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DIRECT EVIDENCE OF DISCRIMINATORY INTENT AND THE BURDEN OF PROOF: AN ANALYSIS AND CRITIQUE

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Discussing the burden of proof in employment discrimination cases, the United States Supreme Court in *Trans World Airlines, Inc. v. Thurston*[1] stated categorically that ". . . the *McDonnell Douglas* test is inapplicable where the plaintiff presents direct evidence of discrimination."[2] With this broad statement, a unanimous Supreme Court appeared to resolve an issue which had been actively litigated in the Courts of Appeal.[3] Rather than quelling the conflict surrounding the burden of proof in these discrimination cases, however, the Courts of Appeal remain at odds.[4] It is the thesis of this article that the Supreme Court's departure from controlling precedent prescribing the allocation of the burden of proof in employment discrimination cases should be recognized as having reiterated the existing law, that is, that a prima facie case of discrimination can be made out in many ways.

The facts in *Thurston* represent a microcosm of the controversy associated with the burden of proof in employment discrimination cases. In *Thurston,* Thurston, a flight captain for Trans World Airlines (TWA), and two other TWA flight captains were involuntarily retired upon reaching the age of 60.[5] The three captains filed an action against TWA and their union,[6]

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1. 105 S.Ct. 613 (1985).

2. *Id.*; *See also infra* note 66 and accompanying text (setting out *McDonnell Douglas* test).

3. *See infra* notes 81 and 88 and accompanying text (discussing cases which have involved disputes surrounding burden of proof in employment discrimination actions).

4. *See infra* notes 193-234 and accompanying text (setting out dispute among courts of appeal on issue of burden of proof).

5. *See* Trans World Airlines, Inc. v. Thurston, 105 S.Ct. 613 (1985).

6. The age-60 retirement policy was a collectively-bargained requirement. Therefore, although the Age Discrimination in Employment Act, 290 U.S.C. §§ 621 *et seq.*, does not allow monetary recovery for age discrimination from a labor organization, the Air Line Pilots Association, International (ALPA), was retained as a party defendant for injunctive relief. The

alleging that they had been forced to retire solely because of age. In addition to accepting TWA's two affirmative defenses based on a bona fide occupational qualification[7] and a bona fide seniority system,[8] the district court held[9] that the plaintiffs had failed to establish a prima facie case of age discrimination under the Supreme Court's *McDonnell Douglas* standard,[10]. The District Court for the Southern District of New York reasoned that none of the discharged flight captains could show the existence of a vacancy in flight engineers' positions when the flight captains were faced with the choice of retiring or transferring to flight engineer.[11] The court asserted that this aspect of its decision was reached "solely because no job vacancy existed at the time they applied and were eligible for the job."[12]

In *Air Line Pilots Association, Int'l v. Trans World Airlines,*[13] the Second Circuit Court of Appeals reversed the district court opinion, observing that the Supreme Court had cautioned that the *McDonnell Douglas* analytical framework was "not necessarily applicable in every respect ot differing factual circumstances,"[14] nor was it "an inflexible rule."[15] Rather, the Second Circuit explained that "a plaintiff is not barred by the *McDonnell Douglas* method from making out a prima facie case of age discrimination by alternative means, such as *direct* proof that an employer discriminates on

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suit was joined with an action filed by ALPA against TWA to challenge the company's continued employment of flight engineers beyond age 60. The propriety of monetary relief against the union was not reached by the Court. *See* 459 U.S.; *cf.* Northwest Airlines, Inc. v. Transport Workers Union, 451 U.S. 77 (1981) (union not liable for contribution where collectively-bargained wage differentials violated Title VII and Equal Pay Act).

7. *See* 29 U.S.C. § 623(f)(1): "It shall not be lawful for any employer, employment agency, or labor organization to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business. . . ." This exemption, normally referred to as "BFOQ," parallels similar language in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(e)(1).

8. 29 U.S.C. § 623(f)(2): "It shall not be unlawful for an employer, employment agency, or labor organization to observe the terms of a bona fide seniority system . . . which is not a subterfuge to evade the purposes of this chapter, except that . . . no such seniority system . . . shall require or permit the involuntary retirement of any individual specified by section 731(a) of this title because of the age of such individual." *Cf.* 42 U.S.C. § 20003-2(h).

9. *See* Air Line Pilots Ass'n, Int'l. v. Trans World Airlines, Inc., 547 F. Supp. 1221 (S.D.N.Y. 1982).

10. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); *see also infra* notes 63-72 and accompanying text (discussing *McDonnell Douglas* test).

11. *See* Air Line Pilots Ass'n, Int'l v. Trans World Airlines, Inc., 547 F. Supp. 1221, 1228-32 (S.D.N.Y. 1982).

12. *Id.* at 1229.

13. Air Line Pilots Ass'n, Int'l v. Trans World Airlines, Inc., 713 F.2d 940 (2d Cir. 1983). Judge Van Graafeiland concurred in part and dissented in part, but there are no distinctions in the panel judges' positions with respect to the burden of proof.

14. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 803 n.13 (1973).

15. *See* Furnco Const. Corp. v. Waters, 438 U.S. 567, 575 (1978); Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 253-54 n.6 (1981); International Bhd. of Teamsters v. United States, 431 U.S. 324, 358 (1977).

the basis of age."[16] The court in *Air Line Pilots Association* went on the note that:

> [Plaintiff's] evidence revealed that TWA grants the downgrading requests of all pilots with sufficient seniority except those of captains and first officers who reach age 60. This direct evidence of a differentiation based solely on age is sufficient to give rise to an inference of discriminatory motive and establishes, therefore, a prima facie case of discriminatory treatment.[13]

TWA's defenses were *not* an articulation of legitimate, nondiscriminatory reasons for the policy.[18] Instead, TWA relied on the absolute statutory defenses argued before, and accepted by, the court below: a bona fide seniority system and a bona fide occupational qualification (BFOQ). These affirmative defenses, as exceptions to the remedial purposes of the statute, required satisfaction by the employer of a burden of proof; in fact, the burden thus assumed is greater than a preponderance-of-the-evidence standard, requiring "plain and unmistakable" evidence that the challenged employment practice "meets the 'terms and spirit' of the remedial legislation."[19]

In *Thurston,* the Supreme Court's review of the dispute between flight captain Thurston and TWA focused on TWA's BFOQ defense and the proper test for the imposition of liquidated damages for "willful" discrimination.[20] Neither the Air Line Pilots Association (ALPA) nor TWA raised a burden of proof issue in their petitions for certiorari.[21] The parties' failure to argue the burden of proof issue calls into question the *Thurston* Court's holding that the *McDonnell Douglas* test is inapplicable when the plaintiff presents direct evidence of discrimination. The validity of the holding of the Supreme Court in *Thurston* is particularly questionable when it is noted that the Court relied for its "direct evidence" analysis on three cited authorities: (1) the Second Circuit's opinion, which is less than illuminating with respect to the burden of proof; (2) *International Brotherhood of Teamsters v. United*

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16. Air Line Pilots Ass'n, Int'l v. Trans World Airlines, Inc., 713 F.2d 940, 952 (2d Cir. 1983) (emphasis in original) citing *Stanojev v. Ebasco Services, Inc.,* 643 F.2d 914, 921 (2d Cir. 1981)); Loeb v. Textron, Inc., 600 F.2d 1003, 1014 n.18 (1st Cir. 1979).

17. 713 F.2d at 952 citing *Geller v. Markham,* 635 F.2d 1027, 1031 (2d Cir. 1980), *cert. denied,* 451 U.S. 945 (1981)); Stanjev v. Ebasco Services, Inc., 643 F.2d 914, 921 (2d Cir. 1981); Stone v. Western Air Lines, Inc., 544 F. Supp. 33, 37 (C.D. Cal. 1982).

18. "Because we determine that TWA and ALPA have failed to come forward with a legitimate, nondiscriminatory reason for their disparate treatment of appellants, we need not consider the third step in the *Burdine* analysis, whether the defendants' reasons were pretextual." Air Line Pilots Ass'n, Int'l v. Trans World Airlines, Inc., 713 F.2d 940, 955 (2d Cir. 1983).

19. *Id.* at 954 (quoting *A. H. Phillips, Inc. v. Walling,* 324 U.S. 490, 493 (1945); and citing *Orzel v. City of Wauwatosa,* 697 F.2d 743, 748 (7th Cir.), *cert. denied,* U.S.____, (1983)).

20. *See* Trans World Airlines, Inc. v. Thurston, 105 S.Ct. 613 (1985) (statement of issues presented).

21. *See* Trans World Airlines, Inc. v. Thurston, No. 83-997, 52 U.S.L.W. 3618 (Dec. 16, 1983); Air line Pilots Ass'n, Int'l. v. Thurston, No. 83-1325, 52 U.S.L.W. 3707 (Feb. 8, 1984).

States[22]; (3) and *Los Angeles Department of Water & Power v. Manhart.*[23] Neither *Teamsters* nor *Manhart* applies to a non-systemic,[24] disparate treatment[25] case.[26] In order to understand what the Court in *Thurston* intended by its discussion of the *McDonnell Douglas* test, it is helpful to review the employment discrimination burden of proof in historical context.

A. Labor Law and the Burden of Proof

The remedial framework of Title VII of the Civil Rights Act of 1964[27]—and, perforce, of the Age Discrimination in Employment Act[28]—is derived from the federal common law developed under the National Labor Relations Act, as amended.[29] The concept of "discrimination" under that statute, while necessarily somewhat different from that which applies to employment discrimination statutes,[30] fits into a common analytical pattern.

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22. 431 U.S. 324, 58 n.44 (1977)

In *Teamsters,* the United States Supreme Court stated: Although the *McDonnell Douglas* formula does not require direct proof of discrimination, it does demand that the alleged discriminatee demonstrate at least that his rejection did not result from the two most common legitimate reasons on which an employer might rely to reject an aplicant: an absolute or relative lack of qualifications or the absence of a vacancy in the jobs sought. Elimination of these reasons for the refusal to hire is sufficient, absent other explanation, to create an inference that the decision [to reject a minority applicant] was a discriminatory one.

23. 435 U.S. 702 (1978).

20. A pattern-or-practice action brought by the federal government, like a class action brought by a private plaintiff, typically challenges a discriminatory policy or system rather than a series of discriminatory acts. *See, e.g.,* International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977); Franks v. Bowman Transportation Co., 424 U.S. 747, 751 (1976).

25. "Disparate impact" cases deal with employment practices which, while neutral on their face, have discriminatory results vis-a-vis a protected group. *See* Griggs v. Duke Power Co., 401 U.S. 424 (1971) (standardized tests, high school education requirements). The distinction between "disparate treatment" and "disparate impact" is discussed in *International Bhd. of Teamsters v. United States.* 431 U.S. 324 (1977); *see* B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW, Ch. 36, p. 1286 (2d ed. 1983).

26. In the *Thurston* context, citation of *Teamsters* and *Manhart* is appropriate; in *Teamsters,* the bona fide seniority system defense was the focus of the Court's attention, while in *Manhart* the issue revolved around an employer requirement of larger pension fund contributions from women than from men, defended by the employer on economic grounds—that is, that the cost of providing benefits to female employees justified the higher contribution rate.

27. Pub. L. No. 88-352, Title VII, 78 Stat. 253, *as amended,* 42 U.S.C. §§ 2000e *et seq.* (July 2, 1964).

28. Pub. L. No. 90-202, 81 Stat. 602, *as amended,* 29 U.S.C. §§ 62 *et seq.* (December 15, 1967).

29. Act of July 5, 1935, c. 372, 49 Stat. 449, *as amended,* 29 U.S.C. §§ 141 *et seq. See* Albemarle Paper Co. v. Moody, 422 U.S. 405, 419 (1975); Franks v. Bowman Transp. Co., 424 U.S. 747, 768-69 (1976).

30. Two forms of employer "discrimination" are proscribed by the National Labor Relations Act (NLRA): "discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization" (29 U.S.C. § 158(a)(3)) and "to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter" (29 U.S.C. § 158(a)(4)). *See* 29 U.S.C. § 158(b)(2) (discrimination by labor organization).

The Supreme Court first dealt with burden of proof issues in *National Labor Relations Board v. Link-Belt Co.*[31] The National Labor Relations Board (NLRB) had ordered Link-Belt to reinstate and pay back pay to a group of employees who had been found to be victims of discrimination because of their union membership and activities.[32] The Seventh Circuit refused to enforce the NLRB's order, finding insufficient evidence of proscribed discriminatory animus.[33] In reversing the Seventh Circuit Court of Appeals, the Supreme Court emphasized that the statute "provides that the "findings of the Board as to the facts, if supported by evidence, shall be conclusive."'[34] The evidence which had been credited by the Board was admittedly circumstantial;[35] nonetheless, the Court stated, "The Board was justified in relying on circumstantial evidence of discrimination and was not required to deny relief because there was no direct evidence that the employer knew these men had joined Amalgamated (the union) and was displeased or wanted to make an example of them."[36]

Link-Belt presents a factual pattern which is remarkably similar to the typical disparate treatment employment discrimination case. Charged with anti-union discrimination, the company "claim[ed] that [the employees] were discharged for unsatisfactory work after time studies had shown their inefficiency and after the day foreman, McKinney, had warned them that their work was not satisfactory."[37] The employees, on the other hand, "denied that anyone had given them any such warning or had criticized their work," resulting in the Board's conclusion "that they were discharged because they joined [the union]."[38] In short, the Court deferred to the Board's resolution of credibility issues.

