[118]

The availability of the *McDonnell Douglas* proof guidelines in ADEA jury trials is not clear since the Supreme Court never has decided whether courts can use the guidelines in jury trials.[119] Generally, courts recognize that the presence of juries in ADEA trials impairs the effectiveness of the *McDonnell Douglas* proof guidelines because judges often have difficulty in explaining the proof guidelines to jurors.[120] For example, the *Loeb* court stated that the subtleties of the shifting

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[115] *See* Comment, *The Right to Jury Trial Under Title VII of the Civil Rights Act of 1964*, 37 U. CHI. L. REV. 167, 171 (1969) (Congress did not intend to provide right to jury trial in Title VII civil actions).

[116] *See* Robinson v. Lorillard Corp., 444 F.2d 791, 802 (4th Cir.) (jury trial is unavailable to Title VII plaintiff seeking back pay award), *cert. denied*, 404 U.S. 1006 (1971); King v. Laborers' Int'l Union, 443 F.2d 273, 279 (6th Cir. 1971) (courts should not present Title VII equitable issues to juries); Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122, 1125 (5th Cir. 1969) (courts should determine equitable issues involved in Title VII cases rather than juries). *Compare* 42 U.S.C. § 2000e-5 (1976 & Supp. III 1979) (courts may only award equitable relief to Title VII claimants) *with* 29 U.S.C. § 626(b) (1976) (courts may award legal or equitable relief to ADEA claimants). *See generally* Lorillard v. Pons, 434 U.S. 575, 583-84 (1977) (Supreme Court refused to decide if jury trial is available under Title VII).

[117] *See* Blakeboro, *supra* note 13, at 103 (major difference between ADEA and Title VII is that ADEA plaintiffs have jury trial right).

[118] *See* 600 F.2d at 1016 (court's failure to develop clear jury instructions defeats jury trial right).

[119] *See* McKenry, *Enforcement of Age Discrimination Employment Legislation*, 32 HASTINGS L.J. 1157, 1169 (1981) (applicability of *McDonnell Douglas* proof guidelines to ADEA jury trial is uncertain because Supreme Court did not create proof guidelines for jury trials); Schickman, *The Strengths and Weaknesses of the* McDonnell Douglas *Formula in Jury Actions Under the ADEA*, 32 HASTINGS L.J. 1239, 1258 (1981) (fact that Court created *McDonnell Douglas* proof guidelines solely for bench trials limits use of proof guidelines in jury trials).

[120] *See infra* notes 121-123 and accompanying text (courts have problems adapting *McDonnell Douglas* proof guidelines to ADEA jury trials); *see also* Blakeboro, *supra* note 13, at 108-09 (requirement that jury examine elements of plaintiff's prima facie case overparticularizes jury's inquiry); Schickman, *supra* note 119, at 1258 (*McDonnell Douglas* proof guidelines distract jury from issue of whether age discrimination occurred); *Age Discrimination*, *supra* note 109, at 398 (courts have difficulties articulating *McDonnell Douglas* proof guidelines in jury instructions).

burdens in the *McDonnell Douglas* proof guidelines often can confuse jurors.[121] The *Loeb* court determined that the *McDonnell Douglas* proof guidelines may divert a juror's attention from the ultimate question of discrimination.[122] The *Lovelace* court acknowledged that judges often have trouble adapting the *McDonnell Douglas* proof guidelines to ADEA jury trials because the *McDonnell Douglas* Court created the proof guidelines for cases involving a refusal to hire while almost all ADEA cases involve discharges or demotions.[123] Despite the difficulties that courts generally have in adapting the *McDonnell Douglas* proof guidelines to ADEA jury trials, a majority of courts continue to rely on the proof guidelines to allocate the burdens of production and persuasion in ADEA jury trials.[124]

The Sixth Circuit recognizes the difficulties in adapting the *McDonnell Douglas* guidelines to an ADEA jury trial and does not use the *McDonnell Douglas* proof guidelines in ADEA jury trials.[125] In *Laugesen v. Anaconda*,[126] the Sixth Circuit affirmed a lower court's refusal to instruct the jury that the *McDonnell Douglas* proof guidelines required the defendant to produce a nondiscriminatory reason for the plaintiff's dismissal.[127] The *Laugesen* court stated that Congress' decision to enact the ADEA as a statute independent of Title VII indicated that Congress did not intend courts in ADEA actions to automatically apply Title VII proof guidelines.[128] The *Laugesen* court held that the *McDonnell Douglas* proof guidelines are inapplicable to ADEA jury trials because the *McDonnell Douglas* Court did not attempt to address the problems and procedures inherent in submitting issues to juries.[129] The *Laugesen* court

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[121] *See* 600 F.2d at 1016 (legal concepts of prima facie case and shifting burdens often confuse jurors).

[122] *See id.* In *Loeb*, the First Circuit stated that a reading of the *McDonnell Douglas* proof guidelines to jurors often leads jurors to abandon the jurors' judgment and rely on poorly understood concepts of law to decide the ultimate question of discrimination. *Id.*

[123] *See* 681 F.2d at 239 n.8 (difficult to adapt *McDonnell Douglas* proof guidelines to ADEA cases because ADEA cases typically involve discharges while *McDonnell Douglas* involved refusal to hire).

[124] *See supra* notes 15-25 and accompanying text (majority of courts use three-stage proof scheme in ADEA cases that is adaptation of *McDonnell Douglas* proof guidelines).

[125] *See* Laugesen v. Anaconda Co., 510 F.2d 307, 312 (6th Cir. 1975) (courts should not automatically apply *McDonnell Douglas* proof guidelines to ADEA jury trials).

[126] 510 F.2d 307 (6th Cir. 1975).

[127] *See id.* at 311 (*Laugesen* court supported trial court's refusal to apply *McDonnell Douglas* proof guidelines to ADEA jury trial).

[128] *See* 510 F.2d at 312 n.4 (Congress did not intend courts to use Title VII proof guidelines in ADEA cases).

[129] *Id.* at 312-13. The *Laugesen* court recognized two considerations that arise in ADEA jury trials and are not present in Title VII bench trials. *Id.* The first consideration is the need to present evidence in a clear manner so that the jury can make the ultimate decision of liability based upon the jury's determination of the weight and credibility of the evidence. *Id.* at 312. The second consideration is the need to develop clear jury instructions to aid a jury in deciding whether discrimination occurred. *Id.*

stated that courts should simply submit ADEA cases to juries with an instruction that the burden is on the plaintiff to prove age discrimination.[130]

Although the Sixth Circuit does not utilize the *McDonnell Douglas* proof guidelines in ADEA jury trials, the Fourth Circuit consistently has relied on the *McDonnell Douglas* proof guidelines to allocate the burdens of production in ADEA jury trials.[131] In *Lovelace*, the Fourth Circuit recognized that the purpose of the proof guidelines is to facilitate an ADEA plaintiff's ability to prove discriminatory intent with circumstantial evidence.[132] The *Lovelace* court, therefore, imposed a light burden of production on Lovelace and invoked the *Burdine* presumption although Lovelace's proof of a prima facie case was unconvincing.[133] The *Lovelace* court then imposed an equally light burden of production on Sherwin-Williams and allowed Sherwin-Williams to rebut Lovelace's prima facie case by simply introducing a reason for Lovelace's dismissal.[134] Since the Fourth Circuit did not require Sherwin-Williams to demonstrate that Sherwin-Williams' explanation was the actual reason for Lovelace's demotion,[135] the *Lovelace* court imposed a difficult burden on Lovelace to prove that Sherwin-Williams' explanation was a pretext for discrimination.[136]

A court can insure that an employer provides the actual reason for an employment action by placing a burden of persuasion on the employer to prove the existence of a nondiscriminatory reason for the employment action.[137] A minority of courts have attempted to ease ADEA plaintiffs' difficulties in proving that an employer's explanation is a pretext for

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[130] *Id* at 312 (court approved jury instruction requiring plaintiff simply to prove age discrimination by preponderance of evidence).

[131] *See* Spagnuolo v. Whirlpool Corp., 641 F.2d 1109, 1115 (4th Cir.) (Feld, J., dissenting) (*McDonnell Douglas* proof guidelines are orderly presentation of evidence in ADEA cases), *cert. denied*, 454 U.S. 860 (1981); Smith v. University of North Carolina, 632 F.2d 316, 333 (4th Cir. 1980) (*McDonnell Douglas* proof guidelines are appropriate method for allocating burdens of proof in ADEA case); Smith v. Flax, 618 F.2d 1062, 1066 n.3 (4th Cir. 1980) (*McDonnell Douglas* proof guidelines are guidance for allocating burdens of proof in ADEA cases).

[132] *See* 681 F.2d at 239 (Title VII proof guidelines favor plaintiffs in initial stages of proof).

[133] *See id.* at 244 (*Lovelace* court stated that plaintiff's evidence triggered presumption of discrimination although *Lovelace* court questioned plaintiff's proof of prima facie case).

[134] *See id.* at 245 (defendant's burden of production is modest).

[135] *See id.* (defendant carries production burden by introducing reason that is not manifestly incredible); *see also* Belton, *supra* note 8, at 1246 (major problem with *Burdine* presumption is that defendant does not need to produce actual reason for employment action).

[136] *See supra* notes 96-100 and accompanying text (*Lovelace* court's explanation of how ADEA plaintiff proves that employer's explanation is pretext for discrimination).

[137] *See* Belton, *supra* note 8, at 1266-71 (court should impose burden of persuasion on defendant to show that nondiscriminatory reason motivated defendant).

discrimination by shifting a burden of persuasion to the defendant.[138] An ADEA plaintiff's burden to prove that an employer's explanation is a pretext for discrimination is especially formidable if a court allows the employer to offer a non-specific reason for the challenged employment action since age discrimination is usually hard to detect.[139] By allowing both Lovelace and Sherwin-Williams to carry the respective burdens of production with little difficulty,[140] the Fourth Circuit failed to facilitate Lovelace's ability to prove discriminatory intent with circumstantial evidence since the Fourth Circuit did not narrow the dispositive motivational issue to whether Sherwin-Williams' explanation or Lovelace's claim of age discrimination was the true reason for Lovelace's demotion.[141] The *Lovelace* court, therefore, did not accomplish the purpose of the *Lovelace* court's proof scheme.[142] The *Lovelace* court achieved the same result as though the Fourth Circuit had followed *Laugeson* because the dispositive issue in *Lovelace* was simply whether Lovelace proved age discrimination by a preponderance of the evidence.[143]

In *Lovelace*, the Fourth Circuit relied on the Supreme Court's proof guidelines for Title VII cases to establish a proof scheme for ADEA cases that involve circumstantial proof of discriminatory intent.[144] The

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[138] *See* Moses v. Falstaff Brewing Corp., 550 F.2d 1113, 1114 (8th Cir. 1977) (employer has burden of proof to justify action on basis other than age); Marshall v. Arlene Knitwear, Inc., 454 F. Supp. 715, 728-29 (E.D.N.Y. 1978) (defendant has burden of proving existence of nondiscriminatory reason for challenged employment action), *modified*, 608 F.2d 1369 (2d Cir. 1979).

