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# COMMENT

## BIBBS V. BLOCK: STANDARD OF CAUSATION AND BURDEN OF PROOF IN AN INDIVIDUAL DISPARATE TREATMENT ACTION UNDER TITLE VII

Disparate treatment of an individual in an employment decision because of the individual's race, color, religion, national origin, or sex<sup>1</sup> is the most obvious discriminatory practice Congress sought to prohibit under Title VII of the Civil Rights Act of 1964 (Title VII).<sup>2</sup> The burden of proof in disparate

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1. See *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977) (discussion of disparate treatment and disparate impact actions pursuant to Title VII). In *Int'l Bhd. of Teamsters v. United States*, the United States Supreme Court stated that an individual alleging employment discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII) may bring an action under the disparate treatment or disparate impact theory or both. *Id.* The disparate treatment of an individual in an employment decision because of the individual's race, color, religion, national origin, or sex is the most easily understood type of employment discrimination. *Id.* Disparate impact actions challenge facially neutral employment practices that discriminate against protected groups without business necessity. *Id.* The primary distinction between disparate treatment and disparate impact actions is that a plaintiff alleging disparate treatment must prove that a discriminatory intent motivated the employment decision. *Id.* Bigoted or otherwise discriminatory statements made by an employer's representatives may establish that a discriminatory intent motivated an employment decision. See B. SCHLEI & P. GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW* 15 n.7 (1983) (discussion of burden of proof in disparate treatment actions) [hereinafter cited as SCHLEI & GROSSMAN].

Direct evidence of discriminatory motivation, however, is difficult to produce and relatively unusual. *Id.* at 15; see *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973) (discussion of prima facie case concept for disparate treatment action). Recognizing that direct evidence of discriminatory intent often is unavailable, the Supreme Court in *McDonnell Douglas Corp. v. Green* established a prima facie case concept for individual disparate treatment actions under Title VII. See 411 U.S. at 802-04. To establish a prima facie case of disparate treatment the plaintiff must prove that the plaintiff applied for an available position, that the plaintiff possessed the required qualifications, and that the employer rejected the plaintiff under circumstances which create an inference of unlawful discrimination. *Id.* at 802. To avoid liability, the employer must articulate legitimate, nondiscriminatory reasons for the employment decision. *Id.* The plaintiff then must prove that the employer's proffered reasons are a mere pretext for intentional discrimination. *Id.* at 804.

2. See The Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified at 42 U.S.C. §§ 1981-2000h-6 (1982)). Title VII of the Civil Rights Act of 1964 (Title VII) provides that it shall be unlawful for an employer to discriminate against any individual in employment because of the individual's race, color, religion, national origin, or sex. 42 U.S.C. § 2000e-2(a)(1) (1982). Before an individual may file a disparate treatment or disparate impact action under Title VII, the individual must file a charge of employment discrimination with the Equal Employment Opportunity Commission (EEOC) within 180 days after the alleged discriminatory employment practice. *Id.* §2000e-5(e). If the EEOC determines that a charge of discriminatory employment practice has merit, the EEOC must endeavor to eliminate the alleged unlawful employment practice by the informal methods of mediation and conciliation. *Id.* §2000e-5(b). If the EEOC is unable to negotiate a conciliation agreement within 30 days after an aggrieved party files a charge, the EEOC may file suit against the employer charged with using discriminatory employment practices. *Id.* §2000e-5(f). If the EEOC dismisses the charge or for any reason fails to negotiate a settlement or file suit within 180 days after the charge is

treatment actions under Title VII remains at all times with the plaintiff.<sup>3</sup> The plaintiff must establish that the employer's discriminatory intent motivated the employment decision.<sup>4</sup> The appropriate standard of causation in disparate treatment actions under Title VII is more problematic, however, because employment decisions may include both discriminatory and nondiscriminatory considerations.<sup>5</sup>

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filed, the EEOC must issue a right to sue notice to the charging party. *Id.* Within 90 days after receiving the EEOC's right to sue notice, the charging party may file suit against the charged employer. *Id.*