There was not any carte blanche judicial deference to Board findings, however. Due to the requirement that findings of the Board have "substantial support in the evidence,"[39] there was a perceptible tendency on the part of some reviewing courts to reject Board findings where there was no direct evidence of discrimination and the circumstantial evidence was less than compelling.[40] Even so, the test which evolved was that stated by the Fourth

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31. 311 U.S. 584 (1941).

32. *See* Link Belt Co., 12 N.L.R.B. 854 (1939).

33. *See* Link-Belt Co. v. National Labor Relations Board, 110 F.2d 506 (7th Cir. 1940).

34. *See* National Labor Relations Board v. Link-Belt Co., 311 U.S. 584, 597 (quoting, 29 U.S.C. § 160(e), 49 Stat. 449).

35. *Id.* at 588. The Court in *Link-Belt* stated: "It would indeed be a rare case where the finders of fact could probe the precise factors of motivation which underlay each employee's choice." *Id.* at 597.

36. *Id.* at 602.

37. *Id.*

38. *Id.*

39. *See* 29 U.S.C. §§ 160(e), (f).

40. *See, e.g.*, National Labor Relations Board v. Norfolk Shipbuilding & Drydock Corp., 109 F.2d 128, 130 (4th Cir. 1940); National Labor Relations Board v. Goshen Rubber & Mfg. Co., 110 F.2d 432, 436 (7th Cir. 1940); Indianapolis Power & Light Co v. National Labor Relations Board, 122 F.2d 747, 761-63 (7th Cir. 1941), *cert. denied*, 531 U.S. 804 (1942) (grudging acceptance of Board's findings as to some, but not all, discriminatees).

Circuit in *National Labor Relations Board v. Entwhistle Manufacturing Company*:[41]

> Circumstantial evidence must, of course, be weighed with caution. Yet, when the strands of such evidence are of sufficient quantity and proper quality, these strands, as in the instant case, make up a rope that is strong enough in probative force to constitute at least substantial evidence that will justify the Board's findings. In that connection, respondent stoutly maintains that the evidence must show that Rainwater's Union activities were the motivating reason that brought about his discharge, and that respondent need not prove why the discharge took place. True enough, respondent could have dismissed Rainwater for silly and inconsequential reasons, such as the color of his hair or the wearing of celluloid collars, and this would not have been an unfair labor practice. But, when there is substantial evidence, direct or circumstantial, to indicate that an employee was discharged because of his Union activities, a very definite burden is imposed upon the employer *to prove the existence of a reason,* not within the prohibitions of the Act, sufficient in itself to warrant or justify the discharge. And, certainly, when the employer fails in his undertaking to prove such a reason, the employer is not thereby in a favorable position to question the Board's findings of discrimination.[42]

The employer in *Entwhistle* had not offered *any* reasonable explanation for the employee's discharge; the only rationale for discharging one of its 1200 employees was "the claimed purpose of giving employment to more 'destitute' inhabitants of [company owned] houses."[43] The Board found that this explanation was pretextual, and the Fourth Circuit agreed.[44]

Enactment of the Taft-Hartley amendments to the statute[45] in 1947 produced no change in the burden of proof analysis. While deference was given to Board findings of discrimination, the courts continued to stress their belief that "mere speculation [was] not sufficient to uphold a finding of an unfair labor practice."[46] The role of direct evidence depended upon its context; as one court explained, criticizing the Board's rejection of a trial examiner's credibility resolutions,

> Discrimination relates to the state of mind of the employer. . . . The General Counsel had the burden of the issue. . . . [Even though] the

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41. 120 F.2d 532 (4th Cir. 1941).

42. *Id.* at 536.

43. *Id.*

44. *See* National Labor Relations Board v. Abbott Worsted Mills, Inc., 127 F.2d 438, 440 (1st Cir. 1942) (employer's denial of discriminatory motive "utterly unworthy of belief").

45. *See* Act of June 23, 1947, c. 120, 61 Stat. 136.

46. National Labor Relations Board v. Thomas Rigging Co., 211 F.2d 153, 158 (9th Cir.), *cert. denied,* 348 U.S. 871 (1954).

> General Counsel did not carry the burden and introduce substantial evidence . . . the employer did introduce substantial and convincing evidence that the discharges were for valid cause and were not discriminatory. The only direct evidence upon the point is that of . . . the . . . supervisors who made the decisions for respondent. . . . There was no controverting testimony. . . . The sole question upon which the Board could base a ruling that the discharges were discriminatory was that they did not believe . . . the . . . witnesses of respondent who testified to the reasons for the discharges.[47]

The Fifth Circuit in *National Labor Relations Board v. West Point Manufacturing Co.*[48] stated that, "we must keep in mind that . . . proof that a discriminatory purpose was the motivating one is rarely direct, and it may therefore be established from all the circumstances."[49] The second half of the Court's statement was, however, less likely to be quoted in later opinions: ". . . the burden is throughout upon the Board to establish that [a discriminatory purpose] was [the motivating one], and this may not lightly be inferred."[50]

Direct evidence of a discriminatory motive was weighed in the totality of the record, not as a burden-shifting device.[51] Indeed, the Fifth Circuit stated,

> It is not and never has been the law that the board may recover upon failure of the respondent to make proof. The burden is on the board throughout to prove its allegations, and this burden never shifts. It is, of course, true that if the board offers sufficient evidence

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47. National Labor Relations Board v. Kaiser Aluminum & Chem. Corp., 217 F.2d 366, 368-69 (9th Cir. 1954).

48. 245 F.2d 783 (5th Cir., 1957).

49. National Labor Relations Board v. West Point Mfg. Co., 245 F.2d 783, 786 (5th Cir. 1957); *see* Northern Virginia Steel Corp. v. National Labor Relations Board, 300 F.2d 168, 174 (4th Cir. 1962) ("this is one of those rare instances in which direct evidence, credited by the examiner, was offered to establish the true motive for discharging an employee"). The Court elaborated upon the definition of "substantial evidence" in its often-cited opinion in *Universal Camera Corp. v. National Labor Relations Board,* 340 U.S. 474 (1951).

50. National Labor Relations Board v. Kaiser Aluminum & Chem. Corp., 217 F.2d 366, 368-69 (9th Cir. 1954).

51. *e.g.*, National Labor Relations Board v. Jones Sausage Co., 257 F.2d 878, 881-82 (4th Cir. 1958); National Labor Relations Board v. Dan River Mills, Inc., 274 F.2d 381, 384 (5th Cir. 1960); Northern Virginia Steel Corp. v. National Labor Relations Board, 300 F.2d 168, 174 (4th Cir. 1962); National Labor Relations Board v. Overnite Transportation Co., 308 F.2d 279 (4th Cir. 1962); National Labor Relations Board v. Melrose Processing Co., 351 F.2d 693, 698-99 (8th Cir. 1965); Local 57, International Ladies' Garment Wkrs. Union v. National Labor Relations Board, 374 F.2d 295, 298 (D.C. Cir.), *cert. denied,* 387 U.S. 942 (1967); Behrendt v. National Labor Relations Board, 82 LRRM 2620, 2621, 70 Lab. Cas. (CCH) ¶ 13,338 (7TH CIR. 1972) (when there is no direct evidence of discriminatory motivation in record, board must examine entire record, before it can determine if there is evidence to support inference of such motivation"); *see also* Dantzler v. Dictograph Products, Inc., 309 F.2d 326 (4th Cir. 1962), *cert. denied,* 372 U.S. 970 (1963) (Clayton Act).

> to support a finding against it, a respondent, as stated in the quotation first above, stands in danger of having such a finding made unless he refutes the evidence which supports it. But it is wholly incorrect to say or suggest that the burden of showing compliance with the act ever shifts to the respondent. The burden of showing no compliance is always on the board. Even in cases of actual discharges, cases in short in which the respondent has taken affirmative action against an employee, this is true, as this court has many times held.[92]

B. Employment Discrimination and Other "Civil Rights" Cases: 1965-1981

Discrimination in the civil rights context has been treated in a different manner. This evolution was gradual; faced with a claim of racially discriminatory non-renewal of teaching contracts, the Eighth Circuit agreed with the trial court that the plaintiffs were less qualified than the white teachers whose contracts were renewed after a consolidation of school districts,[53] since there was "no direct evidence of any race prejudice or discrimination on the part of any Board member or official.[54] The only thing bordering on direct evidence," said the court, was controverted testimony from black teachers concerning two alleged statements by supervisory personnel; even if these statements were made, the court found, "it is doubtful whether these isolated statements are substantial evidence of discrimination."[55]

The drift toward requiring the defendant to carry the burden of proof in "constitutional" civil rights cases is addressed by Professor Belton in *Burdens of Pleading and Proof in Discrimination Cases: Toward a Theory of Procedural Justice.*[56] As Professor Belton points out, lower courts had assumed that the constitutional case was essentially identical to the first Supreme Court Title VII burden-of-proof decision, *Griggs v. Duke Power Company,*[57] "[t]he Supreme Court, however, reversed this trend in *Washing-*

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52. National Labor Relations Board v. Winter Garden Citrus Products Co-operative, 260 F.2d 913, 916 (5th Cir. 1958), *criticizing* National Labor Relations Board v. Shedd-Brown Mfg. Co., 213 F.2d 163, 175 (7th Cir. 1954).

53. Brooks v. School Dist. of City of Moberly, 267 F.2d 733 (8th Cir.), *cert. denied,* 361 U.S. 894 (1959).

54. *Id.* at 737.

55. *Id.* The alleged statements were, "the time would come when teachers would be employed on the basis of qualifications only" and "no colored teachers would be employed in Moberly for at least five years." The Court pointed out that the Board, not the supervisors who were claimed to have made the statements, "was the body that did the hiring." *Id.*

56. 34 VAND. L. REV. 1205, 1233-35, 1247-50 (1981).

57. 401 U.S. 424 (1971). The Court in *Griggs v. Duke Power Co.* set out the "disparate impact" burden of proof formula: once the plaintiff has established that an employment policy, practice, or system has an adverse and disproportionate impact upon a protected class of employees or applicants, the defendant may escape liability only through a showing of "business

ton v. Davis[58] when it made it clear that the *Griggs* statutory disparate impact test is not applicable to constitutional claims."[59]

During the five years between *Griggs* and *Washington*—and, indeed, since the effective date of Title VII in 1965[60]—there had been confusion regarding the elements of proof of discrimination under that statute and its later-enacted counterpart, the Age Discrimination in Employment Act.[61] *Griggs* provided one set of standards,[62] but the Supreme Court's opinion two years later in *McDonnell Douglas v. Green*[63] enunciated a completely different test: while a case of disparate impact under *Griggs* does not entail proof of discriminatory intent, a "disparate treatment" case requires a finding of specific intent to discriminate.

In *McDonnell Douglas,* the Supreme Court first gave a deferential nod to *Griggs,* noting that *Griggs* dealt with "the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification."[64] However, the Court stressed that the *Griggs* situation was not presented in *McDonnell Douglas;* instead, "[t]he critical issue before us concerns the order and allocation of proof in a *private, non-class* action challenging employment discrimination."[65] The Supreme Court in *McDonnell Douglas* stated that,

> The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination. This *may be done* by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications he was rejected and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.[66]

As a cautionary note, the Court observed, "the facts necessarily will vary in Title VII cases, and the specification above of the prima facie proof required from a complainant in this case is not necessarily applicable in every respect to differing factual situations."[67] The *McDonnell Douglas* Court went on to

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necessity" or proof of a statutory defense. Under *Griggs,* this process entails the assumption and satisfaction of a burden of proof by the defendant.

58. 426 U.S. 229 (1976).

59. Belton, *supra* n.51, at 1233.

60. The date was July 2, 1965. *See* Pub. L. No. 88-352, §§ 716(a), (b), 78 Stat. 266, *cited in* Franks v. Bowman Transp. Co., 424 U.S. 747, 758 n.10 (1976).

61. 29 U.S.C. §§ 621 *et seq.*

62.

63. 411 U.S. 792 (1973).

64. *Id.* at 801 (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 430 (1971)).

65. *Id.* at 800 (emphasis supplied).

66. *Id.* at 802 (emphasis supplied).