[139] *See supra* notes 105 & 107 (courts recognize that age discrimination is usually subtle since age discrimination results from unconscious assumptions about elderly employees' ability to work); *supra* notes 110-111 (Congress recognized that age discrimination results from erroneous assumptions about elderly employees' ability to work); *see also* Schickman, *supra* note 119, at 1255-56 (*McDonnell Douglas* Court's requirement that plaintiff must prove employer's explanation is pretext for discrimination does not address distinct evidentiary difficulties ADEA plaintiff's encounter); *cf. Burdens of Proof*, *supra* note 32, at 651 (Title VII plaintiff's task of proving pretext is formidable).

[140] *See supra* notes 133-135 and accompanying text (Lovelace and Sherwin Williams carried light burdens of production). Courts generally allow ADEA plaintiffs and defendants to carry the respective production burdens with little difficulty. *See* Schickman, *supra* note 119, at 1242-43 (ADEA plaintiffs and defendants carry production burdens easily); *see also* Garner v. Boorstin, 690 F.2d 1034, 1036 (D.C. Cir. 1982) (ADEA plaintiff's initial burden to establish prima facie case is not difficult); Cline v. Roadway, 689 F.2d 481, 485 (4th Cir. 1982) (ADEA defendant's production burden is relatively light).

[141] *See* 450 U.S. at 255 n.8 (*Burdine* presumption intended to progressively sharpen inquiry into factual question of intentional discrimination).

[142] *See supra* notes 8 & 9 and accompanying text (purpose of proof scheme is to facilitate plaintiff's ability to prove discriminatory intent with circumstantial evidence).

[143] *See supra* text accompanying notes 125-130 (*Laugesen* court rejected use of *McDonnell Douglas* proof guidelines in ADEA cases). *See generally* Note, *The Prima Facie Approach to Employment Discrimination*, 33 ME. L. REV. 195, 204 (1981) (third stage of ADEA proof order determines outcome of most ADEA cases because proof standards for first two stages are not stringent).

[144] *See supra* text accompanying notes 26-30 (*McDonnell Douglas* proof guidelines); text

Fourth Circuit did not consider whether the differences between age discrimination and Title VII discrimination require different proof guidelines for ADEA cases.[145] The Fourth Circuit also did not consider whether the presence of juries in ADEA cases requires different proof guidelines for ADEA cases since the Supreme Court created the Title VII proof guidelines for bench trials.[146] Furthermore, the Fourth Circuit's proof scheme does not facilitate an ADEA plaintiff's ability to prove discriminatory intent with circumstantial evidence because the proof scheme does not focus the inquiry into whether discriminatory intent motivated an employer to treat the plaintiff unfavorably.[147] The Fourth Circuit's proof scheme, therefore, is an ineffective addition to ADEA jury trials that only complicates ADEA litigation by diverting jurors' attentions from the crucial question of whether age discrimination occurred.[148] To promote the congressional desire to eliminate arbitrary age discrimination,[149] the Fourth Circuit should follow the Sixth Circuit's decision in *Laugeson* by rejecting application of the Title VII proof guidelines in ADEA jury cases and should adopt a proof analysis for ADEA cases that accounts for the differences between age discrimination and Title VII discrimination and the distinctions between jury trials and bench trials.[150]

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B. *Standards of Proof in Title VIII Cases*

Congress passed Title VIII of the Civil Rights Act of 1968[1] (Title VIII

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accompanying notes 38-48 (*Burdine* Court's clarification of *McDonnell Douglas* proof guidelines); text accompanying notes 84-100 (*Lovelace* court's proof scheme).

[145] *See supra* text accompanying notes 101-109 (Supreme Court and lower courts recognize fundamental differences exist between age discrimination and Title VII discrimination); text accompanying notes 110-111 (Congress recognized differences exist between age discrimination and Title VII discrimination).

[146] *See supra* text accompanying notes 120-124 (majority of courts recognize difficulties in adapting Title VII proof guidelines to ADEA jury trials).

[147] *See supra* text accompanying notes 132-143 (*Lovelace* court's proof scheme is ineffective).

[148] *See supra* note 114 and accompanying text (Congress granted jury trial right in ADEA cases); notes 119-122 and accompanying text (Title VII proof guidelines divert jurors' attentions from crucial issues in ADEA jury trials).

[149] *See supra* notes 1-3 and accompanying text (Congress intended ADEA to eradicate arbitrary age discrimination).

[150] *See supra* text accompanying notes 126-130 (*Laugesen* court rejected application of *McDonnell Douglas* proof guidelines in ADEA jury trials).

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[1] Pub. L. No. 90-284, § 801, 82 Stat. 73, 81 (1968) (codified at 42 U.S.C. §§ 3601-3631 (1976 & Supp. III 1979)).

or the Act) intending to provide for fair housing in the United States.[2] Title VIII implements a congressional purpose to replace racially segregated housing with truly integrated living patterns.[3] The courts have responded to the congressional mandate by interpreting Title VIII broadly to eliminate all traces of public and private discrimination in the

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[2] 42 U.S.C. § 3601 (1976). Title VIII of the Civil Rights Act of 1968 (Title VIII or the Act) is only part of a broad government scheme mandating fair housing. In 1962, President Kennedy issued an Executive Order on Equal Opportunity in Housing. Exec. Order No. 11,063, 3 C.F.R. 652 (1959-63 Compliation), *reprinted in* 42 U.S.C. § 1982 app. at 375-76 (1976). Executive Order 11,063 prohibits discrimination based on race, color, creed or national origin with respect to the disposition of residential property by lending institutions, real estate developers, and other parties who receive direct federal funding or federal assistance indirectly through state or local agencies that receive federal funding. *Id.* Since private lending institutions finance most of the nation's housing, the scope of the order is narrow. U.S. COMM'N ON CIVIL RIGHTS, THE FEDERAL FAIR HOUSING ENFORCEMENT EFFORT 29 (1979) [hereinafter cited as ENFORCEMENT EFFORT].

Congress enacted another statute to eliminate discrimination in housing, Title VI of the Civil Rights Act of 1964 (Title VI). Pub. L. No. 88-352, § 601, 78 Stat. 252, 498 (1964) (codified at 42 U.S.C. §§ 2000d-2000d-5 (1976)). Title VI prohibits discrimination in any program or activity receiving federal financial assistance. *Id.* Title VI prohibits housing discrimination when state and local governments use federal financial assistance to operate low-income housing. *Id.* In addition, when benefits from federally assisted programs favor residents of a certain area, state and local governments may not limit minority access to the areas by restricting minority housing opportunities. *See* ENFORCEMENT EFFORT, *supra*, at 2 (Title VI bars exclusion of minorities from areas receiving benefits of federally assisted programs). The scope of Title VI is narrow because only one-half of one percent of the nation's housing receives the benefits of federally assisted programs. Note, *Is the U.S. Committed to Fair Housing? Enforcement of the Fair Housing Act Remains A Crucial Problem*, 29 CATH. U.L. REV. 641, 643 (1980).

In addition to Executive Order 11,063 and Title VI, the Civil Rights Act of 1866, through which Congress guaranteed equal property rights to all United States citizens regardless of race, affords a basis for enforcement of private rights involving the sale or rental of housing. Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (1866) (codified at 42 U.S.C. § 1982 (1976 & Supp. III 1979)); *see* Comment, *Fair Housing—The Use of Testers to Enforce Fair Housing Laws—When Testers are Sued*, 21 ST. LOUIS U.L.J. 170, 172-73 (1977) [hereinafter cited as *Testers*] (§ 1982 affords a basis for private rights of action asserting discrimination in housing); *see also* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 410 (1968). In *Jones*, the Supreme Court interpreted Section 1982 as a valid exercise of congressional power under the thirteenth amendment to eliminate the badges and incidents of slavery, including racial discrimination in public and private housing. 392 U.S. at 410, 438-39.

The lower courts consistently have held that Title VIII is an appropriate exercise of congressional power under the thirteenth amendment. *See, e.g.*, Williams v. Matthews Co., 499 F.2d 819, 825 (8th Cir.) (Title VIII, like Civil Rights Act of 1866, is exercise of congressional power under the thirteenth amendment), *cert. denied*, 419 U.S. 1021 (1974); United States v. Bob Lawrence Realty, Inc., 474 F.2d 115, 120-21 (5th Cir.) (court deferred to congressional determination that Title VIII will effectuate thirteenth amendment's purpose by aiding in elimination of badges and incidents of slavery), *cert. denied*, 414 U.S. 826 (1973); United States v. Hunter, 459 F.2d 205, 214 (4th Cir.) (Title VIII is valid exercise of congressional power under thirteenth amendment to eliminate badges and incidents of slavery), *cert. denied*, 409 U.S. 934 (1972).

[3] 114 CONG. REC. 3422 (1968) (statement of Sen. Mondale) (intent of Title VIII is to replace ghettos with integrated and balanced living patterns). Senator Mondale was one of the sponsors of Title VIII in Congress. *See* Schwemm, *Discriminatory Effect and the Fair*

housing field.[4] Title VIII's provisions prohibit a broad range of practices that deny housing to persons because of race, color, religion, sex, or national origin.[5] Title VIII provisions also apply to a wide variety of parties who employ discriminatory practices, including brokers, apartment house owners, mortgage lenders, municipalities, and public agencies.[6] The Act bars any of these parties from employing discriminatory practices such as refusing to rent or sell a dwelling,[7] indicating a preference

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Housing Act, 54 NOTRE DAME LAW. 199, 208 (1978). Congress recognized that racial discrimination in American housing market posed a serious national problem. *See* 114 CONG. REC. 3127 (1968) (statement of Sen. Hatfield) (impact of housing segregation reaches into most aspects of daily life, including employment, education, public accomodation, and religious worship); *id.* at 3133-34 (statement of Sen. Mondale) (pattern of racial segregation in housing affects employment opportunities and racial composition and quality of schools).

[4] *See, e.g.*, Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 99 (1979) (Court read Title VIII broadly to extend standing under statute to persons participating in investigatory techniques to test racial discrimination in housing); Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 211-12 (1972) (lower courts can vitalize Title VIII only by generously construing statute); Marr v. Rife, 503 F.2d 735, 740 (6th Cir. 1974) (court refused to defeat congressional plan to eliminate all traces of discrimination in housing by narrow interpretation of Title VIII).

[5] 42 U.S.C. § 3604 (1976). Congress passed the National Housing and Community Development Act of 1974, amending Title VIII, to prohibit discrimination on the basis of sex in the sale or rental of housing. Pub. L. No. 93-383, § 808(b) (1)-(4), 88 Stat. 729 (1974), *amending* 42 U.S.C. §§ 3604-3606 (1976). Section 3604 of Title VII prohibits several practices that limit equal housing opportunities. *See* United States v. City of Black Jack, 508 F.2d 1179, 1182 (8th Cir.) (exclusionary land use control), *cert. denied*, 422 U.S. 1042 (1975); Laufman v. Oakley Bldg. & Loan Co., 408 F. Supp. 489, 492-93 (S.D. Ohio 1976) (mortgage red-lining); Zuch v. Hussey, 394 F. Supp. 1028, 1047 (E.D. Mich. 1975) (racial steering), *aff'd in relevant part*, 547 F.2d 1168 (6th Cir. 1977). In *Black Jack*, the plaintiff alleged that the city's adoption of a municipal zoning ordinance denied housing to persons on the basis of race. 508 F.2d at 1182. The complaint in *Laufman* claimed that the defendant mortgage company violated Title VIII by outlining areas in the community where minority groups concentrated and refusing to make loans in those areas. 408 F. Supp. at 492-93. The *Zuch* plaintiffs asserted that the defendant real estate agencies steered prospective buyers into a certain housing area on the basis of race. 394 F. Supp. at 1037.

[6] *See* Comment, *Applying the Title VII Prima Facie Case to Title VIII Litigation*, 11 HARV. C.R.-C.L. REV. 128, 140 (1976) [hereinafter cited as *Prima Facie Case*] (public entities and private parties both subject to Title VIII prohibitions). Title VIII's provisions primarily affect members of the housing industry. U.S. COMM'N ON CIVIL RIGHTS, UNDERSTANDING FAIR HOUSING 3 (1973). The courts have held that Title VIII also applies to municipalities and public agencies. *See, e.g.*, United States v. City of Parma, 661 F.2d 562, 573 (6th Cir. 1981) (Title VIII applies to activities of municipalities); United States v. City of Black Jack, 508 F.2d 1179, 1183-84 (8th Cir.) (local governments not immune from proscriptions of Title VIII), *cert. denied*, 422 U.S. 1042 (1975).

Congress explicitly exempted from Title VIII's coverage the sale of a single family house when the owner owns no more than three such houses at any one time, uses no discriminatory advertisements, and lists none of the dwellings with a rental service. 42 U.S.C. § 3603 (1976). Congress, in Title VIII, also exempted property owned by religious organizations and used for other than a commercial purpose. *Id.* § 3607.

[7] 42 U.S.C. § 3604(a) (1976); *see, e.g.*, United States v. Mitchell, 580 F.2d 789, 791 (5th Cir. 1978) (significant discriminatory effect stemming from rental decisions violated § 3604(a) of Title VIII); Stevens v. Dobbs, 483 F.2d 82, 83 (4th Cir. 1973) (apartment owner's rental policy based on racial animus violated Title VIII).

in advertising,[8] denying access to brokerage services,[9] or denying real estate loans.[10]

A judicial determination of discrimination is a prerequisite for a violation of Title VIII.[11] Courts have employed two different standards to ascertain whether a particular action by a public or private party discriminates in violation of Title VIII.[12] Courts applying the traditional standard hold a Title VIII violation exists when a plaintiff shows that the defendant's discriminatory intent or purpose motivated the challenged practice.[13] Courts also apply the prima facie concept, a more recent standard courts developed to detect violations of Title VII of the Civil Rights Act of 1964[14] (Title VII) in employment discrimination cases.[15] In Title VII litigation, the plaintiff establishes a prima facie case of employment discrimination by demonstrating that a facially neutral employment

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[8] 42 U.S.C. § 3604(c) (1976); *see* United States v. Hunter, 459 F.2d 205, 211 (4th Cir.) (publication of discriminatory rental notice in newspaper violated § 3604(c) of Title VIII), *cert. denied*, 409 U.S. 934 (1972).

[9] 42 U.S.C. § 3606 (1976); *see* Johnson v. Jerry Pals Real Estate, 485 F.2d 528, 529 (7th Cir. 1973) (agent's failure to provide complete rental listings to black couple violated § 3606 of Title VIII).

[10] 42 U.S.C. § 3605 (1976); *see* Laufman v. Oakley Bldg. & Loan Co., 408 F. Supp. 489, 493-95 (S.D. Ohio 1976) (building and loan association's mortgage red-lining practice violated § 3605 of Title VIII); *supra* note 5 (definition of mortgage red-lining).

[11] *See* United States v. City of Parma, 494 F. Supp. 1049, 1053-54 (N.D. Ohio 1980) (Congress designed Title VIII to prohibit all forms of discrimination), *cert. denied*, ___ U.S. ___, 102 S.Ct. 1972, *reh. denied*, ___ U.S. ___, 102 S.Ct. 2308 (1982).

[12] *Id.* at 1053 (courts have applied two different standards of proof under Title VIII).

[13] *Id.*; *see, e.g.*, United States v. Northside Realty Assocs., 474 F.2d 1164, 1171 (5th Cir.) (court analysis of defendant's liability under Title VIII employed intent standard), *cert. denied*, 424 U.S. 977 (1976); United States v. West Peachtree Tenth Corp., 437 F.2d 221, 226 (5th Cir. 1971) (court used intent standard under Title VIII); *see also Testers*, *supra* note 2, at 178 (in early Title VIII litigation plaintiffs had burden of showing that challenged action resulted solely from racial considerations). To prove a Title VIII violation under the intent standard, the plaintiff must show that racial motivation was one factor in the defendant's formulation of the challenged practice. *See* Robinson v. 12 Lofts Realty, Inc., 610 F.2d 1032, 1042 (2d Cir. 1979) (race need not be sole motivating factor behind challenged action for violation of Title VIII to occur); Williams v. Matthews Co., 499 F.2d 819, 826 (8th Cir.) (racial considerations in formation of housing policies is impermissible even when racial policy is not sole motive behind challenged conduct), *cert. denied*, 419 U.S. 1021 (1974).

Under the intent standard, a plaintiff must prove that the defendant intentionally discriminated to establish violations of the fifth amendment and the equal protection clause of the fourteenth amendment. *See Testers*, *supra* note 2, at 179 (constitutional violations require proof of intentional discrimination); *infra* text accompanying notes 73 & 74 (Supreme Court has held that constitutional claims of discrimination require proof of discriminatory intent).

[14] Pub. L. No. 88-352, § 701, 78 Stat. 253 (codified at 42 U.S.C. §§ 2000e to 2000e-17 (Supp. III 1979)). Sections 2000e-2(a)(1) and (a)(2) of Title VII prohibit employers from discriminating against any individual because of race, color, religion, sex or national origin in both public and private employment. 42 U.S.C. §§ 2000e-2 (a)(1) to 2000e-2(a)(2) (Supp. III 1979).

[15] *See infra* text *Prima Facie Case*, *supra* note 6, at 128-29 (courts recently have addressed question of applicability of Title VII prima facie standard to Title VIII).

practice has a racially discriminatory effect.[16] Courts applying the prima facie concept to Title VIII litigation have held that a plaintiff establishes a prima facie case of housing discrimination by demonstrating that a facially neutral housing practice has a discriminatory effect, even without showing the defendant's discriminatory intent.[17]

The Supreme Court has not yet ruled on whether a showing that a housing practice has a discriminatory effect sufficiently establishes a prima facie Title VIII violation.[18] Several lower courts, however, have

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[16] Griggs v. Duke Power Co., 401 U.S. 424, 430 (1971). In *Griggs*, the court first promulgated the prima facie test. *Id.* at 431-33. The Court held that the plaintiff's showing of discriminatory effect was sufficient to prove that the defendant violated Title VII without requiring the plaintiff to show the defendant's discriminatory intent. *Id.* at 432.

[17] *See, e.g.*, Resident Advisory Bd. v. Rizzo, 564 F.2d 126, 146 (3d Cir. 1977) (plaintiff established prima facie Title VIII case by proving that defendant's conduct has discriminatory effect), *cert. denied*, 435 U.S. 908 (1978); Smith v. Anchor Bldg. Corp., 536 F.2d 231, 233 (8th Cir. 1976) (concept of prima facie case applies to housing discrimination suits); United States v. City of Black Jack, 508 F.2d 1179, 1184 (8th Cir.) (Title VIII cases employ concept of prima facie case that requires plaintiff to establish discriminatory effect), *cert. denied*, 422 U.S. 1042 (1975).

In fair housing actions, housing practices or regulations promulgated by public entities or private individuals that promote segregation or cause greater harm to a protected group than to the population as a whole produce "discriminatory effects." *See* Comment, *Justifying a Discriminatory Effect Under the Fair Housing Act: A Search for the Proper Standard*, 27 U.C.L.A. L. REV. 398, 399 n.8 (1979) [hereinafter cited as *Proper Standard*] (discriminatory effects definition).

To measure the nature of the discriminatory effect necessary for the plaintiff to establish a prima facie case under Title VIII, the courts have relied on statistical analysis. *See Testers*, *supra* note 2, at 182. One approach to statistical proof of racial discrimination is the minority underrepresentation method. *See Schwemm*, *supra* note 3, at 243. The underrepresentation method permits the court to infer discrimination in cases in which minorities are underrepresented in or totally absent from the defendant's housing. *Id.* at 243-44. Another approach to statistical proof of racial discrimination is for the plaintiff to present proof that a facially neutral selection practice of the defendant disproportionately excludes minorities from the defendant's housing. *Id.* at 246.

The use of testers is another means of establishing a prima facie case of racial discrimination. *Testers*, *supra* note 2, at 183. Testers are people who investigate whether racial motivation influenced a particular denial of housing. *Id.* at 184. The tester poses as a prospective tenant or homebuyer to determine the reaction of a particular landlord or real estate agent to the tester's race. *Id.* at 183-84.