67. *Id.* at 802, n.13.

explain that once this initial burden has been satisfied, "[t]he burden must then shift to the employer to articulate some legitimate, nondiscriminatory reason for respondent's rejection . . . [that is,] a *reasonable basis for a refusal to hire.*"[68] The Court referred to this articulation as a "burden of proof,"[69] but stressed that the employer's explanation should not be rejected solely because it involved "subjective" criteria.[70]

When the employer has "[made] the prima facie case" in that manner, the plaintiff "must . . . be afforded fair opportunity to show that petitioner's stated reason for respondent's rejection was in fact pretextual."[71] "In short . . . [plaintiff] must be given a full and fair opportunity to demonstrate by competent evidence that the presumptively valid reasons for his rejection were in fact a coverup for a racially discriminatory decision."[72]

It soon became evident that the Supreme Court had not provided sufficient guidance for courts or counsel. The burden of proof issue was raised repeatedly, with mixed results. One line of decisions built upon *McDonnell Douglas (Furnco Construction Corp. v. Waters,*[73] *Board of Trustees of Keene State College v. Sweeney,*[74] and *Texas Department of Community Affairs v. Burdine*[75] refined the disparate-treatment burden-of-proof model. In *Furnco,* the Supreme Court asserted that "the burden which shifts to the employer is merely that of *proving* that [the employer] based his employment decision on a legitimate consideration, and not an illegitimate one such as race."[76] The Court went on to use the word "prove" or "proof" three more times,[77] thereby echoing the unfortunate "burden of proof" phrase from *McDonnell Douglas.*[78]

The Supreme Court in *Sweeney* the necessity for defendant's "proof" by explaining that the employer did not have to prove the absence of a nondiscriminatory motive,[79] holding that the "burden" has been satisfied "if [the employer] simply 'explains what he has done' or 'produc[es] evidence of legitimate nondiscriminatory reasons.'"[80]

Nonetheless, the confusion surrounding the burden of proof in employment discrimination cases remained, particularly in the Fifth Circuit. While

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68. *Id.* at 802-03 (emphasis supplied).
69. *Id.* at 803.
70. *Id.* at 803.
71. *Id.* at 804.
72. *Id.* at 805.
73. 438 U.S. 567 (1978).
74. 439 U.S. 24 (1978).
75. 450 U.S. 248 (1981).
76. *See* Furnco Const. Corp. v. Waters, 438 U.S. 567, 577 (1978).
77. *Id.* at 577-78: "To prove that, he need not prove that he pursued the course which would both enable him to achieve his own business goals *and* allow him to consider the *most* employment applications." (Emphasis in original). "This is not to say of course that proof of a justification which is reasonably related to some legitimate goal ends the inquiry."
78. *See supra,* n.69 and accompanying text (discussing *McDonnell Douglas*).
79. *See* Board of Trustees of Keene State College v. Sweeney, 439 U.S. 24, 25 (1978).
80. *Id.* at 25, n.2.

acknowledging the *McDonnell Douglas/Furnco/Sweeney* analysis, the United States Court of Appeals for the Fifth Circuit continued to subject employers' explanations for discharging employees to a rigorous second-guessing.[81] The end product of the Fifth Circuit line of decisions was *Burdine*.[82]

Burdine demonstrates a somewhat impatient explanation to the Fifth Circuit that its idea about "the burden of proof borne by the defendant conflicts with interpretations of our precedents by other Courts of Appeals."[83] Stressing that the burden of persuasion "never shifts,"[84] the Court in *Burdine* stated:

> Establishment of the prima facie case in effect creates a presumption that the employer unlawfully discriminated against the employee. If the trier of fact believes the plaintiff's evidence, and if the employer

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81. Some of these decisions were expressly overturned by the Supreme Court, including Turner v. Texas Instruments, Inc., 555 F.2d 1251 (5th Cir. 1977) (expressly disapproved in *Burdine*, 450 U.S. at 256); East v. Romine, Inc., 518 F.2d 332 (5th Cir. 1975) (criticized in *Burdine* 450 U.S. at 256); General Telephone Co. v. Falcon, 450 U.S. 1036 (1981), *vacated*, 626 F.2d 369 (5th Cir. 1980); Uncle Ben's Inc. v. Johnson, 451 U.S. 902 (1981), *vacated*, 628 F.2d 419 (5th Cir. 1980); *see also* Westinghouse Elec. Corp. v. Vaughn, 450 U.S. 972 (1981), *vacated*, 620 F.2d 655 (8th Cir. 1980). Certiorari was denied in others. *See, e.g.*, Scott v. City of Anniston, 597 F.2d 897 (5th Cir. 1979), *cert. denied*, 446 U.S. 917 (1980); James v. Stockham Valves & Fittings Co., 559 F.2d 310 (5th Cir. 1977), *cert. denied*, 429 U.S. 861 (1976); Tanner v. McCall, 625 F.2d 1183 (5th Cir. 1980), *cert. denied*, 451 U.S. 907 (1981); Williams v. Tallahassee Motors, Inc., 607 F.2d 689 (5th Cir. 1979), *reh'g denied*, 614 F.2d 294, *cert. denied*, 449 U.S. 848 (1980); Fisher v. Procter & Gamble Mfg. Co., 613 F.2d 527 (5th Cir.), *reh'g denied*, 618 F.2d 1389 (1980), *cert. denied*, 449 U.S. 1115 (1981); Hamilton v. General Motors Corp., 606 F.2d 576 (5th Cir. 1979), *reh'g denied*, 622 F.2d 882, *cert. denied*, 447 U.S. 907 (1980). But a large residuum of unreviewed Fifth Circuit case law was left with all its foundations removed but facially intact. It is this body of precedent which continues to haunt the Fifth Circuit and, even more so, its successor, the Eleventh Circuit. The following list of burden-of-proof decisions is illustrative, but by no means exhaustive: Corley v. Jackson County Police Dept., 566 F.2d 997, 999 (5th Cir. 1978) (relying on *Turner)*; Williams v. DeKalb County, 577 F.2d 248, 253 (5th Cir.) (relying on *East*), vac. on reh'g on other grounds, 582 F.2d 2 (1978); Davis v. Board of School Comm'rs of Mobile County, 600 F.2d 470, 473 (5th Cir. 1979), *reh'g granted, reaff'd*, 616 F.2d 893 (1980) (relying on *Hereford v. Huntsville Bd. of Educ.*, 574 F.2d 268 (5th Cir. 1978), and *Roper v. Effingham County Bd. of Educ.*, 528 F.2d 1024 (5th Cir. 1976)); Gay v. Board of Trustees of San Jacinto College, 608 F.2d 127, 128 (5th Cir. 1979) (relying on *Scott v. City of Anniston, supra*); Crawford v. Western Elec. Co., 614 F.2d 1300, 1319-20 (5th Cir.), *reh'g denied*, 620 F.2d 300 (1980) (relying on *Turner);* Ramirez v. Sloss, 615 F.2d 163, 169 (5th Cir. 1980) (relying on *Burdine*, 608 F.2d 563 (5th Cir. 1979)), *Turner*, and *East)*; Whiting v. Jackson St. Univ., 616 F.2d 116, 121 (5th Cir.), *reh'g denied*, 622 F.2d 1043 (1980) (relying on *Burdine).* Some of the cited decisions also involved class claims, and others resulted in judgments for the defendants; notwithstanding those distinctions, each one misstates the individual-disparate-treatment burden of proof.

82. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981).

83. *Id.* at 252,citing, *Lieberman v. Gant*, 630 F.2d 60 (2d Cir. 1980); *Jackson v. U.S. Steel Corp.*, 624 F.2d 436 (3d Cir. 1980); *Ambush v. Montgomery County Govt.*, 620 F.2d 1048 (4th Cir. 1980); *Loeb v. Textron, Inc.*, 600 F.2d 1003 (1st Cir. 1979)). The lone "but see" was *Vaughn v. Westinghouse Elec. Corp.*, 620 F.2d 655 (8th Cir. 1980), *vacated*, 450 U.S. 972 (1981).

84. 450 U.S. at 253 (quoting 9 J. WIGMORE, EVIDENCE § 2489 (3d ed. 1940)).

> is silent in the face of the presumption, the court must enter judgment for the plaintiff because no issue of act remains in the case.[85]

According to the Supreme Court in *Burdine* the burden on the defendant once the prima facie case has been established is one of production, not of proof;[86] "the defendant bears only the burden of explaining clearly the nondiscriminatory reasons for its actions."[87]

If the *McDonnell Douglas* to *Burdine* standards were the only Supreme Court pronouncements other than those in *Griggs,* on the issue of the burden of proof in employment discrimination cases, the number of analyses of the propriety of those standards would no doubt be far smaller than it is.[88] The

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85. *Id.* at 254.

86. *Id.* at 254-56, 258.

87. *Id.* at 260.

88. In addition to the *Griggs* and *McDonnell Douglas* analyses discussed in this article, and the pattern-or-practice/class action model set out in *Teamsters v. United States,* 431 U.S. 324 (1977) and *Hazelwood Sch. Dist. v. United States,* 433 U.S. 299 (1977) the Court has presented a variety of other burden-of-proof criteria. These include but are not limited to the following: (1) *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 771-73 (1976) (individual class members have a very limited burden; to avoid liability to individuals once discrimination against the class is proved, the employee must "prove that individuals who reapply were not in fact victims of previous hiring discrimination." The Court cited *McDonnell Douglas* in this regard); (2) *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 282 n.10 (1976) (after recounting the *Green* test, the Court then cited *Moody, infra,* for the proposition that "[t]he use of the term 'pretext' . . . does not mean, of course, that the Title VII plaintiff must show that he would have been rejected or discharged solely on the basis of his race, without regard to the alleged deficiencies, . . . no more is required to be shown than the race was a "but for" cause."); (3) *Rogers v. Lodge*, 458 U.S. 613, 621, 627 (1982) (while a determination of discriminatory intent is "a requisite to a finding of unconstitutional vote dilution, such a finding is described as "the ultimate issue" rather than as a consideration at the prima facie case stage). *Griggs* was followed in *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975) (employment tests), *Dothard v. Rawlinson*, 433 U.S. 321 (1977) (minimum height and weight requirements), *New York City Transit Auth. v. Beazer*, 440 U.S. 568 (1979) (methadone maintenance program), *Casteneda v. Partida*, 430 U.S. 482 (1977) (statistical proof of discrimination in grand jury selection) and *Connecticut v. Teal*, 457 U.S. 440 (1982) (test with disparate impact may be challenged even though "bottom line" of selection process does not produce discriminatory statistical pattern). Other examples of the *Teamsters* model include *California brewers Ass'n v. Bryant*, 444 U.S. 598 (1980), *American Tobacco Co. v. Patterson*, 456 U.S. 63 (1982), and *General Tel. Co. v. Falcon*, 457 U.S. 147 (1982). *See also* Gomez v. Toledo, 446 U.S. 635 (1980) ("good faith" related to public official's qualified immunity from suit, is affirmative defense to employment discrimination action under 42 U.S.C. § 1983 which defendant must plead and prove, rather than requiring plaintiff to plead and prove bad faith).

Law review commentary on burden-of-proof issues has been quite extensive. *See, e.g.,* Belton, *supra* n.56; Blumrosen, *Strangers in Paradise:* Griggs v. Duke Power Co. *and the Concept of Employment Discrimination,* 71 MICH. L. REV. 59 (1972); Chamallas, *Evolving Conceptions of Equality under Title VII: Disparate Impact Theory and the Demise of the Bottom Line Principle,* 31 UCLA L. REV. 305 (1983); Player, *Title VII Impact Analysis Applied to the Age Discrimination in Employment Act: Is a Transplant Appropriate?* 14 U. TOLEDO L. REV. 1261 (1983); Helfand & Pemberton, *The Continuing Vitality of Title VII Disparate Impact Analysis,* 36 MERCER L. REV. 939 (1985); Note, *Beyond the Prima Facie Case in Employment Discrimination Law: Statistical Proof and Rebuttal,* 89 HARV. L. REV. 387 (1975); Note,

Court has been roundly criticized as inconsistent and as insensitive to legislative and social policy.[89] That debate is beyond the scope of this article. Instead, the following discussion will demonstrate how—and why—some courts have strayed from the path once again.

C. *"Direct Evidence" and the Burden of Proof*

Before proceeding to the judicial point of departure from *Burdine,* it is necessary to consider the concept of "direct evidence" itself. As one court has explained:

> Circumstantial evidence is that which establishes the fact to be proved only through inference based on human experience that a certain circumstance is usually present when another certain circumstance or set of circumstances is present. Direct evidence establishes the fact to be proved without the necessity for such inference.[90]

With direct evidence, the only inference needed is the assumption that the witness (or document) is credible. Direct evidence is always relevant; circumstantial evidence must be weighed for its relevance.[91]

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*Discriminatory Purposes and Discriminatory Impact: An Assessment After*Feeney, 79 COLUM. L. REV. 1376 (1979); Bodin, *The Standard of Causation in Mixed Motive Title VII Actions: A Social Policy Perspective,* 82 COLUM L. REV. 292 (1982); Note, *Discriminatory Purpose and Mens Rea: The Tortured Argument of Invidious Intent,* 93 YALE L.J. III (1983); Note, *Quasi-Suspect Classes and Proof of Discriminatory Intent: A New Model,* 90 YALE L.J. 912 (1981); Note, *Section 1981: Discriminatory Purpose or Disproportionate Impact?* 80 COLUM. L. REV. 137 (1980); Friedman, *The Burger Court and the Prima Facie Case in Employment Discrimination Litigation: A Critique,* 65 CORNELL L. REV. 1 (1979); Player, *Defining 'Legitimacy' in Disparate Treatment Cases: Motivational Inferences as a Talisman for Analysis,* 36 MERCER L. REV. 855 (1985); Player, *Proof of Disparate Treatment Under the Age Discrimination in Employment Act: Variations on a Title VII Theme,* 17 GA. L. REV. 621 (1983); Player, *The Evidentiary Nature of Defendant's Burden in Title VII Disparate Treatment Cases,* 49 No. L. REV. 17 (1984); Smith, *Employment Defenses in Employment Discrimination Litigation: A Reassessment of Burdens of Proof and Substantive Standards,* 55 TEMPLE L. Q. 372 (1982); Furnish, *A Path Through the Maze: Disparate Impact and Disparate Treatment Under Title VII of the Civil Rights Act of 1964 After* Beazer *and* Burdine, 23 B.C. L. REV. 1129 (1980); Terrell, *Employment Discrimination: The Defendant's Burden,* 29 LOYOLA L. REV. 287 (1983); Witherington, *Standards of Proof in Employment Law,* 57 CONN. B. J. 239 (1983); Smalls, *Burden of Proof in Title VII Cases,* 25 HOWARD L. J. 247 (1982); Smith, *Employer Defenses in Employment Discrimination Litigation: A Reassessment of the Burdens of Proof and Substantive Standards Following* Texas Department of Community Affairs v. Burdine, 55 TEMPLE L.Q. 372 (1982); Pannick, *The Burden of Proof in Discrimination Cases,* 131 NEW L. J. 895 (1981); Bartholet, *Proof of Discriminatory Intent Under Title VII,*" 70 CAL. L. REV. 1201 (1982).

89. *See, e.g.,* Belton, *supra* n.56.

90. Radomsky v. United States, 180 F.2d 781, 783 (9th Cir. 1950). *Cf.* United States v. Henderson, 693 F.2d 1028, 1031 (11th Cir. 1982) (direct evidence defined as when witness testifies to fact being asserted on basis of his or her personal knowledge of fact).

91. *See* MCCORMICK, EVIDENCE § 185 at 435 (2d ed. 1972); *see also* 1 WIGMORE, EVIDENCE § 25 (using "testimonial" rather than "direct" evidence). "Direct evidence also embraces objects

While there is a tendency to assume that testimonial evidence falls into the "direct" category,[92] the testimony of an interested party concerning ultimate facts, even if credited, can be "substantial evidence," but is "less than direct evidence."[93] When the focus is upon "direct evidence of discriminatory intent," the courts are in hopeless disagreement over a definition of the term. For example:

(1) Even though a private school distributed printed cards which stated, "the policy of the school is one of nonintegration," the Fifth Circuit concluded that "[d]irect evidence as to the discriminatory nature of the private schools was unavailable."[94]

(2) In dictum, the First Circuit opined in an age discrimination case that direct evidence might be found in a statement such as "I am firing you solely because I want someone younger,"[95] or "in a letter or an admission from a defendant."[96] Company documents "that might be interpreted as indicating a preference for younger employees," however, were not found to be "direct evidence that [plaintiff] in particular was fired because of age."[97]

(3) The Ninth Circuit found that an alleged comment to plaintiff, "I would suggest you find a well-qualified, younger man, someone I can replace you with" was direct evidence.[98]

(4) The Second Circuit stated, "[d]irect proof might sometimes be available if, for example, the employer had told the employee that he was being fired because of his age."[99]

(5) Again in dictum, the Fifth Circuit said that evidence of intent to discriminate might be found in "direct evidence . . . *e.g.*, a paper scrap with the notation, "Lay-off—Too Old."'"[100]

(6) A racially-biased letter of complaint from an airline passenger was deemed to be "direct evidence which served as the nexus between [plaintiff's] termination and her race."[101]

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or documents offered in evidence to show their existence, characteristics or contents, or a view of some scene by the Court." McCORMICK, at p. 435 n.12.

92. *See infra* notes 94-108 and accompanying text.

93. *See* National Labor Relations Board v. Buckhorn Hazard Coal Corp., 472 F.2d 53, 56-57 (6th Cir. 1973).

94. School Board of Broward County v. Department of HEW, 525 F.2d 900, 907 and n.7 (5th Cir. 1976).

95. Loeb v. Textron, Inc., 600 F.2d 1003, 1014 n.12 (1st Cir. 1979).

96. *Id.* at 1018.

97. *Id.*

98. *See* Sutton v. Atlantic Richfield Co., 646 F.2d 407, 409 n.12 (9th Cir. 1981).

99. *See* Stanojev v. Ebasco Services, Inc., 643 F.2d 914, 921 (2d Cir. 1981) citing, *Gillin v. Federal Paper Board Co.*, 479 F.2d 97, 102 (2d Cir. 1973)); *see also* Hagelthorn v. Kennecott Copper Corp., 710 F.2d 76, 80 (2d Cir. 1983).

100. *See* Williams v. General Motors Corp., 656 F.2d 120, 130 (5th Cir. 1981), *cert. denied*, 455 U.S. 943 (1982).

101. *See* Williams v. Trans World Airlines, Inc., 660 F.2d 1267 (8th Cir. 1981).

(7) The Seventh Circuit, in *Syvock v. Milwaukee Boiler Manufacturing Company,*[102] contrasted the case before it, which it found to be "wholly circumstantial," with two "direct evidence cases": *Robb v. Chemetron Corporation*[103] involving an "expressed management philosophy of reducing and controlling the age of management-level employees," and *Buchholz v. Symons Manufacturing Company,*[104] in which there had been testimony regarding numerous statements with respect to the plaintiff's age.

(8) The Eighth Circuit gave "great weight" to direct evidence of discriminatory intent in a voting rights case, including statements of legislators and testimony of city aldermen concerning the reasons for enactment of statutes and ordinances.[105]

(9) "[T]estimony that an interviewer told a [female] job applicant that 'he wanted to fill the position with a man' " was treated as direct evidence by the District of Columbia Circuit.[106]

(10) The Fourth Circuit found that "statements of the defendant" can be direct evidence,[107] while a Sixth Circuit judge has defined direct evidence to include "discriminatory statements or admission."[108]

The Eighth Circuit's approach to the direct evidence question is especially difficult to assess. In addition to the decisions discussed above,[109] the court has held that "direct proof of age discrimination" included the plaintiff's demotion from a position for which he was qualified, and his replacement by a younger man.[110] The Eighth Circuit also implied that an inference that the demotion was "to save money" might be direct evidence.[111]

In *Goodwin v. Circuit Court of St. Louis County,*[112] Eighth Circuit treated two alleged statements by one of the defendants—a state court judge—as direct evidence. In *Goodwin,* the defendent allegedly asserted that: "This court will never run well so long as there are women in charge," and "[the judge] had taken [plaintiff] out of the kitchen, taken her apron off, and put a robe on her."[113] Arguments that these statements were made in jest and that the prejudicial impact of the evidence far outweighed its probative value were rejected.

Although the foregoing examples are far from unanimous in their

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102. 665 F.2d 149, 157-58 (7th Cir. 1981).

103. 17 FEP Cas. 1535, 1541 (S.D. Tex. 1978).

104. 445 F. Supp. 706, 713 (E.D. Wis. 1978).

105. *See* Perkins v. City of West Helena, 675 F.2d 201, 207, 213-14 (8th Cir.), *aff'd mem.,* 459 U.S. 801 (1982).

106. DeMedina v. Reinhardt, 686 F.2d 997, 1002 n.3 (D.C. Cir. 1982).

107. *See* Moore v. City of Charlotte, 754 F.2d 1100, 1105 (4th Cir. 1985).

108. *See* Weems v. Ball Metal & Chem. Div., Inc., 753 F.2d 527, 531 (6th Cir. 1985) (Jones, J., dissenting).

109. *See supra* notes 101-05 and accompanying text.

110. *See* Dace v. ACF Industries, Inc., 722 F.2d 374, 377-78 (8th Cir. 1984).

111. *Id.* The court also called this inference "circumstantial" proof. *Id.*

112. 729 F.2d 541 (8th Cir. 1984), *cert. denied,* 105 S.Ct. 112 (1985).

113. *Id.* at 546.

definitions, it appears to be the prevailing view that "direct evidence" is probative of an ultimate fact; if believed, this "direct evidence" satisfies the plaintiff's burden of proving that fact.[114] It is also the prevailing view that direct evidence is entitled to no greater weight than circumstantial evidence; direct evidence may be used either to prove a fact or to support a legal conclusion.[115] The principal reason for reliance upon circumstantial evidence rather than direct evidence in employment discrimination cases is the virtually unanimous recognition that direct evidence of discriminatory intent is seldom available;[116] as one court put it, "Unless the employer is a latter-day George Washington, employment discrimination is as difficult to prove as who chopped down the cherry tree."[117] Indeed, in a voting rights case, the Fifth Circuit Court of Appeals noted that it was unlikely that plaintiffs could ever uncover direct proof that "[a voting system] was being maintained for the purpose of discrimination," and found it "likely that no plaintiff could ever

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114. While the Fifth Circuit has likened direct evidence to a "smoking gun," Lodge v. Buxton, 639 F.2d 1358, 1363 n.8 (5th Cir. 1981), *aff'd sub nom*, Rogers v. Lodge, 458 U.S. 613 (1982), such a colorful characterization is inaccurate. Presence of a smoking gun leads the viewer to infer that the gun has been fired; it is, therefore, circumstantial rather than direct evidence of that fact. *See* Haupt v. United States, 330 U.S. 637, 640 (1947).

115. "Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 266 (1977). The apparent lack of difference between direct and circumstantial evidence is seen in, *e.g.*: *Hombre Hombre Enterprises, Inc. v. National Labor Relations Board*, 582 F.2d 204, 207 (9th Cir. 1978); *Page v. Bolger*, 21 FEP Cas. 780,784, 21 EPD 30,500 (4th Cir. 1979); *Smith v. University of North Carolina*, 632 F.2d 316, 334-35 (4th Cir. 1980); *Mistretta v. Sandia Corp.*, 639 F.2d 588, 597 (10th Cir. 1980); *Hoots v. Pennsylvania*, 672 F.2d 1107, 1116-19 (3d Cir., *cert. denied*, 459 U.S. 824 (1982)); *Gay v. Waiters' & Dairy Lunchmen's Union*, 694 F.2d 531 (9th Cir. 1982); *EEOC v. American National Bank*, 652 F.2d 1176, 1189 (4th Cir. 1981), *cert. denied*, 459 U.S. 923 (1982); *DeMedina v. Reinhardt*, 686 F.2d 997 (D.C. Cir. 1982); *National Labor Relations Board v. Brookwood Furniture*, 701 F.2d 452, 464 (5th Cir. 1983); *Dace v. ACF Industries, Inc.*, 722 F.2d 374, 377-78 (8th Cir. 1983); and *Krodel v. Young*, 748 F.2d 701, 710 (D.C. Cir. 1984).

116. *See* Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 265 (1977) ("such cases are rare"); *accord*, Sweeney v. Board of Trustees of Keene State College, 569 F.2d 169, 175 (1st Cir.), *rev'd on other grounds*, 438 U.S. 567 (1978); Polynesian Cultural Center, Inc. v. National Labor Relations Board, 582 F.2d 467, 473 (9th Cir. 1978); Ramirez v. Sloss, 615 F.2d 163, 168 (5th Cir. 1980); Lynn v. Regents of Univ. of California, 656 F.2d 1337, 1342 n.3 (9th Cir. 1981); Scott v. Greenville County, 716 F.2d 1409, 1424 (4th Cir. 1983); *see also* Metropolitan Housing Dev. Corp. v. Village of Arlington Heights, 558 F.2d 1283, 1290 (7th Cir. 1977) ("as overtly bigoted behavior has become more unfashionable, evidence of intent has become harder to find"); United States v. Dillon Supply Co., 429 F.2d 800, 804 (4th Cir. 1970) ("proof of overt racial discrimination in employment is seldom direct"); Smith v. Town of Clarkton, 582 F.2d 1055, 1064-65 (4th Cir. 1982) ("the brief trial in this case presented more direct evidence than is usually available for assessing the motives of those numicipal officers"); Little v. United States, 489 F. Supp. 1012, 1024 (C.D. Ill. 1980), *aff'd*, 645 F.2d 77 (7th Cir. 1981), *quoted with approval in* Leonard v. City of Frankfort Elec. & Water Plant, 752 F.2d 189, 193 (6th Cir. 1985) ("it is the exceptional case where there is clear, direct evidence of racial animus").

117. Thornbrough v. Columbus & Greenville R.R., 760 F.2d 633, 638 (5th Cir. 1985).

find direct evidence that the system was maintained for discriminatory purposes."[118] The Sixth Circuit in *Alexander v. Youngstown Board of Education* [119] expressed a similar sentiment, stating that: "As a practical matter, intent can only be proven circumstantially."[120]

D. The Eleventh Circuit Loses Its Way

On October 1, 1981, the Fifth Circuit was split in two: the "new" Fifth Circuit was comprised of the states of Louisiana, Mississippi and Texas, while Alabama, Florida and Georgia became the Eleventh Circuit.[121] As its first order of business, the Eleventh Circuit in *Bonner v. City of Prichard*[122] adopted "old" Fifth Circuit decisions as binding precedent.[114] This apparently ministerial act, however, was to sow the seeds of mischief.

In order to see the problem in perspective, it is best to leapfrog interim decisions and then retrogress. The "landing point" is the Eleventh Circuit's opinion rendered two years after *Bonner*: *Bell v. Birmingham Linen Service.*[124] *Bell* was a straightforward sex discrimination action brought under Title VII, in which the plaintiff alleged that her employer "declined to promote her, or 'constructively demoted' her, because she was a woman."[125] Following a non-jury trial in the United States District Court for the Northern District of Alabama, judgment was entered for the defendant employer.[126]

Reviewing the district court's decision in *Bell,* the Eleventh Circuit panel seized upon testimony of both plaintiff and her union steward (also a woman) that the company's production manager, when asked why plaintiff was not being awarded a seniority-bid job in the washroom at a higher rate of pay, "stated . . . that he would not put Nora Bell in the washroom because if he did, 'every woman in the plant would want to go into the washroom.'"[127] The trial court had "specifically found that Westbrook (the production manager) made this statement, or a similar statement in substance, to Bell and Robinson (the union steward)."[128]

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118. Lodge v. Buxton, 639 F.2d 1358, 1363, 1373 (5th Cir. 1981),, *aff'd sub nom,* Rogers v. Lodge, 458 U.S. 613 (1982) ("clearly, the right to relief cannot depend on whether or not public officials have created inculpatory documents") For an interesting discussion of injudicious comments as being less than conclusive, see Player, *Proof of Disparate Treatment Under the Age Discrimination in Employment Act: Variations on a Title VII Theme,* 17 GA. L. REV. 621, 662-663 (1983).

119. 675 F.2d 787 (6th Cir. 1982).

120. *Id.* at 791.

121. Pub. L. No. 96-452, § 2, 94 Stat. 1994 (Oct. 14, 1980), 28 U.S.C. § 41.

122. 661 F.2d 1206 (11th Cir. 1981).

123. *See id.; see also* Stein v. Reynolds Securities, Inc., 667 F.2d 33 (11th Cir. 1982).