[18] On two occasions the Supreme Court has remanded a Title VIII housing case to the lower courts rather than rule on the prima facie standard. *See* Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 270 (1977) (remanded to Seventh Circuit to decide whether defendant's housing policy violated Title VIII); Joseph Skillken & Co. v. City of Toledo, 429 U.S. 1068, 1075 (1977) (remanded to the Sixth Circuit for further consideration of Title VIII issue in light of *Arlington Heights* decision). On remand, the Seventh Circuit in *Arlington* held that the discriminatory effects produced by the defendant's housing policy established a prima facie violation of Title VIII. Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights, 558 F.2d 1283, 1294 (7th Cir. 1977) (*Arlington II*), *cert. denied*, 434 U.S. 1025 (1978); *see infra* text accompanying notes 63-68 (*Arlington II* discussion). On remand in *Skillken*, the Sixth Circuit adhered to its previous decision that the refusal of a municipal defendant to rezone an area to permit building of low-income public housing was not unconstitutionally discriminatory. Joseph Skillken & Co. v. City of

ruled that the prima facie concept applies to Title VIII litigation for a number of reasons.[19] The courts use the prima facie Title VII standard because of the similar statutory language of Titles VII and VIII.[20] The courts also apply the Title VII prima facie standard because both Titles VII and VIII address the consequences of discrimination and not simply the motivation behind it.[21] Moreover, courts have held the prima facie standard applicable to Title VIII because of the difficulties inherent in proving a defendant's specific intent to discriminate.[22]

Toledo, 558 F.2d 350, 351 (6th Cir. 1977); *see* Joseph Skillken & Co. v. City of Toledo, 528 F.2d 867, 879 (6th Cir. 1975) (original Sixth Circuit decision), *vacated and remanded*, 429 U.S. 1068 (1977), *decision adhered to*, 558 F.2d 350 (6th Cir.), *cert. denied*, 434 U.S. 985 (1977). In a brief *per curiam* opinion, the Sixth Circuit concluded that the Supreme Court's decision in *Arlington Heights* supported its previous decision. 558 F.2d at 351. The remand opinion, like the earlier Sixth Circuit decision, did not discuss the plaintiff's Title VIII claim. *See id.* at 350-51.

The sparse legislative history of Title VIII does not establish whether Title VIII prohibits neutral housing practices with unintended discriminatory effects. *See Schwemm*, *supra* note 3, at 209 (nothing in legislative history of Title VIII clearly resolves question whether Title VIII covers cases of discriminatory effect). The fair housing laws were an amendment to a civil rights workers' protection bill the House Judiciary Committee proposed in June, 1967. *See* H.R. 2516, 90th Cong., 2d Sess.; *see also* S. REP. No. 721, 90th Cong., 2d Sess. 2, *reprinted in* 1968 U.S. CODE CONG. & AD. NEWS 1837, 1838. Title VIII came to the Senate floor as an amendment to the Civil Rights Bill in 1968. 114 CONG. REC. 2270-73 (1968). The assassination of Martin Luther King and the general racial tensions of the late 1960's served to accellerate congressional consideration of the amendment. *Schwemm*, *supra* note 3, at 208; *see* 114 CONG. REC. 2274 (1968) (statement of Sen. Mondale) (fair housing legislation is keystone to any solution of present urban crisis). The amended version of the bill quickly passed both the House and the Senate, resulting in a dearth of committee hearings, reports, or other legislative papers courts often use to ascertain legislative intent. *See* Comment, *A Last Stand in* Arlington Heights: *Title VIII and the Requirement of Discriminatory Intent*, 53 N.Y.U.L. REV. 150, 158 n.58 (1978) [hereinafter cited as *Last Stand*] (rapid passage of Title VIII resulted in dearth of legislative papers). A number of courts have examined the length Senate debates to determine congressional intent. *Id.*; *see* Resident Advisory Bd. v. Rizzo, 564 F.2d 126, 147 (3d Cir. 1977) (examined Senate debates to determine congressional purpose behind Title VIII), *cert. denied*, 435 U.S. 908 (1978).

[19] *See infra* text accompanying notes 20-22 (courts' rationale for applying Title VII prima facie standard to Title VIII violations).

[20] *See infra* notes 69 & 78 (Seventh and Third Circuits recognized statutory language of Titles VII and VIII is similar).

[21] *See, e.g.*, Resident Advisory Bd. v. Rizzo, 564 F.2d 126, 147 (3d Cir. 1977) (court noted Supreme Court has emphasized need to construe both Title VII and Title VIII broadly), *cert. denied*, 435 U.S. 938 (1978); United States v. City of Black Jack, 508 F.2d 1179,1184-85 (8th Cir. 1974) (prima facie concept governs burden of proof in Title VIII cases because effect not motivation is touchstone), *cert. denied*, 422 U.S. 1042 (1975); *see also Prima Facie Case*, *supra* note 6, at 154 (purpose of Title VII and Title VIII is to redress consequences of discrimination).

[22] *See, e.g.*, Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights, 558 F.2d 1283, 1288-90 (7th Cir.) (strict focus on intent allows racial discrimination to go unpunished absent evidence of overt bigotry), *cert. denied*, 434 U.S. 1025 (1978); United States v. City of Black Jack, 508 F.2d 1179, 1184-85 (8th Cir. 1974) (prima facie test provides proper standard

In *Smith v. Town of Clarkton*,[23] the Fourth Circuit applied the Title VII prima facie standard to a Title VIII suit in which a black plaintiff alleged that Clarkton's withdrawal from a low income housing authority discriminated against the town's minority population.[24] The *Smith* plaintiff was a candidate for admittance to a proposed unit of public housing.[25] The proposed housing project was part of a joint governmental venture undertaken by the city of Clarkton, North Carolina, the Clarkton Housing Authority, and two neighboring towns, to acquire and operate low income public housing in the area.[26] The cooperative decided, after consultations with the Department of Housing and Urban Development (HUD), to construct fifty units of public housing in Clarkton.[27] HUD approved the cooperative's application for construction and funding of the housing units and the cooperative purchased fifteen acres of land.[28]

Soon after the cooperative purchased the fifteen acre site, a number of Clarkton residents questioned the projected need for public housing in Clarkton.[29] Public sentiment adverse to the housing project led the

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under Title VIII because clever men easily conceal racial motivation), *cert. denied*, 422 U.S. 1042 (1975).

The difficulty of proving specific intent in fair housing cases arises because many discriminatory effects stem from facially neutral actions that perpetuate the effects of past patterns of racial discrimination. *See Testers*, *supra* note 2, at 170 n.6. For example, a requirement that new tenants secure recommendations appears facially neutral, but when the landlord imposes the requirement on black residents only, the practice perpetuates segregation. *See* United States v. Grooms, 348 F. Supp. 1130, 1134 (M.D. Fla. 1972). In *Grooms*, the United States sought injunctive relief against the owners and operators of a mobile home park. *Id.* at 1131. The complaint alleged that the defendants engaged in a pattern or practice of housing discrimination by requiring that prospective black tenants obtain recommendations from incumbent residents of the park. *Id.* at 1132. The district court held that defendants' housing policy treated the prospective black tenants differently because the defendants admitted white tenants without demanding recommendations. *Id.* at 1132-33. The court therefore ruled that the defendant engaged in a pattern or practice of housing discrimination in violation of Title VIII. *Id.* at 1134.

Specific intent to discriminate is also difficult to identify because defendants can disguise racial prejudice easily. *Testers*, *supra* note 2, at 170; *Prima Facie Case*, *supra* note 6, at 151; *see* U.S. COMM'N ON CIVIL RIGHTS, UNDERSTANDING FAIR HOUSING 15-16 (1973) (racial discrimination in United States largely hidden).

[23] 682 F.2d 1055 (4th Cir. 1982).

[24] *Id.* at 1065.

[25] *Id.* at 1062.

[26] *Id.* at 1061. In *Smith*, Clarkton officials established the Clarkton Housing Authority (CHA) in 1968 to secure public housing funds for the town. *Id.* After failing to obtain the funds, the CHA united with the nearby towns of Bladenboro and Elizabethtown to form the Joint Municipal Housing Cooperative (JMHC). *Id.*

[27] *Id.*

[28] *Id.* The *Smith* court found that in addition to the Department of Housing and Urban Development (HUD), various federal and state agencies approved the JMHC's public housing plan. *Id.* Upon receiving the agencies' approval of the plan, the JMHC bought a fifteen acre site for the housing project, hired and architect, and considered plans to survey the site area. *Id.*

[29] *Id.* at 1061-62. In *Smith*, the public expressed opposition to the housing development

Town Commission to withdraw Clarkton from the joint cooperative.[30] Town officials blocked a subsequent effort by local black residents to build alternative low income housing in Clarkton.[31] Shortly thereafter, plaintiff Smith filed suit against the city of Clarkton and four town officials alleging violations of Title VIII and the equal protection clause of the fourteenth amendment.[32] In the complaint, the plaintiff alleged that community opposition to the project directly influenced the official decision to withdraw Clarkton from the housing authority.[33] The plaintiff fur-

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in various ways. A petition signed by Clarkton residents conveyed an initial display of community animus. *Id.* at 1061. In the petition, the town citizens requested a delay of construction on the project to allow local residents time to study the need for public housing in Clarkton. *Id.* At a subsequent public hearing, citizens of Clarkton raised numerous objections to the project. *Id.* at 1062. At trial, the testimony of local residents revealed further community opposition as expressed in past conversations relating to the proposed project. *Id.* The last express act of community opposition occurred when a group of local taxpayers demanded that the town commissioners conduct an opinion poll. *Id.*

[30] *Id.* at 1062. To gauge public sentiment concerning the project, the town officials in *Smith* conducted an opinion poll. *Id.* The poll showed 146 registered voters opposing the proposed housing, while 98 favored the housing development. *Id.* The town commissioners subsequently withdrew the CHA from the JMHC. *Id.*

[31] *Id.* at 1062-63. A group of Clarkton black residents in *Smith* formed the Bladen County Improvement Association to develop low income housing in Clarkton. *Id.* at 1062. The town officials opposed the project in favor of a plan the Commission devised to build 20 units of housing for the elderly and handicapped on the original fifteen acre site, with 30 units of general low income housing outside the town limits. *Id.*

[32] *Id.* at 1059. Title VIII offers two alternative remedies for plaintiffs filing suit under the statute. U.S. COMM'N ON CIVIL RIGHTS, TWENTY YEARS AFTER BROWN 38 (1975) [hereinafter cited as TWENTY YEARS]. Victims of discrimination in housing who prefer an administrative remedy may file a written complaint with the Secretary of HUD within 180 days of the alleged discriminatory practice. 42 U.S.C. § 3610(a)-(b) (1976). HUD, the agency responsible for the administration of Title VIII, then has 30 days to act on the complaint. *Id.* § 3610(a). HUD's enforcement powers include the receipt, investigation, and eventual resolution of the complaint through voluntary compliance with HUD orders. *See id.* §§ 3610, 3611(a); TWENTY YEARS, *supra*, at 38 (enforcement of HUD orders occurs mainly through voluntary compliance). The agency has no power to request temporary or permanent injunctions or restraining orders. TWENTY YEARS, *supra*, at 38. If HUD is unable to reconcile a complaint, the Secretary of HUD may refer the grievance to the Justice Department, and the United States Attorney General may proceed with litigation. *Id.*, *see* 42 U.S.C. § 3611(g) (1976) (Attorney General provision).