124. 715 F.2d 1552 (11th Cir. 1983), *cert. denied,* 105 S.Ct. 2385 (1984).

125. *Id.* at 1552.

126.

127. Bell v. Birminham Linen Service, 715 F.2d 1552, 1553 (11th Cir. 1983), *cert. denied,* 105 S.Ct. 2385 (1984).

128. *Id.* at 1553-54.

An arbitrator found for Bell and awarded her back pay.[129] The Equal Employment Opportunity Commission found reasonable cause to believe that she had been the victim of sex discrimination.[130] The trial court found that Bell had made out a prima facie case of discrimination under *McDonnell Douglas* and *Burdine*.[131] Nonetheless, the court found for the employer on the merits, stating,

> the real issue in this case, notwithstanding any comments made by Westbrook or the findings of the EEOC or the arbitration decision, is whether [the company's] deliberate effort to place [a male employee] in the position was motivated by matters relating to sex or whether this effort was motivated by [the male's] prior experience and ability to perform the job without further training.[132]

The Eleventh Circuit panel reviewed these findings and the development of case law concerning the burden of proof in what it conceded to be a disparate treatment case,[133] but then announced a departure from the precedents it had cited:

> It should be clear that the *McDonnell Douglas* method of proving a prima facie case pertains primarily, if not exclusively, to situations where direct evidence of discrimination is lacking. It would be illogical, indeed ironic, to hold a Title VII plaintiff presenting direct evidence of a defendant's intent to discriminate to a more stringent burden of proof, or to allow a defendant to meet that direct proof by merely articulating, but not proving, legitimate, nondiscriminatory reasons for its actions. Following these principles, this court has held that where a case of discrimination is proved by direct evidence, it is incorrect to rely on a *McDonnell Douglas* rebuttal. If the evidence consists of direct testimony that the defendant acted with a discriminatory motive, and the trier of fact accepts this testimony, the ultimate issue of discrimination is proved. Defendant cannot refute this evidence by mere articulation of other reasons; the legal standard changes dramatically:
>
> > Once an [illegal] motive is proved to have been a significant or substantial factor in an employment decision, defendant can rebut only by proving by a preponderance of the evidence that the same decision would have been reached even absent the presence of that factor.
>
> The district court in this case specifically accepted as credible testimony indicating that Birmingham Linen Service's decision-maker,

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129.
130. *Id.* at 1554.
131. *Id.* at 1555.
132. *Id.* at 1555.
133. *Id.* at 1556.

> Gus Westbrook, stated that he would not allow Bell into the washroom because if she were allowed in, all women would want to enter. This testimony is "highly probative evidence" of illegal discrimination.[134]

Concluding its decision to remand the case, the Eleventh Circuit in *Bell* asserted that, "Unless the district court concludes that Westbrook's sexual bias had *no relation whatsoever* to his employment decision, (Birmingham Linen Service) must establish by a preponderance of evidence that it would have made the same decision in the absence of the illegal factor."[135]

Contrary to the Eleventh Circuit panel's assertions, however, the result in *Bell* and the test it espouses represent a misreading of prior decisions coupled with a reliance on precedents which are no longer valid, *Bonner* notwithstanding. Examination of those precedents clearly demonstrates the court's errors.

(1) *Lee v. Russell County Board of Education:*[136] *Russell County,* a long-running school desegregation case, served as the umbrella under which a variety of claims of unlawful and unconstitutional discrimination had been brought.[137] When three untenured teachers and their principal were all denied reemployment, constitutional claims of discrimination were lodged with the court.[138] Applying the *McDonnell Douglas* proof standard, the trial court "ruled from the bench that plaintiffs had not met their burden of proving by a preponderance of the evidence that their nonrenewals were unconstitutional."[139]

The Eleventh Circuit, in an opinion written by Chief Judge Godbold, vacated the trial court's judgment.[140] Looking at the three steps in the *McDonnell Douglas* minuet[141] the court first observed, "[t]he *McDonnell Douglas* analysis is only one means of proving a case of discrimination,

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134. *Id.* at 1556-57.

135. *Id.* at 1558.

136. 684 F.2d 769 (11th Cir. 1982).

137.

138. *Id.* at 771. One teacher was a black male, one a black female, and one an "[Asiatic] Indian" female; the principal was a white male.

139. *Id.* at 772.

140.

141. Characterization of the *Mcdonnell Douglas* analytical process as a "minuet" apparently originated with *Sime v. Trustees of California St. Univ. and Colleges,* 526 F.2d 1112, 1114 (9th Cir. 1975). *See also* Flowers v. Crouch-Walker Corp., 552 F.2d 1277, 1281 (7th Cir. 1977); Halsell v. Kimberly-Clark Corp., 683 F.2d 285, 291 n.5 (8th Cir. 1981), *cert. denied,* 459 U.S. 1205 (1983); Cline v. Roadway Express, Inc., 689 F.2d 481, 486 (4th Cir. 1982); Lewis v. University of Pittsburgh, 725 F.2d 910, 925 (3d Cir. 1984) (Adams, J., dissenting), *cert. denied,* 105 S.Ct. 266 (1985). There is also a somewhat pejorative use of the expression, first found in (then-District) Judge Higginbotham's observation that the "value of the *Burdine* sequence" in a complex class action "is about as relevant as a minuet is to a thermonuclear battle." Vuyanich v. Republic National Bank, 521 F. Supp. 656, 661 (N.D. Tex. 1981), *vac. on other grounds,* 723 F.2d 1195 (5th Cir. 1984) (quoted with approval in *Craik v. Minnesota St. Univ. Bd.,* 731 F.2d 465, 470 n.7 (8th Cir. 1984); and *Chang v. University of Rhode Island,* 606 F. Supp. 1161, 1185 (D.R.I. 1985)).

however. It is not the exclusive means."[142] Five authorities were cited: *Furnco,*[143] which followed the *McDonnell Douglas* pattern but stated that the test for proof of a prima facie Title VII case "was not intended to be an inflexible rule;"[144] *Teamsters,*[145] a pattern-or-practice case in which a statutory affirmative defense was asserted by the defendants;[146] and three Fifth Circuit opinions.[147]

Lee v. Conecuh County Board of Education,[148] the first of the three Fifth Circuit decisions relied upon by the Eleventh Circuit in *Bell,* arose out of a school desegregation order in which the Fifth Circuit imposed a "clear and convincing evidence" standard on the defendant,[149] relying in turn upon *Lee v. Washington County Board of Education.*[150] There is serious question regarding the continued viability of the *Conecuh County* standard after *Burdine.*[151] In any event, the standard is, at most, only pertinent to a case "where the defendant has an immediate past history of racial discrimination, such as a school district operating under a Federal injunction ending a recent regime of *de jure* segregation."[152]

The second and third Fifth Circuit opinions cited in *Lee v. Russell County Board* are *McCuen v. Home Insurance Company*[153] and *McCorstin v. United States Steel Corporation,*[154] both of which modified the *McDonnell Douglas* standards in the context of age discrimination challenges to employers' reductions in force. These precedents, therefore, add nothing out of the ordinary to the analytical picture.

Next, the court in *Russell County* stated,

> [t]he *McDonnell Douglas* analysis is "[i]ntended progressively to sharpen inquiry into the elusive factual question of intentional discrimination" . . . where the plaintiff's case is made out with *circumstantial* evidence supporting the *inference* of discrimina-

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142. *See* Lee v. Russell County Board of Education, 684 F.2d 769, 773 (11th Cir. 1982).

143. Furnco Const. Corp. v. Waters, 438 U.S. 567 (1978).

144. *Id.* at 576.

145. International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977).

146. *Id.* at 357-58.

147. *Id.*

148. 634 F.2d 959 (5th Cir. 1981).

149. *Id.* at 963.

150. 625 F.2d 1235 (5th Cir. 1980); *see also* Lee v. Russell County Board of Education, 684 F.2d 769, 774-75 n.7 (11th Cor. 1982).

151. *See* Hammond v. Rapides Parish Sch. Bd., 590 F. Supp. 988, 994 (W.D. La. 1984), *aff'd mem.,* 755 F.2d 171 (5th Cir. 1985); *cf.* Baylor v. Jefferson County Bd. of Educ., 733 F.2d 1527, 1533 (11th Cir. 1984) (question reserved).

152. Hammond v. Rapides Parish Sch. Bd., 590 F. Supp. 988, 994 (W.D. La. 1984), *aff'd mem.,* 755 F.2d 171 (5th Cir. 1985). The Fifth Circuit now sees *Lee v. Conecuh County Bd. of Educ.* as a *McDonnell Douglas* case. *See* Merwine v. Board of Trustees for State Institutions, 754 F.2d 631, 635 n.3 (5th Cir. 1985) (also citing *Burdine).* With the summary affirmance of *Hammond,* little is left of the *Lee/Lee* test.

153. 633 F.2d 1150 (5th Cir. 1981).

154. 621 F.2d 749 (5th Cir. 1980).

> tion. . . . where a case of discrimination is made out by direct evidence, reliance on the four-part test developed for circumstantial evidence is obviously unnecessary.[155]

Two examples were given: *Ramirez v. Sloss*[156] and *Crawford v. Western Electric Company.*[157]

Ramirez relied in turn upon three decisions which were either expressly or implicitly overruled by the Supreme Court in *Burdine.*[158] *Crawford,* on the other hand, simply stated, "Statistical disparity between blacks and whites, especially when coupled with direct evidence of racially motivated conduct or language, might also, in a proper case, satisfy plaintiff's initial burden."[159]

The questionable precedent of *Ramirez* is, therefore, the only stated support for the idea that direct evidence, without more, is sufficient to meet the plaintiff's burden; moreover, the only burden which is involved is that of establishing a prima facie case[160]—hence, reference to the "four-part test."[161] Nothing else in *Ramirez* survived *Burdine.* Even so, this aspect of the court's decision in *Russell County,* while novel, is not wholly objectionable. Assuming a showing of membership in the protected group and an adverse employment action—neither of which is usually contested—the other elements of the first *McDonnell Douglas* step may indeed be supplied by direct rather than circumstantial evidence. There is general agreement that direct evidence of a discriminatory motive may suffice to establish a prima facie case.[162] This was, in fact, the meaning of the Supreme Court's language

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155. Lee v. Russell County Board of Educ., 684 F.2d 769, 773-74 (11th Cir 1982) (emphasis in original) (citations omitted).

156. 615 F.2d 163 (5th Cir. 1980).

157. 614 F.2d 1300 (5th Cir. 1980).

158. *See supra* note 81 and accompanying text.

159. Crawford v. Western Electric Co., 614 F.2d 1300, 1315 (5th Cir. 1980). The *Crawford* court noted that in a purely statistical case without evidence of purposeful discrimination, no prima facie case was found. *Id. (*citing, 586 F.2d 457 (5th Cir. 1978)).

160. Ramirez v. Sloss, 615 F.2d 163, 169 (5th Cir. 1980).

161. *See* Lee v. Russell County Board of Educ., 684 F.2d 769, 774 (11th Cir. 1982).

162. *See, e.g.,* Loeb v. Textron, Inc., 600 F.2d 1003, 1014 n.12 (1st Cir. 1979) (dictum); Spagnuolo v. Whirlpool Corp., 641 F.2d 1109, 1113 (4th Cir. 1981); Stanojev v. Ebasco Services, Inc., 643 F.2d 914, 921 (2d Cir. 1981) (dictum); Sutton v. Atlantic Richfield Co., 646 F.2d 407, 409, 412 (9th Cir. 1981) (dictum); Douglas v. Anderson, 656 F.2d 528, 531 n.2 (9th Cir. 1981) (dictum); Baldwin v. Sears, Roebuck & Co., 667 F.2d 55-458, 462 (5th Cir. 1982) ("the appellant failed to discharge his burden of proving, by direct or circumstantial evidence, a prima facie case of age discrimination"); Bradley v. Allstate Ins. Co., 683 F.2d 86, 88 (4th Cir. 1982), *cert. denied,* 459 U.S. 1038 (1983) (dictum); Blackwell v. Sun Elec. Corp., 696 F.2d 1176, 1180 (6th Cir. 1983) (dictum); Pace v. Southern Ry. Syst., 701 F.2d 1383, 1388 (11th Cir.), *cert. denied,* 105 S.Ct. 549 (1983) (dictum); Hagelthorn v. Kennecott Corp., 710 F.2d 76, 80 (2d Cir. 1983); Coburn v. Pan American World Airways, Inc., 711 F.2d 339, 343 (D.C. Cir.), *cert. denied,* 104 S.Ct. 488 (1983) (dictum); Rasimas v. Michigan Dept. of Mental Health, 714 F.2d 614, 623 (6th Cir. 1983), and 714 F.2d at 630 n.6 (Hoffman, J., dissenting), *cert. denied,* 104 S.Ct. 426 (1984); Air Line Pilots Ass'n, Int'l v. Transworld Airlines, Inc.,

in *Thurston:*[163] direct evidence may be used to establish a prima facie case.

The *Russell County* decision then marched into uncharted territory. Purporting to rely on *Mt. Healthy City School District v. Doyle,*[164] a public-employee freedom-of-speech case, the court stated:

> Where a case for discrimination is proved by direct evidence it is incorrect to rely on a *McDonnell Douglas* form of rebuttal. Under the *McDonnell Douglas* test plaintiff establishes a prima facie case when the trier of fact believes the four circumstances outlined above which give rise to an inference of discrimination. Where the evidence for a prima facie case consists, as it does here, of direct testimony that defendants acted with a discriminatory motivation, if the trier of fact believes the prima facie evidence the ultimate issue of discrimination is proved; no inference is required. Defendant cannot rebut this type of showing of discrimination simply by articulating or producing evidence of legitimate, nondiscriminatory reasons. Once an unconstitutional motive is proved to have been a significant or substantial factor in an employment decision, defendant can rebut only by proving by a preponderance of the evidence that the same decision would have been reached even absent the presence of that factor.[165]

This holding is unsupported by the other authority cited by the court in *Russell County, Avery v. Homewood City Board of Education.*[166] *Avery* involved the same defendant's burden analysis discussed above,[167] and likewise should be limited to discriminatory patterns established as a matter of issue preclusion.

Mt. Healthy, which antedates *Burdine, Furnco,* and *Sweeney,* presents a procedural framework for analyzing a so-called "mixed-motive"[168] employment decision in the public sector. The principles involved are constitutional—"a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[169]

Discussing the burden of proof in *Mt. Healthy,* the Supreme Court stated that,

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713 F.2d 940, 952 (2d Cir. 1983), *aff'd* 465 U.S. 1065 (1985); White v. Vathally, 732 F.2d 1037, 1043 (1st Cir. 1984), *cert. denied,* 105 S.Ct. 331 (1985).

163. *See supra* note 2 and accompanying text.

164. 429 U.S. 274 (1977).

165. *See* Lee v. Russell County Board of Educ., 684 F.2d 769, 774 (11th Cir. 1982).

166. 674 F.2d 337 (5th Cir. 1982), *cert. denied,* 461 U.S. 943 (1983).

167. *See supra* notes 150-52 and accompanying text; *cf.* Professional Ass'n of College Educators v. El Paso County Community College, 730 F.2d 258 (5th Cir. 1984), *cert. denied,* 105 S.Ct. 248 (1985).

168. *See supra* notes and accompanying text.

169. Mt. Healthy City School Dist. Doyle, 429 U.S. 274, 283 (1977) (quoting Pickering v. Board of Education, 391 U.S. 563, 568 (1968)).

> Initially, the burden was properly placed upon the [employee] to show that his conduct was constitutionally protected, and that this conduct was a "substantial factor"—or to put it in other words, that it was a "motivating factor" in the Board's decision not to rehire him. [The employee] having carried that burden, however, the District Court should have gone on to determine whether the Board had shown by a preponderance of the evidence that it would have reached the same decision as to respondent's reemployment even in the absence of the protected conduct.[170]

Although *Mt. Healthy* may be applicable to constitutional claims involving free speech, equal protection, or due process, there is no basis for transposing a burden of proof upon a private employer in a Title VII or ADEA disparate treatment case, irrespective of the nature or quantum of the plaintiff's proof. The importation of a *Mt. Healthy* burden in *Russell County*, therefore, was marginally defensible, but its use in *Bell* is totally inappropriate.[171]

Interestingly, on remand in*Russell County* the trial court once more applied *McDonnell Douglas* standards, rejecting the purported direct evidence;[172] On a second appeal, the Eleventh Circuit affirmed, apparently without recognizing this change of emphasis.[173]

(3) *Perryman v. Johnson Products Company.*[174] References to the role of direct evidence in *Perryman,* a sex discrimination action, are not supportive of the result reached in *Bell.* The Eleventh Circuit in *Perryman* cautioned, "It is important to bear in mind . . . that the defendant's burden of rebuttal [under *McDonnell Douglas* and *Burdine*] is exceedingly light."[175] The *Perryman* court explained that "the defendant's burden is 'merely one of production, not proof.'"[176] The Eleventh Circuit in *Perryman* noted that the record "present[ed] substantial direct and circumstantial evidence of illegal sexual discrimination,"[177] but that the employer had "presented a vigorous defense which created an issue of fact as to most, if not all, of the allegations of discrimination" and, in so doing "met its minimal burden of articulating non-discriminatory reasons for its decisions."[178]

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170. *Id.* at 287.

171. In fact, *Russell County* is self-limiting: "Where *strong,* direct evidence is presented, reliance on *McDonnell Douglas* as the exclusive means of proving the case and as the proper form of rebuttal is incorrect. *When a significant unconstitutional motive is ultimately proved by either circumstantial or direct evidence,* the defendants' only form of rebuttal is under *Mt. Healthy.*" 684 F.2d at 774 (emphasis supplied). Hence, *Mt. Healthy* applies upon proof of an unconstitutional motive, irrespective of whether the proof was direct oı circumstantial

172. *See* Lee v. Russell County Bd. of Educ., 744 F.2d 768, 770 (11th Cir. 1984).

173. *Id.*

174. 698 F.2d 1138 (11th Cir. 1983).

175. *Id.* at 1142.

176. *Id.* quoting *Lee v. Russell County Board of Educ.*, 684 F.2d 769, 773 (11th Cir. 1982)).

177. *Id.* at 1143.

178. *Id.* However, the court had clouded this holding by citing *Mt. Healthy* and stating

Perryman, as a class action, presented problems which are not pertinent to a *McDonnell Douglas* model.[179] But the Eleventh Circuit Court of Appeals, in a burst of misplaced enthusiasm, threw in a bit of advice:

> Of course, some plaintiffs are able to prove the existence of discriminatory intent by direct evidence; in these rare cases, the plaintiff is not required to rely on the inference of discrimination created by the prima facie case of *McDonnell Douglas.* . . . . *If the factfinder believes the direct evidence presented by the plaintiff, a presumption is created that the adverse employment action taken against the plaintiff was a product of that discriminatory intent.* . . . . *At this point, just as with a successful showing by the plaintiff of discriminatory intent based on circumstantial evidence, the burden shifts to the defendant to prove by a preponderance of the evidence that the adverse action would have been taken even in the absence of a discriminatory motive.*[180]

This dictum was a source of the later mischief in *Bell,* because it superimposed a constitutional standard of proof, premised on discredited Fifth Circuit authority, onto a private, statutory case. The trial court which had to grapple with *Perryman* on remand[181] simply quoted the varying burden of proof tests, also citing *Bell,*[182] restated the findings of fact at length, and once more found for the plaintiffs. This time, however, the court found that discriminatory intent had been shown through direct evidence[183] and that the defendant's response did "not meet the defendant's heavy burden of proving by a preponderance of the evidence that the adverse action . . . would have been taken even in the absence of gender discrimination.[184] Every other substantive ruling with respect to both individual and class claims also was premised on *Mt. Healthy* even though there was no direct evidence involved.[185] This is not surprising, given the Eleventh Circuit's expressed view that any proof of discriminatory intent placed the "but for" burden on the employer.[186]

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that the presumption of discriminatory intent created by the prima facie case "may only be rebutted by a showing by the employer that the adverse action would have been taken even in the absence of discriminatory intent." *Id.* at 1142.

179. *See Id.* at 1143-44.

180. *Id.* at 1143.

181. *See* Perryman v. Johnson Products Co., 580 F. Supp. 1015 (N.D. Ga. 1983).

182. *Id.* at 1017-18.

183. The only direct evidence mentioned by the court was a statement by a district sales manager "that the company was looking for men to fill the sales reprsentative position because the women who had worked for Johnson Products in those positions in the past had been 'a bunch of rotten eggs.' " *Id.* at 1021.

184. *Id.* at 1022.

185. *Id.* at 1023, 1030, 1034-35 (class claims); *id.* at 1025, 1027 (promotion claims); *id.* at 1032, 1033-34 (discharge claims).

186.

(4) *Eastland v. Tennessee Valley Authority.*[187] The final authority cited in *Bell, Eastland* was a class action brought by black employees of Tennessee Valley Authority (TVA). The only portion of the *Eastland* decision mentioned in *Bell* was that "testimony of selecting supervisor's racial bias, plus other evidence, defeated defendant's *McDonnell Douglas* rebuttal."[188] But in *Eastland,* the trial court made a finding that the supervisor was not racially biased, which the Eleventh Circuit reversed because "four black employees testified as to [the supervisor's] racially discriminatory behavior."[189] The reversal was phrased in classic *McDonnell Douglas* terms: "We need not decide whether TVA met its burden of articulating legitimate reasons for its decision because [plaintiff] established that TVA's asserted reasons were pretexts for discrimination."[190]

The preceding analysis shows that the "new rule" in *Bell* is neither supported by precedent nor consistent with the underlying statutory framework. It imposes upon a defendant precisely the sort of burden criticized in *Sweeney* as "the almost impossible burden of proving absence of discriminatory motive"[191] with an even more staggering twist: discriminatory motive has been proved, so that the employer must show that its discrimination made no difference!

E. Unringing the Bell

The Eleventh Circuit is not solely responsible for the confusion over direct evidence and its effect. In *Spagnuolo v. Whirlpool Corporation,*[192] an age discrimination case, a Fourth Circuit panel majority stated:

> Plaintiff produced direct evidence of the purpose and conduct of Whirlpool, demonstrating discrimination against him and others because of his age, that the jury clearly found persuasive. The reliance on direct evidence instead of inferences obviated any need for an independent showing that Whirlpool's asserted justifications were "Pretextual."[193]

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187. 704 F.2d 613 (11th Cir.) *on reh'g,* 714 F.2d 1066 (1983) (the opinion on rehearing was rendered before, but not referenced in, *Bell).*

188. *See* Bell v. Birmingham Linen Service, 715 F.2d 1552, 1552 (11th Cir. 1983), *Cert. denied,* 104 S.Ct. 2385 (1984) (citing Eastland v. Tennessee Valley Authority, 704 F.2d 613, 626 (11th Cir. 1983)).

189. *See* Eastland v. Tennessee Valley Authority, 704 F.2d 613, 626 (11th Cir. 1983)).

190. *Id.* Use of direct evidence to show pretext is commonplace. *See, e.g.,* Sweat v. Miller Brewing Co., 708 F.2d 655, 657 (11th Cir. 1983) (dictum); Dade v. ACF Industries, Inc., 722 F.2d 374, 377-78 (8th Cir. 1983); Weems v. Ball Metal & Chem. Div., Inc., 753 F.2d 527, 531 (6th Cir. 1985) (Jones, J., dissenting); Jorgensen v. Modern Woodmen of America, 751 F.2d 502, 504 (8th Cir. 1985); Easley v. Empire Inc., 757 F.2d 923 (8th Cir. 1985).

191. *See* Board of Trustees of Keene State College v. Sweeney, 439 U.S. 24, 25 (1978); *see also id.* at 29 (Stevens, J., dissenting).

192. 641 F.2d 1109 (4th Cir. 1981).

193. *Id.* at 1113. The court never explained what the "direct evidence" was.

The dissent in *Spagnuolo,* however, had a different view of the effect of the production of direct evidence, pointing out that: "While the production of direct evidence might relieve the plaintiff of the necessity of proving each of the elements of a *McDonnell Douglas* prima facie case, it does not justify a complete departure from the sensible and orderly presentation of evidence under that case."[194]

The *Bell* test has established a misconception—little allayed by the Eleventh Circuit's later decisions—that any biased comment alleged to have been made by a management representative automatically saddles the employer with the burden of proof. While there must be a causal nexus between the biased statement or document and the decision at issue,[195] that rather obvious tenet has not been adhered to by the Eleventh Circuit.

For example, in *Walker v. Ford Motor Company,*[196] the court found that racial slurs and epithets had created a discriminatory atmosphere, but the causal link between this "atmosphere" and plaintiff's discharge was established circumstantially.[197] In *Lewis v. Smith,*[198] although discarding the "clear and convincing evidence" test as inappropriate,[199] testimony that plaintiff was qualified but that her application was not considered was treated as conclusively shifting the burden of proof to the employer. *Miles v. M.N.C. Corporation*[200] reversed a judgment for the defendant because the trial court struck a racial slur from the record after trial.[201] Such testimony, which has been described as a "bloody shirt"[202]—inflammatory and prejudicial, but not particularly probative—should not be encouraged. However, many plaintiff's counsel, in their quest to take advantage of the *Bell* test, have made direct evidence a *sine qua non* to their case in chief.

Equally disturbing is a trend toward characterizing evidence as "direct" which is not "direct" at all. The First Circuit in *Banerjee v. Board of Trustees of Smith College,*[203] addressed this trend and characterized plaintiff's purported "direct evidence" as consisting "simply of nonprobative evidence accompanied by speculation. Other items are minor examples of what

194. *Id.* at 1115. Interestingly, the Eleventh Circuit has said that *Spagnuolo* means that direct evidence established a prima facie case—not that the burden is shifted. *See* Pace v. Southern Ry. System, 701 F.2d 1383, 1388 (11th Cir.), *cert. denied,* 104 S.Ct. 97 (1983) (dictum).

195. 684 F.2d 1355 (11th Cir. 1982).

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198. 731 F.2d 1535 (11th Cir. 1984).

199. *Id.* at 1539. *But see* Gilchrist v. Bolger, 733 F.2d 1551, 1554 (11th Cir. 1984) ("Without proof of an immediate past history of discrimination, the rebuttal burden on the defendant is the preponderance of the evidence, not clear and convincing evidence." There was no direct evidence in the case).

200. 750 F.2d 867 (11th Cir. 1985); *see also* Thompkins v. Morris Brown College, 752 F.2d 558 (11th Cir. 1985).

201.

202. *See* Carter v. Duncan-Huggins, Inc., 727 F.2d 1225, 1245 (D.C. Cir. 1984) (Scalia, J., dissenting).