The aggrieved party may choose a judicial remedy as an alternative to the administrative remedy. *See* U.S. COMM'N ON CIVIL RIGHTS, EQUAL OPPORTUNITY IN SUBURBIA 3 (1974) (judicial and administrative remedies under Title VIII). A party may file a civil action under Title VIII in federal court that has jurisdiction over the parties or in state courts of general jurisdiction. 42 U.S.C. § 3612(a) (1976). Title VIII empowers the courts to grant temporary or permanent injunctions, restraining orders and any damages deemed appropriate *Id.* § 3612(c).

Title VIII also empowers the United States Attorney General to bring civil actions on his own initiative in cases involving a pattern or practice of racial discrimination, or if the case raises an issue of general public importance. *Id.* § 3613. The Attorney General may apply for a permanent or temporary injunction, restraining order, or any other order he deems necessary. *Id.*

[33] 682 F.2d at 1059. In the original complaint, the plaintiff Smith alleged violations

ther alleged that racial bias motivated the public opposition and that the officials acted with personal knowledge of the public bias in deciding to block the housing project.[34]

The *Smith* trial court held that the defendants violated Title VIII and the equal protection clause of the fourteenth amendment.[35] The trial court reasoned that the defendants' decision to withdraw Clarkton's participation from the housing authority resulted solely from Clarkton residents' opposition to the housing project.[36] The court concluded that racial bias was the principal basis of the public's opposition to the project and that the defendants blocked the project knowing the racial nature of the public animus.[37] In addition, the trial court ordered affirmative remedial action, requiring the defendants to take all steps necessary to construct or cause the construction of fifty low income housing units in Clarkton.[38]

On appeal to the Fourth Circuit, the defendants argued that the trial court's factual findings were clearly erroneous, including the determination that improper discriminatory motives prompted the defendant's action.[39] In addition, the defendants argued that even if the trial court cor-

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under various statutes protecting his right to the full and equal benefit of all United States laws and providing for civil actions by United States citizens for deprivation of rights secured by law. *Id.*; *see* 42 U.S.C. § 1981 (1976) (minority persons within jurisdiction of United States have full and equal benefit of all laws enjoyed by white citizens); 42 U.S.C. § 1982 (all minority United States citizens have same rights as white citizens to purchase, lease, sell, hold, and convey real and personal property). The *Smith* trial court granted the plaintiff's motion to amend the complaint to allege jurisdiction under Title VIII. 682 F.2d at 1059; *see* 42 U.S.C. § 3612(a) (1976) (jurisdiction of courts under Title VIII). The court later dismissed the claims based on §§ 1981 and 1982. 682 F.2d at 1059 n.1. Since the plaintiff chose not to appeal the dismissal, the Fourth Circuit did not address the dismissal. *Id.*

[34] 682 F.2d at 1059; *see supra* notes 28 & 29 (public opposition to housing project and defendants' decision to withdraw Clarkton from JMHC).

[35] 682 F.2d at 1059; *see* 42 U.S.C. § 3604 (1976) (unlawful to refuse to sell or rent dwelling to any person because of race, color, religion, sex or national origin).

[36] 682 F.2d at 1063.

[37] *Id.*; *see supra* notes 29 & 30 (evidence of public opposition and opinion poll).

[38] 682 F.2d at 1067. In addition to requiring the defendants' in *Smith* to take all steps necessary to construct the housing units, the *Smith* trial court ordered the defendants to rescind the Town Commissioners' action withdrawing the CHA from the JMHC. *Id.* The trial court also ordered the defendants to rescind the Town Commissioners' action approving plans to build twenty units of elderly and handicapped housing in Clarkton. *Id.* The trial court then instructed the defendants to take affirmative steps to facilitate the construction of the housing units by one or more methods, such as reinstating Clarkton in the JMHC, requiring the CHA to construct the fifty units, or requiring the defendants to construct the housing units themselves. *Id.*

[39] *Id.* at 1064; *see* FED. R. CIV. P. 52(a) (appellate courts may reverse factual findings only if clearly erroneous). The defendants alleged that the trial court, in making its factual determinations, erred in admitting certain evidence that was irrelevant and prejudicial or hearsay under the Federal Rules of Evidence. 682 F.2d at 1064; *see* FED. R. EVID. 402, 403, 802 (exclusion of irrelevant, prejudicial or hearsay evidence). The defendants also asserted that the trial court erred in allowing the plaintiff to amend the complaint five weeks before

rectly determined the defendants' liability for obstructing the construction of the public housing with discriminatory intent, the trial court seriously erred in devising the remedial action.[40]

The Fourth Circuit held that the trial court's factual findings were not clearly erroneous.[41] The *Smith* court reasoned that the facts adduced at trial clearly demonstrated violations of Title VIII and the equal protection clause of the fourteenth amendment.[42] In considering the Title VIII violation, the Fourth Circuit held that the prima facie concept, employed by courts in Title VII cases, applies to Title VIII violations.[43] The Fourth Circuit cited Third and Seventh Circuit decisions in which

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the trial. 682 F.2d at 1059. The defendants argued the amendment violated Title VIII's 180 day statute of limitations. *Id.*; *see* 42 U.S.C. § 3612(a).

[40] 682 F.2d at 1060; *see supra* text accompanying note 38 (district court ordered affirmative remedial action). The defendants alleged that the trial court's order exceeded the traditional scope of equity powers because the defendants had no statutory or constitutional duty to provide low income housing. 682 F.2d at 1067.

[41] 682 F.2d at 1064. The *Smith* court noted that the case record amply supported the trial court's factual findings. *Id.* at 1060. The Fourth Circuit also held that the district court did not err in admitting the contested testimony at trial. *Id.* at 1064; *see supra* note 39 (defendant's relevance and hearsay arguments). Moreover, the *Smith* court held that even if the trial court had admitted the testimony erroneously, the error was harmless under Federal Rule of Evidence 103. 682 F.2d at 1064; *see* FED. R. EVID. 103 (ruling that admits or excludes evidence only erroneous if ruling affects substantial right of parties). In upholding the trial court's factual findings, the Fourth Circuit emphasized that discrimination cases involving evidence of the defendant's motive and intent require cautious evaluation by the courts. 682 F.2d at 1064. The *Smith* court noted that the difficulty plaintiffs encounter in providing evidence of specific intent to discriminate arises because individuals acting from invidious motives seldom make open statements of discriminatory intent. *Id.* The Fourth Circuit held that the trial record in *Smith* presented more direct evidence revealing the motives behind the defendants' conduct than usually appears in racial discrimination cases. *Id.* at 1065.

The *Smith* court also held that the original complaint alleged facts sufficient to state a claim under either the fourteenth amendment or Title VIII. *Id.* at 1060. The *Smith* court employed the liberal amendment policies of Federal Rule of Civil Procedure 15(a) (Rule 15(a)) and held that the plaintiff's complaint supported an alternative claim of relief under Title VIII. *Id.* at 1059-60; *see* FED. R. CIV. P. 15(a). Rule 15(a) states that courts have broad discretion to allow amendment of the plaintiff's pleadings when justice requires. *Id.*; *see* Foman v. Davis, 371 U.S. 178, 182 (1962) (Rule 15(a) allows amendment of plaintiff's pleadings when justice requires and facts plaintiff relied on in pleadings constitute proper grounds of relief); Bamm, Inc. v. GAF Corp., 651 F.2d 389, 391 (5th Cir. 1981) (review of trial court's decision to grant leave to amend entailed determination of whether trial court abused discretion). The Fourth Circuit in *Smith* employed the relation back provision of Rule 15(c) to satisfy Title VIII's statute of limitations. 682 F.2d at 1060; *see* FED. R. CIV. P. 15(c) (when claim in amended complaint arose out of transaction set forth in original complaint, amendment relates back to date of original pleading); *see* 42 U.S.C. § 3612(a) (1976) (civil actions under Title VIII must commence within 180 days of alleged discriminatory housing practice).

[42] 682 F.2d at 1065-66; *see* 42 U.S.C. § 3604(a) (1976) (refusal to rent or sell a dwelling because of race or color violates Title VIII); U.S. Const. amend. XIV, § 1 (equal protection clause).

[43] 682 F.2d at 1065; *see supra* text accompanying notes 14-17 (prima facie standard).

the courts had employed the prima facie concept in Title VIII cases because of the common goals of both Titles VII and VIII.[44] The Fourth Circuit also employed the four-prong test the Seventh Circuit adopted in *Metropolitan Housing Development Corporation v. Village of Arlington Heights*[45] (*Arlington II*) to determine whether the defendant's conduct produced discriminatory effects sufficient to violate Title VIII.[46] The *Arlington II* court premised its analysis on the theory that not all discriminatory effects are illegal.[47] The four factors that determine when conduct with a discriminatory effect constitutes a violation of the Act include the strength of the plaintiff's showing of discrimination, a showing of the defendant's intent, the interest of the defendant in the challenged action, and the nature of the relief sought by the plaintiff.[48]

Applying the *Arlington II* test to the events in *Smith*, the Fourth Circuit held that the plaintiff made a strong showing of the discrim-

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[44] 682 F.2d at 1065. In support of the application of the prima facie test to Title VIII, the *Smith* court relied on the precedent of the Seventh and the Third Circuits. *Id.*; *see* Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights (*Arlington II*), 558 F.2d 1283, 1289-90 (7th Cir. 1977), *cert. denied*, 434 U.S. 1025 (1978); Residents Advisory Bd. v. Rizzo, 564 F.2d 126, 146-48 (3d Cir. 1977), *cert. denied*, 435 U.S. 908 (1978); *infra* notes 65-78 and accompanying text (discussion of *Arlington II* and *Rizzo*).

[45] 558 F.2d 1283 (7th Cir.), *cert. denied* 434 U.S. 1025 (1978).

[46] 682 F.2d at 1065-66; *see infra* text accompanying note 48 (*Arlington II* test).

[47] 558 F.2d at 1290. The *Arlington II* court emphasized that courts should not find every action that produces a discriminatory effect illegal because a per se rule would exceed the intent of Congress in passing Title VIII. *Id.* The Seventh Circuit recommended that courts use their discretion and evaluate Title VIII relief on a case-by-case basis. *Id.*

[48] 558 F.2d at 1290. The *Arlington II* court, in devising a four-prong test for measuring the defendant's burden of justification, outlined each of the four factors separately. *Id.* at 1290-93. Addressing the first factor, which requires a showing of discriminatory effect, the court identified two kinds of racially discriminatory effects that a facially neutral decision about housing may produce. *Id.* at 1290-91. One type of discriminatory effect occurs when the defendant's facially neutral decision adversely impacts one racial group more than another. *Id.* at 1290. Another type of discriminatory effect occurs when the defendant's decision prevents interracial association in the community. *Id.* at 1290-91.

Considering the second factor, which requires some showing of intent, the *Arlington II* court noted that the plaintiff may provide evidence of the defendant's intent without meeting the constitutional standard of intent required under equal protection claims. *Id.*; *see infra* text accompanying notes 74-76 (constitutional intent standard). The *Arlington II* court concluded that the intent factor was the least important of the four factors in the test. 558 F.2d at 1292. The court reasoned that judicial emphasis on purposeful discrimination forces courts to rely on a conjectural inference that the defendant acted with bad intent. *Id.* Moreover, the Seventh Circuit considered that the problems involved in acquiring conclusive proof of discriminatory intent exist even when the plaintiff seeks to develop only partial evidence of intent. *Id.*

Addressing the third factor, which requires a showing of the defendant's interest in taking the challenged action, the *Arlington II* court considered three types of defendants. *Id.* at 1293. When the defendant is a private group or individual, the Seventh Circuit asserted that courts must undertake a rigorous examination of the defendants' interests when the discriminatory effect serves to perpetuate segregation. *Id.* For similar reasons, the *Arlington II* court considered a critical judicial examination appropriate when the

inatory effects of the defendant's conduct.[49] In addition, the *Smith* court held that the plaintiff proved the racial motivation behind the public opposition to the housing project.[50] The Fourth Circuit further ruled that the defendants had no legitimate justification for the decision to withdraw Clarkton from the proposed project.[51] Applying the last factor of the *Arlington* test, the Fourth Circuit noted that the plaintiff sought only to restore the status quo regarding the construction of low income housing in Clarkton.[52] The *Smith* court concluded that, under the *Arlington II* test, the discriminatory effects the defendants' conduct produced were significant enough to establish a Title VIII violation.[53]

Addressing the defendant's argument concerning the scope of the trial court's equity powers, the Fourth Circuit modified the portion of the trial court's remedial order requiring Clarkton to construct or cause the construction of fifty units of public housing.[54] The Fourth Circuit stated that, as a general proposition, courts have broad and flexible equitable powers to fashion remedies that correct past wrongs.[55] The *Smith* court held that in Title VIII violation cases broad remedial powers stemmed from the congressional intent underlying the statute.[56] The Fourth Cir-

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defendant is a governmental body acting outside the scope of its authority. *Id.* When the defendant is a governmental body acting within the scope of legitimately derived authority, however, the court called for a higher degree of judicial deference. *Id.*

Concerning the final factor, the nature of the relief sough by the plaintiff, the court drew a distinction between cases in which a plaintiff attempts to force municipal defendants to provide housing for minorities and cases in which the plaintiff seeks to prevent the defendant from interfering with the plaintiff's attempt to build integrated housing. *Id.* The court noted that to require a municipal defendant to appropriate money, land, and manpower to provide integrated housing is a massive judicial intrusion on governmental autonomy. *Id.* The Seventh Circuit reasoned, therefore, that courts should be more reluctant to grant affirmative relief than to restrain the defendant's inference with the plaintiff's private plans for integrated housing. *Id.*

[49] 682 F.2d at 1065-66. The *Smith* court, in assessing the discriminatory effects of the defendants' conduct, relied on statistical evidence that the defendants' decision to terminate the housing project primarily affected the black residents of the Clarkton area. *Id.* at 1065. The evidence showed that the black population was the group most in need of new construction to replace substandard housing and the group with the highest percentage of presumptively eligible applicants. *Id.*

[50] *Id.* at 1065; *see supra* text accompanying note 37 (district court held that racial basis motivated public opposition to housing project).

[51] 682 F.2d 1065; *see supra* text accompanying note 3 (district court finding that racial bias was principle basis of public opposition to project).

[52] 682 F.2d at 1065. The Fourth Circuit noted that the modified trial court remedial order restored the parties to the positions they occupied before the Title VIII violation occurred. *Id.*; *see infra* text accompanying notes 54-62 (Fourth Circuit modification of trial court's remedial order).

[53] 682 F.2d at 1066; *see supra* text accompanying notes 45-48 (*Arlington II* test).

[54] 682 F.2d at 1070; *see supra* text accompanying note 38 (district court's remedial order).

[55] 682 F.2d at 1068; *see* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 15 (1971) (scope of district court's equitable powers to remedy past wrongs is broad).

[56] 682 F.2d at 1068; *see supra* note 3 (purpose of Title VIII is to provide fair housing).

cuit noted a limitation, however, on the courts' power to devise Title VIII remedies.[57] The Fourth Circuit held that when a judicial remedy interferes with the normal functioning of local government to an excessive degree, the court has exceeded its remedial powers under Title VIII.[58] In *Smith* the Fourth Circuit approved that part of the trial court's order which required the defendants to take affirmative steps to reinstate the housing plans.[59] The Fourth Circuit concluded, however, that the trial court exceeded its equity powers in requiring Clarkton to construct and maintain the housing units.[60] The Fourth Circuit noted that the town officials had acted in good faith to seek better housing for the town's residents.[61] The town officials' good faith actions, considered with the town's limited resources, convinced the Fourth Circuit that the trial court's order disproportionately intruded into local government functions.[62]

Although the Fourth Circuit previously considered a Title VIII case under an implied intent standard,[63] the *Smith* decision marks the first time the Fourth Circuit has employed the Title VII prima facie standard in Title VIII litigation. The Fourth Circuit's application of the prima facie standard is consistent with decisions of the Second, Third, Fifth, Sixth, Seventh, Eighth, and Ninth Circuits.[64] One of the most important

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[57] 682 F.2d at 1069.

[58] *Id.*

[59] *Id.*; *see supra* note 38 (trial court's remedial order).

[60] 682 F.2d at 1069.

[61] *Id.*

[62] *Id.* at 1069-70. The *Smith* court cautioned that the defendants' future interference with or disregard for the modified court order could justify an affirmative order requiring the defendants to construct the housing from town resources. *Id.* at 1069.

[63] *See* Madison v. Jeffers, 494 F.2d 114, 116 (4th Cir. 1974). In *Madison*, the plaintiff alleged that the defendant property owner racially discriminated in refusing to sell land because the plaintiff was black. *Id.* at 115. The defendant asserted tax reasons for the refusal to sell the property. *Id.* at 116. The Fourth Circuit concluded that because the plaintiff did not produce evidence of racial bias on the part of the defendant, the trial court's holding that the defendant did not violate Title VIII was not clearly erroneous. *Id.* at 116-17.

[64] *See, e.g.*, Halet v. Wend Inv. Co., 672 F.2d 1305, 1331 (9th Cir. 1982) (significant discriminatory effects flowing from rental decisions demonstrate a violation of Title VIII); United States v. City of Parma, 661 F.2d 562, 576 (6th Cir. 1981) (trial court complied with proper legal standards in deciding city violated Title VIII because municipal zoning ordinance had discriminatory effects), *cert. denied*, ___ U.S. ___, 102 S. Ct. 1972, *reh. denied*, ___ U.S. ___, 102 S. Ct. 2308 (1982); United States v. Mitchell, 580 F.2d 789, 791 (5th Cir. 1978) (Title VIII prohibits direct discrimination and practices with discriminatory effects); Wharton v. Knefel, 562 F.2d 550, 555 (8th Cir. 1977) (prima facie standard governs Title VIII cases); Smith v. Anchor Bldg. Corp., 536 F.2d 231, 233 (8th Cir. 1976) (concept of prima facie case applies to housing discrimination cases under Title VIII); *see also infra* text accompanying notes 65-78 (Seventh and Third Circuit Courts held that discriminatory effects violated Title VIII).

The Second Circuit recently decided that proof of discriminatory effects is sufficient to establish a Title VIII claim. *See* Robinson v. 12 Lofts Realty, Inc., 610 F.2d 1032, 1038 (2d Cir. 1979) (prima facie case proper standard under Title VIII). The *Robinson* decision con-

cases holding a Title VIII defendant to a discriminatory effects standard is the Seventh Circuit's decision in *Arlington II*.[65] The *Arlington II* court held that proof of discriminatory effects alone constitutes a prima facie violation of Title VIII.[66] The Seventh Circuit then applied a four-part test to determine whether the defendant's conduct actually violated Title VIII.[67] The Seventh Circuit's analysis emphasized the common purpose of Titles VII and VIII to end discrimination.[68] The *Arlington II* court also noted that the prohibitory language of both statutes is almost identical.[69] The Seventh Circuit concluded, on the basis of its comparison of the two

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tradicts an earlier Second Circuit decision holding that proof of a civil rights statutory violation requires the plaintiff to make a showing of discriminatory intent. *See* Boyd v. Lefrak Org., 509 F.2d 1110, 1113 (2d Cir.), *cert. denied*, 423 U.S. 896 (1975). In *Boyd*, the plaintiff welfare recipients brought a class action on behalf of all New York City welfare recipients, who claimed that the defendant landlords' rental policies prevented them from renting any of the defendants' apartments. *Id.* at 1111. The defendants' challenged rental policy required applicants for apartments to have weekly net income equal to at least 90% of the monthly rent of the unit desired. *Id.* The plaintiffs claimed that the effect of the 90% rule was racially discriminatory and violated Title VIII. *Id.* The *Boyd* court rejected the plaintiffs' claim, holding that proof of discriminatory effect was inappropriate in private actions asserting discrimination in housing. *Id.* The *Boyd* court held in dictum, however, that proof of discriminatory effect was applicable in equal protection claims challenging government action. *Id.*

The *Boyd* decision has limited precedential value because of the *Robinson* holding. *Boyd* also is inapplicable in Title VIII cases because the court failed to distinguish constitutional from statutory standards. *See* 509 F.2d at 1111 (*Boyd* court held that plaintiffs may establish constitutional claims of discrimination by proving discriminatory effect). In holding that equal protection claims may be decided by a showing of discriminatory effect, the *Boyd* court directly contradicted the Supreme Court's decision in *Washington v. Davis* that requires plaintiffs to show the defendants' discriminatory intent under equal protection claims. *See* Washington v. Davis, 426 U.S. 229, 239 (1976) (proof of discriminatory intent necessary to establish constitutional claim of racial discrimination); *infra* text accompanying notes 74-76 (*Davis* discussion).

[65] Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights, 558 F.2d 1283 (7th Cir. 1977), *cert. denied*, 434 U.S. 1025 (1978).

[66] 558 F.2d at 1290.

[67] *Id.*; *see supra* text accompanying note 48 (*Arlington II* four-part test).