203. 648 F.2d 61 (1st Cir. 1981)

assuredly may have constituted poor judgment, and hence may have circumstantial value, but they are hardly 'direct' or compelling evidence.[204]

No court of appeals other than the Eleventh Circuit has accepted the burden-shifting model set up by *Bell.*[205] Nonetheless, the Eleventh Circuit has continued to demonstrate a fondness for the *Bell* test and has compounded the problem because of a tendency to remand any lower court decision which does not expressly mention the presence and role of direct evidence in that determination.[207] *Bell* is also cited with approval in opinions which have no direct evidence at issue.[208]

Also moving in another direction to exact greater evidentiary submissions from the defendant employer, the Eleventh Circuit now deems articulated reasons which are "subjective" to be illegitimate[209]—or, at least, *sometimes*

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204. *See* Banerjee v. Board of Trustees of Smith College, 648 F.2d 61, 66 (1st Cir.), *cert. denied,* 454 U.S. 1098 (1981); *see also* Clay v. Hyatt Regency Hotel, 724 F.2d 721, 724 (8th Cir. 1984); Carter v. Duncan-Huggins, Inc., 727 F.2d 1225, 1236 (D.C. Cir. 1984); Johnson v. Allyn & Bacon, Inc., 731 F.2d 64, 69 n.6 (1st Cir. 1984), *cert. denied,* 105 S.Ct. 433 (1985); Gilchrist v. Bolger, 733 F.2d 1551, 1554 (11th Cir. 1984); Norcross v. Sneed, 755 F.2d 113, 118-19 (8th Cir. 1985).

205. *See, e.g.,* Clay v. Hyatt Regency Hotel, 724 F.2d 721, 724 (8th Cir. 1984); Curry v. Oklahoma Gas & Elec. Co., 730 F.2d 598, 602 (10th Cir. 1984); Johnson v. Allyn & Bacon, Inc., 731 F.2d 64, 69 n.6 (1st Cir. 1984); Grigg v. W. A. Foote Memorial Hosp., Inc., 741 F.2d 1486, 1494-1505 (6th Cir. 1984); Norcross v. Sneed, 755 F.2d 113, 118-19 (8th Cir. 1985); Friends v. Coca-Cola Bottling Co. of Mid-America, 759 F.2d 813, 814 (10th Cir. 1985); Easley v. Empire Inc., 757 F.2d 923 (8th Cir. 1985). *But see* Wheeler v. City of Columbus, 686 F.2d 1144, 1153 (5th Cir. 1982) (on remand, trial court to deal with allegation that city council member told plaintiff "that her job of auditorium manager was not one for a woman." On a second appeal, 703 F.2d 853 (5th Cir. 1983), judgment for the defendant was affirmed).

206. "In cases where proof of impact alone is insufficient, where a stark pattern of discrimination is not evident, the courts should consider circumstantial evidence. . . ." Jean v. Nelson, 711 F.2d 1455, 1486 (11th Cir. 1983), *reh'd on reh'g en banc,* 727 F.2d 957, *reh'g denied,* 733 F.2d 9089 (1984), *vacated,* 105 S.Ct. 2992 (1985). And in *NAACP v. Badsden County School Bd.,* 691 F.2d 978, 981-82 (11th Cir. 1982), the court even made reference to direct evidence of discriminatory intent which had been presented by an expert witness The testimony, although apparently credited, was found insufficient to establish such intent. *But cf.* Dybczak v. Tuskeegee Institute, 737 F.2d 1524, 1528 (11th Cir.), *reh'g denied,* 744 F.2d 97 (1984), *cert. denied,* 105 S.Ct. 576 (1985) (direct evidence does not shift burden of proof unless it is "directly probative of intent").

207. *See, e.g.,* Miles v. M.N.C. Corp., 750 F.2d 867, 875-76 (11th Cir. 1985); Thompkins v. Morris Brown College, 751 F.2d 558, 563 (11th Cir. 1985); Buckley v. Hospital Corp. of America, 758 F.2d 1525, 1529-30 (11th Cir. 1985); Hill v. Seaboard Coast Line R.R., 767 F.2d 771, 775 (11th Cir. 1985).

208. *See* Fowler v. Blue Bell, Inc., 737 F.2d 1007, 1017 (11th Cir. 1984) (Hatchett, J., dissenting); Carmichael v. Birmingham Saw Works, 738 F.2d 1126, 1131 n.1 (11th Cir. 1984); Smith v. Georgia, 749 F.2d 683, 687 (11th Cir. 1985); Simmons v. Camden County Bd. of Educ., 757 F.2d 1187, 1189 (11th Cir. 1985); Nord v. U.S. Steel Corp., 748 F.2d 1462, 1467-68 (11th Cir. 1985); Conner v. Fort Gordon Bus Co., 761 F.2d 1495, 1498-99 n.4 (11th Cir. 1985).

209. *See* Morrison v. Booth, 763 F.2d 1366 (11th Cir. 1985); Miles v. M.N.C. Corp., 750 F.2d 867 (11th Cir. 1985); Williams v. City of Montgomery Fire Dept., 742 F.2d 586 (11th Cir. 1984); *see also* Joshi v. Florida St. Univ. Health Ctr., 763 F.2d 1227, 1235-36 (11th Cir. 1985) (presence or absence of direct evidence irrelevant where court deemed employer's rebuttal

the court so holds.[210] These decisions are wholly inconsistent with the Supreme Court's repeated reminders that the trial court's factual conclusions, including those regarding the ultimate question of discrimination, cannot be overturned unless they are clearly erroneous.[211];

The most direct criticism of the *Bell* test has come, however, from two district courts. In *Spanier v. Morrison's Management Services,*[212] an age discrimination case, the United States District Court for the Northern District of Alabama reviewed the hopelessly conflicting state of Fifth/Eleventh Circuit precedent in a number of areas.[213] After a jury verdict for the plaintiff, the defendants moved for judgment notwithstanding the verdict, arguing that a charge based on the *Bell* test was wholly at odds with *Burdine.*[214] The *Spanier* court stated that it agreed with the defendants, but felt bound by Eleventh Circuit precedent to the contrary.[215]
The district court in *Spanier* went on to explain that:

> In *Lee v. Russell County Board of Education* . . . and its progeny, the Eleventh Circuit has held that a trial court's finding that a statement evidencing a bias was made, is tantamount to "proof" that bias was a substantial motivating factor in the making of a particular employment decisions. In *Bell* . . . the court apparently concluded that if the evidence consists of direct testimony that the defendant made a sexually biased statement, and the trier of the fact accepts the testimony, the ultimate issue of discrimination is proved. . . . Apparently credible evidence of a sexual bias is tanta-

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"insufficient as a matter of law"); Nash v. Consol. City of Jacksonville, 763 F.2d 1393 (11th Cir. 1985) (firefighter promotion examination should have been justified by business necessity; *Griggs/Teal* test, not *Burdine,* applies and *Aikens* is irrelevant); Henson v. City of Dundee, 682 F.2d 897, 912-13 (11th Cir. 1982) (although credibility resolutions by a trial court are normally conclusive, credibility assessments premised on "a faulty theory" are not); *cf.* Nix v. WLCY Radio/Rehall Communications, 738 F.2d 1181 (11th Cir. 1984) (reversing because pretext finding was allowed to obscure failure to make out a prima facie case).

210. *Cf.* Allison v. Western Union Telegraph Co., 680 F.2d 1318, 1321-22 (11th Cir. 1982) (employer's decision may properly be based on subjective factors); Fowler v. Blue Bell, Inc., 737 F.2d 1007 (11th Cir. 1984); Conner v. Fort Gordon Bus Co., 761 F.2d 1495 (11th Cir. 1985); Phillips v. Joint Legislative Committee, 637 F.2d 1014 (5th Cir. 1981), *cert. denied,* 456 U.S. 960 (1982).

211. Pullman Standard v. Swint, 456 U.S. 273 (1982) (reversing Eleventh Circuit's rejection of judgment for defendant); Anderson v. Bessemer City, 105 S.Ct. 1504 (1985) (reversing Fourth Circuit's rejection of judgment for plaintiff); Lehman v. Trout, 465 U.S. 1056 (1984); *see also* Note, *The Standard of Appellate Review in Title VII Disparate-Treatment Actions,* 50 U. CHI. L. REV. 1481 (1983). The Eleventh Circuit's view on this subject is expressed in *Maddox v. Claytor,* 764 F.2d 1539, 1545 (11th Cir. 1985).

212. 611 F. Supp. 642 (N.D. Ala. 1985).

213. Included in the discussion were inconsistent tests for granting a directed verdict, confusion over the weight to be given to employee evaluations, and the "meaningless" liquidated damages test afforded by the Supreme Court's decision in *Thurston. Id.*

214. *Id.* at

215. *Id.* at

> mount to proof of "acting" with a discriminatory motive and the element of causation is eliminated. Apparently, the appellate court makes the leap from a discriminatory statement being made to *proving* an illegal motive *was* "a significant or substantial factor in an employment decision." This court has always assumed that direct evidence or bias can be weighed in determining whether a plaintiff has met his or her burden of proving either a prima facie case or pretext.[216]

The *Spanier* court continued, noting that, "In a Title VII disparate treatment suit, the plaintiff *always* retains the burden of proving discrimination by the employer."[217] The United States District Court for the Northern District of Alabama in *Spanier* perceived a fundamental error in shifting the burden of proof to the defendant in Title VII disparate treatment suits, and merging the constitutional framework of a *Mt. Healthy* analysis with the analytic scheme of *McDonnell-Douglas.* The District Court in *Spanier* explained this concern as a:

> General criticism . . . that the attempt to synthesize the standards enunciated in *Mt. Healthy* with Title VII standards enunciated in *McDonnell-Douglas v. Green* and its progeny is incongruous. It appears to be totally illogical to suggest that a court can find that the plaintiff was *the victim of intentional discrimination* which connotes a causal finding and, at the same time, find that the defendant would have taken the same action in the absence of discrimination. The approach appears to be an illogical way to shift the burden of persuasion, presumably definitively allocated in *Burdine.* . . . What appears to be eliminated is the causal factor in connection with direct evidence as it relates to the plaintiff's burden of persuasion. The Eleventh Circuit appears to make the leap, in Title VII cases, that all credible "direct evidence" of discrimination is proof of a substantial motivating factor.
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> The difficulty created by the *Mt. Healthy* approach is made vivid by this case. On the one hand, the jury is instructed that the burden of persuasion or proof is on the plaintiff. On the other hand, they are instructed that, when there is direct evidence, the burden shifts to the defendant. Thus direct evidence is given inordinate weight and the jury cannot help but be confused.[218] These gratuitous

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216. *Id.* at 643.

217. Dickerson v. Metropolitan Dade County, 659 F.2d 574, 580 (5th Cir. 1981) (emphasis supplied in *Spanier*).

218. "This court has repeatedly charged juries that the law makes no distinction between the weight to be given direct and circumstantial evidence." Spanier v. Morrison's Management Services, 611 F.Supp. 642, 145 n.4 (N.D. Ala. 1982). *See* Eleventh Circuit Pattern Criminal Charge 4.2; *see also* Fifth Circuit Pattern Criminal Charge 5.

and somewhat churlish comments are offered for whatever questionable value they may have.

The fact that there was present, in this case, "direct evidence" of discrimination which shifted the burden of persuasion to defendants coupled with proof of a prima facie case would appear to require this court to deny defendants' motion.[219] Plaintiff appears to have satisfied all four prongs of a prima facie case.[220]

It is no wonder that the District Court in *Spanier* found the Eleventh Circuit's treatment of the burden of Proof in employment discrimination cases perplexing. The Eleventh Circuit's analytical models seem to be little more than a phased regression to the pre-*Burdine,* pre-*Teamsters,* pre-*Rodriquez* days when the Fifth Circuit was fulfilling its desire "to make sure the Act works."[221]

Spanier must be contrasted with another district court decision in the Eleventh Circuit which illustrates the lengths to which the *Bell* test can be taken. *Maddox v. Grandview Care Center, Inc.,*[222] a pregnancy discrimination action, involved an employment leave policy which stated, "Maternity leave is limited to three months per employee" while the provisions for absence for "illness" contained no time limitation.[223] The United States District Court for the Middle District of Georgia concluded in *Maddox* that the policy was "discriminatory on its face," thereby constituting "direct evidence of discriminatory intent."[224] Citing *Thurston* and *Russell County,* the court brushed aside the employer's assertions that extended maternity leave was available since no instances were named in which "a single employee . . . had obtained such an extended maternity leave under the policy in effect.[225] The defendant's attempts to adduce evidence that the same decision would have been reached irrespective of plaintiff's pregnancy were likewise rejected.[226]

The other case which is highly critical of the *Bell* test is the decision of the United States District Court for the Eastern District of Virginia in *Equal Employment Opportunity Commission v. Electrolux Corp.*[227] The court, being situated in the Fourth Circuit, was free to decline to follow the

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219. "There is a real question as to whether the 'direct evidence' of discrimination in this case was *strong* evidence." 611 F. Supp. at 645.

220. *Id.*

221. *See* Culpepper v. Reynolds Metals Co., 421 F.2d 888, 891 (5th Cir. 1970); *see also* Guerra v. Manchester Terminal Corp., 498 F.2d 641, 658-59 (5th Cir. 1974). *But see* Culpepper v. Reynolds Metals Co., 421 F.2d 888, 895 (5th Cir. 1970) (Coleman, J., concurring) ("it is never the duty or concern of the courts 'to make sure the Act works.'").

222. 607 F. Supp. 1404 (M.D. Ga. 1985).

223. *Id.* at

224. *Id.* at

225. *Id.* at 1405-06.

226. *Id.* at 1406-07.

227. 611 F.Supp. 926 (E.D. Va. 1985).

Eleventh Circuit's lead. Judge Warriner of the Eastern District of Virginia met the burden of proof issue head-on; stating that, "it is not the nature of the evidence offered in proof of the case but the nature of the method of proof offered that is sought to be be captured, inartfully and confusingly I believe, by the terms circumstantial evidence and direct evidence. . . ."s2[28] Thus, said the court, *Thurston*[229] Perryman,[230] and *Bell*[231] "are dealing with evidence, direct or circumstantial, which has proven discrimination without the need to rely on the judicially created *McDonnell-Douglas* inference."[232]

While observing that the Eleventh Circuit had treated "direct evidence" as shifting the burden of proof,[233] the *Electrolux* court stated, "Even under plaintiff's interpretation . . . the burden of proof did not shift to defendant to prove that it would have fired plaintiff even absent its discriminatory conduct until plaintiff has *proven* discrimination by the *Thurston* proof method."[234] No such proof having been credited by the court, no prima facie case was made.

The court concluded:

> The foregoing discussion on the burden of proof was prompted by the vexingly careless use of words by judges in deciding discrimination actions. Ordinarily, I would not deal at such length with such well-known evidentiary criteria for deciding cases. However, the EEOC, the pre-eminent authority on illegal discrimination, in oral argument and in brief contended earnestly for its mistaken view. Under the circumstances I thought it appropriate carefully to consider the Commission's argument.[235]

F. What Is an Employer to Do?

The approach adopted by the Eighth Circuit's decision in *DeHues v. Western Electric Company*[236] suggests a logical compromise. Holding that the presence of some direct evidence of discriminatory intent does not preclude use of the *McDonnell Douglas* format, the *Deltues* court stated "where either party disputes one or more elements of the *McDonnell Douglas* prima facie case and insists that proof of each element is essential to the case, the trial court should be cautious in departing from the *McDonnell Douglas* framework."[237] By contrast, an otherwise divided Third Circuit

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228. EEOC v. Electrolux Corp., 611 F. Supp. 926, 927-28 (E.D. Va. 1985).
229. Trans World Airlines Inc. v. Thurston, 105 S.Ct. 613 (1985).
230. Perryman v. Johnson Products Co., 580 F. Supp. 1015 (N.D. Ga. 1983).
231. Bell v. Birmingham Linen Service, 715 F.2d 1552 (11th Cir. 1983), *cert. denied*, 104 S.Ct. 2385 (1984).
232. EEOC v. Electrolux Corp., 611 F. Supp. 926, 929(E.D. Va. 1985).
233. *Id.* at 931 n.5.
234. *Id.* at 931 (emphasis in original).
235. *Id.* at 933.
236. 710 F.2d 1344 (8th Cir. 1983).
237. *Id.* at 1346-47.

panel in *Massarsky v. General Motors Corporation*[238] found itself in agreement over the need for a separate showing of intent to discriminate once it could be seen that "an employer's policy or practice is discriminatory on its face."[239] The panel majority deemed such proof unnecessary[240] and Judge Sloviter's dissenting opinion agrees:

> In cases of facially discriminatory policy, the policy itself establishes the intent necessary to show discriminatory intent. . . . There is no evidence in [*McDonnell Douglas*] or its progeny that it establishes the exclusive method of proving discriminatory treatment. Direct evidence of discrimination obviously would suffice. Similarly, a facially discriminatory policy satisfies the requisite proof.[240]

With all due respect, such an assertion will not withstand scrutiny. "Discrimination" does not prove "intent to discriminate" any more than the fact that a crime has been committed establishes *mens rea.*[242] *Unrebutted* direct evidence which relates directly to the motives and state of mind of the decision maker with respect to a particular challenged decision may, *if credited,* supply proof of discriminatory intent. Such evidence is, however, most likely to be used to establish that the employer's explanation is pretextual. It is the truly rare case in which the employer's sole articulated reason is a policy or practice which would be discriminatory in the absence of a statutory defense; statutory affirmative defenses, consisting as they do of exceptions to the protections afforded by the law, are narrowly construed and must be proved by the defendant who relies upon them.[243]

Admittedly, the courts have been cast adrift by the Supreme Court's use of murky language and apparently inconsistent rationales; evidence of the chaos so created is easily seen in recent appellate decisions.[244] Some judges

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238. 706 F.2d 111 (3d Cir. 1983), *cert. denied,* 104 S.Ct. 348 (1984).

239. *Id.* at 119.

240. *Id.*

241. *Id.* at 127, 128.

242. *See* Note, *Beyond the Prima Facie Case in Employment Discrimination Law: Statistical Proof and Rebuttal,* 89 HARV. L. REV. 387, 393 (1975) ("Courts are willing to proceed as though discrimination explains the observed conditions even in the absence of direct evidence.") *see also* Dillon v. Coles, 746 F.2d 998, 1004 (3d Cir. 1984) ("Just as in the tort field, where 'negligence in the air' is not enough to fasten liability on a defendant, so in a Title VII case discrimination in general does not entitle an individual to specific relief.").

243. *See, e.g.,* Western Air Lines, Inc. v. Criswell, 105 S.Ct. 2743, (1985) (age not accepted as bona fide occupational qualification); Johnson v. City of Baltimore, 105 S.Ct. 2717 (1985) (same). Professor Belton argues that *all* employers' defenses are necessarily affirmative, a view which finds some support in the ADEA (exclusions for "discharge or discipline for cause" (29 U.S.C. §623(f)(3)) and for "differentiation based on reasonable factors other than age" (29 U.S.C. § 623(f)(1)). *See* Belton, *supra* note 56. No court has accepted this view, however.

244. *See, e.g.,* Lewis v. University of Pittsburgh, 725 F.2d 910 (3d Cir. 1983), *cert. denied,* 105 S.Ct. 266 (1984) ("but for" standard applies to all employment discrimination cases) (*noted in* 53 UNIV. CINCINNATI L. REV. 863 (1984)0; Carter v. Duncan-Huggins, Inc., 727 F.2d 1225 (D.C. Cir. 1984).

have gone so far as to contend that the actual effect of the *Burdine* analysis is to require direct evidence of intent in every case.[245] This is not so, as the Supreme Court has pointed out. In *United States Postal Service Board of Governors v. Aikens,*[246] the United States Supreme Court stated:

> [W]hen the defendant fails to persuade the district court to dismiss the action for lack of a *prima facie* case, and responds to the plaintiff's proof by offering evidence of the reason for the plaintiff's rejection, the factfinder must then decide whether the rejection was discriminatory within the meaning of Title VII. At this state, the *McDonnell-Burdine* presumption "drops from the case," and "the factual inquiry proceeds to a new level of specificity". . . .
>
> The "factual inquiry" in a Title VII case is "whether the defendant intentionally discriminated against the plaintiff." . . . In short, the district court must decide which party's explanation of the employer's motivation it believes.[247]

Aikens emphasizes that direct evidence of discriminatory intent is not required in order to establish a prima facie case.[248] The evidence which was *not* characterized as "direct" is significant:

> Aikens showed that white persons were consistently promoted and detailed over him and all other black persons between 1966 and 1974. Aikens has been rated as "an outstanding supervisor whose management abilities are far above average." There was no derogatory or negative information in his Personnel Folder. He had more supervisory seniority and training and development courses than all but one of the white persons who were promoted above him. He had a Masters Degree and has completed three years of residence towards a Ph.D. Aikens had substantially more education than the white employees who were advanced ahead of him; of the 12, only two had any education beyond high school and none had a college degree. He introduced testimony that the person responsible for the promotion decisions at issue had made numerous derogatory comments about blacks in general and Aikens in particular. If the District Court were to find, on the basis of this evidence, that the Postal

245. *See* Wells v. Gotfredson Motor Co., 709 F.2d 493, 499 (8th Cir. 1983) (Lay, J., dissenting).

246. 461 U.S. 941, (1983); *see also* Cooper v. Federal Reserve Bank of Richmond, 467 U.S. 867, (1984).

247. United States Postal Service Bd. of Governors v. Aikens, 461 U.S. 941 (1983) (quoting *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 255 (1981)).

248. *Id.* ("we agree . . . that the District Court should not have required Aikens to submit direct evidence of discriminatory intent.")

> Service did discriminate against Aikens, we do not believe that this would be reversible error.[249]

It should be apparent from the foregoing discussion that direct evidence, just as any other form of evidence, may be used both to prove a prima facie case and to show that an employer's articulated legitimate, nondiscriminatory reasons are, in reality, pretextual. A policy or practice which is specifically based on age, sex, or race does not even fit within the individual disparate treatment model, since such a policy or practice has a classwide effect which presumably has disparate impact. But no authority can be found which supports a burden-shifting requirement simply because there has been credible testimony that a decision-maker harbors a bias. If that bias is a determinative factor in the decision which is at issue[250]—"in the sense that, 'but for' his employer's motive to discriminate against him . . . he would not have been adversely treated"[251]—the plaintiff should prevail.[252] Consequently, the Su-

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249. *Id.* n.2.

250. The "direct evidence" test, as applied by the Eleventh Circuit, assumes that there is only one motive for an employer's actions. This is not usually the case. As the Tenth Circuit has explained in discussing instructions to an age discrimination jury, "The jury must understand that it is not enough that age discrimination figures in the decision to demote or discharge; age must 'make a difference' between termination and retention of the employee in the sense that, 'but for' the factor of age discrimination, the employee would not have been adversely affected." Perrell v. Financeamerica Corp., 726 F.2d 654, 656 (10th Cir. 1984), *quoted with approval in* EEOC v. Prudential Fed. Sav. & Loan Ass'n, 763 F.2d 1166, 1170 (10th Cir.), *vacated,* U.S.__ (1985). Just as the plaintiff need not prove that discrimination was the sole motivating factor, the defendant does not lose simply because some discriminatory motive may have been present. *See generally* Lansman, *Dual Motive Terminations: The Shifting Burdens, 10* EMPLOYEE REL. L.J. 64 (1984); Furnish, *Formalistic Solutions to Complex Problems: The Supreme Court's Analysis of Individual Disparate Treatment Cases Under Title VII,* 6 INDUS. REL. L. J. 353 (1984); Brodin, *The Standard of Causation in the Mixed-Motive Title VII Action: A Social Policy Prospective,* 82 COLUM. L. REV. 292 (1982); *cf.* Remar, *Climbing* Mt. Healthy: *In Search of the "Wright Line" on Mixed-Motive Discharges Under Section 8(a)(3),* 4 INDUS. REL. L. J. 636 (1981); DuRoss, *Toward Rationality in Discriminatory Discharge Cases: The Impact of* Mt. Healthy Board of Education v. Doyle *Upon the NLRA,* 66 GEO. L. J. 1109 (1978).

251. *See* Loeb v. Textron, Inc., 600 F.2d 1003, 1019 (1st Cir. 1979) (citing *McDonald v. Santa Fe Trail Transp. Co.,* 427 U.S. 273, 283 n.10 (1976)); Fisher v. Flynn, 598 F.2d 663 (1st Cir. (1979); Givhan v. Western Line Consol. Sch. Dist., 439 U.S. 410 (1979); Mt. Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274 (1977); Rosaly v. Ignacio, 593 F.2d 145 (1st Cir. 1979); National Labor Relations Board v. Eastern Smelting & Refining Corp., 598 F.2d 666 (1st Cir. 1979).

252. The Eleventh Circuit has a variety of approaches to the "but for" test. For example, in *Henson v. City of Dundee,* 682 F.2d 897 (11th Cir. 1982), an exhaustive analysis of the burden of proof in sexual harassment actions brought under Title VII, the court applied the *McDonnell-Douglas* model of proof to claims of "hostile or offensive work environment" but stated that "quid pro quo" harassment claims would be analyzed from a strict liability standpoint even though *McDonnell-Douglas* was cited. *Id.* at 908-12 and n.22. However, the court rejected an argument that the burden of proof shifted to the employer criticizing the D.C. Circuit's approach in *Bundy v. Jackson,* 641 F.2d 934, 952 (D.C. Cir. 1981), as imposing "an onerous burden of persuasion to rebut the prima facie case" which was deemed inconsistent with *Burdine.* As part of the plaintiff's prima facie case of an "environmental" sexual harassment

preme Court's statement in *Thurston*[253] is capable of a reading which places it in the mainstream of burden of proof analyses, but the Eleventh Circuit's pronouncements in *Bell* and its offspring are misstatements of the law and should be corrected.

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case, "the plaintiff must show that but for the fact of her sex, she would not have been the object of harassment." *Id.* at 904. It was implied that the same requirement applies to the quid pro quo case. *Id.* at 909, 911 n.22).

For other decisions which refer to the "but for" test as a *plaintiff's* burden, *see, e.g.*, Loeb v. Textron, Inc., 600 F.2d 10903, 1019 (1st Cir. 1979); Geller v. Markham, 635 F.2d 1027 (2d Cir. 1980), *cert. denied,* 451 U.S. 945 (1981); Richerson v. Jones, 551 F.2d 918, 923-25 (3d Cir. 1977); Smith v. University of North Carolina, 632 F.2d 316, 333 (4th Cir. 1980); Tice v. Lampert Yards, Inc., 761 F.2d 1210, 1217 (7th Cir. 1985); Bibbs v. Block, 749 F.2d 508 (8th Cir. 1984), *reh'g en banc pending;* Lincoln v. Board of Regents, 697 F.2d 928, 938 (11th Cir.), *cert. denied,* U.S. *;* McGee v. South Pemiscot Sch. Dist., 712 F.2d 339 (8th Cir. 1983); Matthews v. Allis-Chalmers, 38 FEP Case. 1118 (7th Cir. 1985). In *McDonald v. Santa Fe Trail Transp. Co.*, under facts which the Court deemed "indistinguishable from *McDonnell Douglas,*" a Fifth Circuit decision (513 F.2d 90 (1975)) was reversed; the Court said that plaintiff bore the "but for" burden, citing *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975)—which is not pertinent to that point.

253. *See supra* note 2 and accompanying text (discussing *Thurston*).