[68] 558 F.2d at 1289. The *Arlington II* court's analysis of Title VII and Title VIII focused on the Supreme Court's treatment of Title VIII cases. *Id.* at 1288-89. The Seventh Circuit noted that the Supreme Court's decision in *Washington v. Davis* establishing an intent standard for equal protection cases did not affect the plaintiff's ability to establish a Title VII prima facie case of employment discrimination by evidence of discriminatory impact alone. *Id.*; *see infra* text accompanying notes 75 & 76 (*Washington v. Davis* decision). Reviewing Supreme Court decisions relating to Title VII, the Seventh Circuit noted that the Court construed Title VII broadly to effectuate the congressional purpose of ending discriminatory employment practices. *Id.* at 1289. Employing the same approach, the *Arlington II* court recognized the need to construe Title VIII broadly to implement the congressional goal of ending discrimination in housing. *Id.*

[69] 558 F.2d at 1289. The *Arlington II* court's analysis of the language of Title VII and Title VIII focused on the "because of race" phrase in both statutes. *Id.* The Seventh Circuit noted that the Supreme Court did not consider the "because of race" language in Title VII sufficient for the Court to impose an intent standard, and concluded that the same language in Title VIII did not preclude a discriminatory effects standard under Title VIII. *Id.* at 1289 n.6.

statutes, that a showing of discriminatory intent is not necessary to establish a Title VIII violation and that the defendant's conduct produced discriminatory effects sufficient to prove a violation.[70]

The Third Circuit adopted the prima facie standard for Title VIII litigation in *Resident Advisory Board v. Rizzo*.[71] In *Rizzo*, the Third Circuit accepted the Seventh Circuit's decision in *Arlington II* which held that a demonstration of discriminatory effect alone may establish a violation of Title VIII.[72] The *Rizzo* court specifically noted that the Seventh Circuit decided the Title VIII issue on remand from the Supreme Court's decision in *Arlington Heights v. Metropolitan Housing Development Corp.* (*Arlington I*).[73] In *Arlington I*, the Supreme Court ordered the Seventh Circuit to reconsider the appellate court's prior holding that discriminatory effects violated the equal protection clause in light of the Supreme Court decision in *Washington v. Davis*.[74] In *Davis*, the Supreme Court held that a plaintiff must show that the defendant intentionally discriminated to prove a violation of the equal protection clause of the United States Constitution.[75] The Court distinguished constitutional claims from statutory proscriptions of discrimination, stating that constitutional claims require proof of intent while antidiscrimination statutes do not require proof of discriminatory purpose.[76] In *Rizzo*, the Third Circuit reasoned that the *Davis* decision in effect held that Title VIII standards did not require proof of discriminatory intent.[77] The Third Circuit also stated that the similar language of Titles VII and VIII and the statutes' common purpose supported the court's use of the discriminatory effects standard in Title VIII litigation.[78]

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[70] *Id.* at 1289-90. The *Arlington II* court noted the difficulty of proving discriminatory intent stems from the fact that persons with intent to discriminate keep their purpose hidden to conform with the public distaste for overtly bigoted behavior. *Id.* at 1290.

[71] 564 F.2d 126 (3d Cir. 1977), *cert. denied*, 435 U.S. 908 (1978). The *Rizzo* case began when various individuals eligible for low income housing sued the City of Philadelphia, city agencies, and certain city officials. *Id.* at 129. In the complaint, the plaintiffs alleged that the defendant's failure to permit construction of a planned low income housing project violated Title VIII. *Id.* at 129-30. The district court held that the city agencies had violated Title VIII because the agencies' actions produced a discriminatory effect. *Id.* at 146.

[72] *Id.* at 148.

[73] *Id.* at 147; *see* Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 271 (1977) (Supreme Court reversed and remanded Seventh Circuit's decision).

[74] 429 U.S. at 268; *see* Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights, 517 F.2d 409, 415 (7th Cir. 1975) (Seventh Circuit holding that discriminatory effects violated plaintiff's constitutional rights); *infra* notes 73-74 (*Washington v. Davis* decision).

[75] Washington v. Davis, 426 U.S. 229, 239 (1976); *see* U.S. CONST. amend. XIV, § 1 (equal protection clause).

[76] 426 U.S. at 238-41.

[77] 564 F.2d at 147. The *Rizzo* court reasoned that if the same intent standard applied to Title VIII as to equal protection cases, the Supreme Court would have decided the Title VIII issue immediately instead of wasting judicial resources by remanding the case to the Seventh Circuit. *Id.*

[78] 564 F.2d at 147-48. In analyzing the statutory language of Titles VII and VIII, the *Rizzo* court agreed with the Seventh Circuit's conclusion that the "because of race" language in the statutes does not require proof of intentional discrimination. *Id.* at 147; *see supra* note

Defendants in Title VIII cases bear the burden of justifying practices that produce discriminatory effects.[79] The courts have disagreed about how to assess the defendant's justification.[80] In *Smith*, the Fourth Circuit adopted the Seventh Circuit's four-part *Arlington II* test.[81] The Eighth Circuit on the other hand employed the business necessity test, first developed by the courts in Title VII employment discrimination cases involving a private party defendant.[82] Courts using the Title VII business necessity test state that once a plaintiff establishes a prima facie case of discrimination, the burden of proof shifts to the defendant to show that the challenged practice arises for a legitimate business reason.[83] The Eighth Circuit, however, joined the Second Circuit in employing the compelling governmental interest test when dealing with a municipal defendant.[84] Under the compelling governmental interest standard, the court must determine whether the challenged practice in fact furthers the defendant's interests.[85] Courts applying the compelling governmental interest standard must determine whether the local governmental interest served is constitutionally permissible and whether less drastic means of achieving the goal exist.[86] In *Rizzo*, the

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69 (Seventh Circuit analysis of statutory language). The *Rizzo* court then examined Title VIII's legislative history and determined that the congressional purpose in enacting Title VIII was to eliminate discriminatory effects of past and present prejudice in housing. 564 F.2d at 147. The *Rizzo* court noted that congressional intent requires courts to construe Title VIII broadly. *Id.* The *Rizzo* court also noted that the Supreme Court recognized the need to construe both Title VII and Title VIII broadly to end discrimination. *Id.*; *see supra* note 4 (Supreme Court reads Title VIII broadly); Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971) (Court read Title VII broadly).

[79] *See* United States v. City of Parma, 494 F. Supp. 1049, 1055 (N.D. Ohio 1980) (defendant must justify challenged conduct), *cert. denied*, ___ U.S. ___, 102 S. Ct. 1972, *reh. denied*, ___ U.S. ___, 102 S. Ct. 2308 (1982).

[80] *See* Halet v. Wend Inv. Co., 672 F.2d 1305, 1311 (9th Cir. 1982) (circuit courts have applied different standards in determining importance of discriminatory effect).

[81] *See supra* text accompanying notes 49-53 (Fourth Circuit application of *Arlington II* test in *Smith* to determine defendant's burden of justification).

[82] *See* Williams v. Matthews Co., 499 F.2d 819, 827 (8th Cir.) (when plaintiff establishes prima facie case of discrimination, burden shifts to defendant to articulate some legitimate nondiscriminatory reason for challenged practice), *cert. denied*, 419 U.S. 1027 (1974).

[83] *See* Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971). If the defendant successfully rebuts the prima facie case, then the plaintiff assumes the burden of demonstrating a Title VII violation by showing that an alternative employment practice is possible that is less discriminatory and that meets the employer's legitimate concerns. Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975).

[84] *See* United States v. City of Black Jack, 508 F.2d 1179, 1186 (8th Cir. 1974) (if plaintiff establishes prima facie case, burden shifts to municipality to show compelling government interest), *cert. denied*, 422 U.S. 1042 (1976); Kennedy Park Homes Ass'n v. City of Lackawanna, 436 F.2d 108, 114 (2d Cir. 1970) (municipal defendant has burden to show compelling government interest after plaintiff establishes prima facie case), *cert. denied*, 401 U.S. 1010 (1971).

[85] 508 F.2d at 1186-87.

[86] *Id.* The compelling governmental interest test usually arises in cases involving equal protection challenges to statutes or ordinances creating suspect classifications or impinging on fundamental rights. *Id.* at 1185 n.4.

Third Circuit held that the defendant's burden of justifying discriminatory effects must be measured on a case-by-case basis.[87]

The Fourth Circuit, by applying the *Arlington II* test, ignored the test's deficiencies.[88] The *Arlington II* test does not recognize the possibility that the defendant's interests could be rooted in legitimate public policy. Although the *Arlington II* analysis allows courts to distinguish between public and private defendants, the test fails to evaluate the legitimacy of the defendants' interests or to consider the availability of alternative measures.[89] For instance, a public defendant's discriminatory zoning decision may rest on legitimate considerations of public health and safety.[90] Another deficiency of *Arlington II* test is its failure to explain whether courts should weigh all factors equally or whether some factors deserve greater consideration.[91] The *Arlington II* court indicated that courts should decide in the plaintiff's favor when

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[87] *See* 564 F.2d 126, 149 (3d Cir. 1977), *cert. denied*, 435 U.S. 908 (1978). The *Rizzo* court disapproved of the *Arlington II*, the business necessity, and the compelling governmental interest tests employed by other circuit courts. *Id.* at 148. The *Rizzo* court distinguished the compelling governmental interest test because the test normally arises in equal protection cases that require a showing of purposeful intent by the plaintiff. *Id.* The *Rizzo* court noted that requiring a Title VIII defendant to justify a challenged action by proving a compelling governmental interest places too great a burden on the defendant. *Id.* The Third Circuit also decided that the business necessity test was unacceptable in Title VIII cases. *Id.* The court noted that Title VII criteria for measuring the defendant's justification for a discriminatory employment practice is easier for courts to define and analyze than any justification of discriminatory housing practices under Title VIII. *Id.* The *Rizzo* Court distinguished the *Arlington II* test by suggesting that the *Arlington II* test applied to a court's determination of a prima facie violation of Title VIII rather than to the determination of the defendant's burden of justification. *Id.* at n.32. The *Rizzo* court concluded that the problem of measuring the defendant's justification requires a case-by-case approach. *Id.* at 149. As guidance for lower courts, the *Rizzo* court stated that the Title VIII defendant rebuts a prima facie case of housing discrimination only by showing some legitimate interest in the challenged action. *Id.* The *Rizzo* court further stated that the defendant must demonstrate that no alternative course of conduct exists that satisfies the defendant's legitimate interest without producing a discriminatory effect. *Id.*

[88] *See* Smith v. Town of Clarkton, 682 F.2d 1055, 1065-66 (4th Cir. 1982) (Fourth Circuit application of *Arlington II* test); *Last Stand*, *supra* note 18, at 170 (*Arlington II* test is deficient in a number of respects); *Proper Standard*, *supra* note 17, at 410-11 (*Arlington II* test suffers from defects).

[89] *See Last Stand*, *supra* note 17, at 175-76 (*Arlington II* court failed to consider municipal defendant's justifications for decision to deny rezoning petition); *Proper Standard*, *supra* note 17, at 411 (third and fourth factors of *Arlington II* test fail to evaluate the strength of the defendant's interests).

[90] *See Last Stand*, *supra* note 18, at 176 (zoning decisions may be legitimate exercise of local police power). Municipalities traditionally have broad powers to promote the health and safety of the community through zoning ordinances. *Id.* A court infringes upon municipal authority in zoning matters when the court invalidates a zoning decision under Title VIII without evaluating the defendant's justification for the action. *Id.*

[91] *See Schwemm*, *supra* note 3, at 257 (Seventh Circuit in *Arlington II* failed to explain how courts should weigh four factors); *Last Stand*, *supra* note 18, at 170 (*Arlington II* court did not explain whether four factors weigh equally or whether some should play a greater role); *Proper Standard*, *supra* note 17, at 413 (weakness of *Arlington II* test is court's consideration of number of factors supporting each party and not weight of factors).

two of the four factors support the plaintiff's assertion.[92] Deciding all two-two splits in plaintiff's favor, however, would seem inevitably to produce unfair results.[93]

The business necessity test is arguably a more appropriate tool for assessing the defendant's burden of justification in *Smith*.[94] In addition to requiring courts to determine whether the challenged practice arises from a legitimate business interest,[95] the business necessity test requires the courts to consider the possibility of alternative practices.[96] Thus, the business necessity test corrects the deficiencies of the *Arlington II* test,[97] while providing courts with a well-defined framework for analyzing the defendant's burden of justification.

The *Smith* court's affirmation of the trial court's order that the defendants take affirmative steps to reinstate the Clarkton housing project is consistent with precedent holding that affirmative action requirements in Title VIII remedial orders are proper.[98] The Seventh Cir-

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[92] *See* 558 F.2d at 1294.

[93] *See Proper Standard*, *supra* note 17, at 413 (*Arlington II* text may produce unfair results). Ideally, courts using the *Arlington II* test should decide some two-two splits in favor of the plaintiff and some in favor of the defendant, depending upon the relative weights of the factors. *Id.*

[94] *See supra* text accompanying note 83 (business necessity test).

[95] *See Prima Facie Case*, *supra* note 6, at 176 (business necessity test requires defendant to prove that challenged practice stems from legitimate business practice). The weight of the burden on the Title VII defendant to justify his action varies according to the case. *Id.*

Most courts agree, however, that the defendant bears the burden of coming forward with convincing evidence that the challenged practice is consistent with the asserted justification. *See* Castro v. Beecher, 459 F.2d 725, 732 (1st Cir. 1972) (defendant must show convincing relationship between challenged practice and asserted justification). Under Title VIII, the defendant should try to demonstrate that the challenged housing practice legitimately seeks to achieve the asserted justification. *Prima Facie Case*, *supra* note 6, at 176-77; *see* Williams v. Matthews Co., 499 F.2d 819, 827-28 (8th Cir. 1974). In *Williams*, the Eighth Circuit held that the defendant developer's policy of selling lots only to approved white builders resulted in a discriminatory effect that violated Title VIII. *Id.* at 826. The Eighth Circuit employed the business necessity test to hold that the defendant failed to justify the challenged practice. *Id.* at 828. The *Williams* court held that the defendant's assertions that the practice was unbiased did not overcome the prima facie case of discrimination. *Id.* at 828.

[96] *See supra* note 83 (plaintiff bears burden of demonstrating alternative practices exist); *Last Stand*, *supra* note 17, at 178. One proposed balancing test is very similar to the Title VII business necessity test. *Id.* Under the proposed test, the Title VIII plaintiff will bear the burden of establishing the discriminatory effect. *Id.* at 179. When the plaintiff meets that burden, the burden will shift to the defendant to show that the practice served a legitimate interest. *Id.* The proposed test then will divide between the plaintiff and defendant the burden of suggesting reasonable alternatives. *Id.* The test differs from the Title VII standard by requiring the plaintiff to meet a minimum discriminatory effects threshold before the burden of justification shifts to the defendant. *Id.* The test also differs from the Title VII business necessity standard because the test allows the defendant to justify the challenged practice by demonstrating a broader range of legitimate interests than simply the safety or efficiency concerns relevant in Title VII employment cases. *Id.* at 180.

[97] *See supra* text accompanying notes 88-93 (discussion of *Arlington II* deficiencies).

[98] *See* 682 F.2d at 1069; *infra* text accompanying notes 98-104 (courts' approval of affir-

cuit has held that a district court's remedial powers include the power to order a municipal defendant to identify a parcel of land suitable for low-cost housing within the city.[99] The Seventh Circuit recognized that appellate courts regularly have provided affirmative relief from discriminatory land use practices employed by municipal defendants.[100] Like the Fourth Circuit, the Seventh Circuit noted that authority for affirmative relief stems from the broad language of Title VIII that justifies all measures necessary to protect federal rights and implement federal policies.[101] Similarly, the Eighth Circuit has held that district courts may impose affirmative action relief on municipal defendants, such as requiring the defendants to attend joint conferences with the plaintiffs to seek a mutually acceptable housing plan.[102] The Eighth Circuit held that the purpose of Title VIII, to promote integrated housing, authorized the court to fashion comprehensive affirmative relief designed to eliminate discriminatory effects.[103] The Third and Sixth Circuits also have approved affirmative relief in Title VIII cases.[104]

The Fourth Circuit's decision to modify the scope of the trial court's order, in recognition of the limitations on a court in ordering remedial relief, is consistent with Fourth Circuit precedent. In *United States v. Warwick Mobile Homes Estates, Inc.*,[105] the Fourth Circuit reviewed the district court's issuance of an injunction restraining the defendant from practicing discriminatory policies in the rental of mobile homes.[106] The Fourth Circuit held that the district court properly issued injunctive relief, but also noted that courts should not order remedial relief that is

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mative remedial relief); *see also* Otero v. N.Y. City Hous. Auth., 484 F.2d 1122, 1125 (2d Cir. 1972) (courts may order municipal defendants to take affirmative action to correct violation of fair housing statute).

[99] Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights (*Arlington III*), 616 F.2d 1006, 1011 (7th Cir. 1980).

[100] *Id.* The *Arlington III* court noted that the relief granted by the Seventh Circuit is a common remedy awarded by courts in exclusionary zoning cases. *Id.* The remedy, known as "site-specific relief," serves to open up particular parcels of land to low-income housing. *Id.*

[101] *Id.*; *see supra* text accompanying note 59 (Fourth Circuit upheld affirmative relief under Title VIII).

[102] Park View Heights Corp. v. City of Black Jack (*Black Jack III*), 605 F.2d 1033, 1040 (8th Cir. 1979), *cert. denied*, 445 U.S. 905 (1980).

[103] *Id.* at 1036, *see supra* note 3 (purpose of Title VIII is to encourage integrated housing).

[104] *See* Resident Advisory Bd. v. Rizzo, 564 F.2d 126, 149-50 (3d Cir. 1977), *cert. denied*, 435 U.S. 908 (1978) (district court had power to order affirmative relief in Title VIII cases); United States v. City of Parma, 661 F.2d 562, 577 (6th Cir. 1981) (Sixth Circuit explicitly approved use of affirmative provisions in Title VIII cases).

[105] United States v. Warwick Mobile Homes Estates, Inc., 588 F.2d 194, 197 (4th Cir. 1977).

[106] *Id.* at 197. The *Warwick* court asserted that courts determining injunctive relief under racial discrimination cases must determine if the defendant is likely to persist in employing discriminatory practices. *Id.* The *Warwick* court then noted that the relevant factors for the courts to consider are the bona fide intentions of the defendant, the termination of discriminatory practices, and the character of past violations. *Id.*

overly burdensome to the defendant.[107] Therefore, the Fourth Circuit denied the plaintiff's request for further affirmative relief, holding that the limited nature of the defendant's past violations and the unlikely event of recurrent violations rendered any further relief unnecessary.[108] In modifying the remedial order in *Smith*, the Fourth Circuit also considered the limited nature of the town officials' violation and assumed that the defendants would in good faith observe the district court's remedial order.[109]

The *Smith* court's decision to limit the trial court's order also is consistent with Eighth and Sixth Circuit precedent.[110] The Eighth Circuit has recognized that federal courts must carefully tailor equitable relief to be no more intrusive on governmental functions than is necessary to remedy proved statutory violations.[111] Like the Fourth Circuit, the Eighth Circuit has held that a district court fashioning remedial relief must consider the municipal defendant's duty to seek out and make land sites available for low-cost housing without requiring the defendant city to build the housing.[112] Similarly, the Sixth Circuit has noted that courts must carefully tailor the remedy in cases of statutory violations to award only the relief necessary to correct the violations.[113] In *United States v. City of Parma*,[114] the Sixth Circuit modified a portion of the district court's order requiring the city of Parma to ensure the construction of a specific number of low income housing units each year.[115] Like the Fourth Circuit, the Eighth Circuit recognized that the ultimate burden of providing low income housing rests with the housing development community and that requiring the defendant to ensure a particular number of units each year establishes an unreasonably burdensome obligation.[116]

The Fourth Circuit's holding in *Smith* is an important addition to

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[107] *Id.* at 197-98.

[108] *Id.* at 198. The *Warwick* court noted that its decision might have been different if the court had considered a case of consistent and extreme discrimination with a strong possibility the defendant would violate the Act in the future. *Id.* at 198.

[109] *See* 682 F.2d at 1069. In modifying the district court order, the *Smith* court noted that the defendants originally made a good faith effort to seek better housing in Clarkton. *Id.* The Fourth Circuit cautioned, however, that if the defendants attempted to circumvent the requirements of the district court's order, the district court would be justified in imposing a more wide-ranging judicial intrusion into Clarkton's local affairs. *Id.*

[110] *See infra* text accompanying notes 110-16 (Eighth and Sixth Circuit precedent).

[111] Park View Heights Corp. v. City of Black Jack (*Black Jack III*), 605 F.2d 1033, 1040 (8th Cir. 1979), *cert. denied*, 445 U.S. 905 (1980).

[112] *Id.* The *Black Jack III* court noted that the municipal defendant did not have the means to build the low cost housing entirely on its own. *Id.*

[113] United States v. City of Parma, 661 F.2d 562, 576 (6th Cir. 1981).

[114] *Id.*

[115] *Id.* at 577-78. In a court order, the *Parma* district court had required that the defendant provide at least 133 units of low-income housing each year. *Id.* at 577.

[116] *Id.* at 578; *see supra* text accompanying notes 59-62 (Fourth Circuit held portion of trial court's remedial order too burdensome on defendants).