3. See Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 251 (1981) (discussion of burden of proof in disparate treatment actions). In *Texas Dep't of Community Affairs v. Burdine* the plaintiff, Joyce Ann Burdine, alleged that sex discrimination in violation of Title VII motivated the Texas Department of Community Affairs' decision to deny the plaintiff's promotion. *Id.* The plaintiff appealed the district court's holding that nondiscriminatory considerations motivated the promotion decision to the United States Court of Appeals for the Fifth Circuit. *Id.* The Fifth Circuit reversed the district court's decision and held that after a plaintiff in a disparate treatment action establishes a prima facie case of employment discrimination the employer must prove by a preponderance of the evidence that legitimate nondiscriminatory reasons motivated the employment decision. *Id.* at 252. The Supreme Court in *Burdine* vacated the Fifth Circuit's decision, and held that in a disparate treatment action the ultimate burden of proving that an employer intentionally discriminated against the plaintiff remains at all times with the plaintiff. *Id.* at 253. The *Burdine* Court stated that after a plaintiff establishes a prima facie case of employment discrimination the burden of production, not persuasion, shifts to the employer. *Id.* at 254-55. The Supreme Court stated that to meet the burden of production the employer must introduce admissible evidence of legitimate nondiscriminatory reasons for the employment decision. *Id.* at 255. See generally Note, *Easing Title VII Burdens From the Employer*, 5 AM. J. OF TRIAL ADVOC. 337 (1981) (discussion of *Burdine* and burden of proof in disparate treatment actions); Comment, *Civil Rights: Defendant's Burden of Proof in Title VII Disparate Treatment Cases*, 21 WASHBURN L.J. 143 (1981) (discussion of employer's burden of proof in disparate treatment actions after *Burdine*).

4. See 450 U.S. at 253. In *Burdine*, the Supreme Court stated that in a disparate treatment action the plaintiff must prove that the employer intentionally discriminated against the plaintiff. *Id.*

5. See Brodin, *The Standard of Causation in the Mixed-Motive Title VII Action: A Social Policy Perspective*, 82 COLUM. L. REV. 292, 293 (1982) (discussion of degree of causation required in mixed-motive disparate treatment actions) [hereinafter cited as Brodin, *Standard of Causation*]. If both discriminatory and nondiscriminatory considerations influence an employment decision, the question arises as to how large a part the discriminatory factor must play in the decision to establish a violation of Title VII. *Id.* Several federal courts of appeals have articulated various formulations for the appropriate standard of causation in disparate treatment actions. See, e.g., *Carino v. Univ. of Oklahoma Bd. of Regents*, 750 F.2d 815, 820 (10th Cir. 1984) (discriminatory consideration must be significant factor in employment decision); *Jackson v. RKO Bottlers of Toledo, Inc.*, 743 F.2d 370, 375 (6th Cir. 1984) (plaintiff establishes Title VII violation if plaintiff proves that discriminatory consideration more likely than not motivated employment decision); *Fadhl v. City and County of San Francisco*, 741 F.2d 1163, 1166 (9th Cir. 1984) (plaintiff establishes Title VII violation if plaintiff proves that discriminatory consideration is significant factor in employment decision); *Lewis v. Univ. Pittsburgh*, 725 F.2d 910, 914 (3d Cir. 1983) (plaintiff must prove that but for consideration of discriminatory factor employment decision would have been favorable to plaintiff to establish Title VII violation); *McMillan v. Rust College, Inc.*, 710 F.2d 1112, 1116 (5th Cir. 1983) (standard of causation requires showing that but for consideration of discriminatory factor employment decision would not have been adverse to plaintiff); *Cuthbertson v. Bigger Bros., Inc.*, 702 F.2d 454, 458 (4th

In a mixed-motive disparate treatment action, the degree of causal relation required between the unlawful motive and the employment decision will profoundly influence the outcome of a disparate treatment case.<sup>6</sup> Several federal courts of appeals have indicated that an employer in a mixed-motive disparate treatment action may avoid the imposition of some forms of relief or even escape liability altogether if the employer can establish that he would have reached the same decision absent the proven discriminatory consideration.<sup>7</sup> In *Bibbs v. Block*,<sup>8</sup> the United States Court of Appeals for the Eighth Circuit considered the proper allocation of the burden of proof and the appropriate standard of causation in a mixed-motive disparate treatment action under Title VII.<sup>9</sup>

In *Bibbs*, the plaintiff, Thomas Bibbs, filed a civil action against the United States Department of Agriculture (DOA) in the United States District Court for the Western District of Missouri.<sup>10</sup> The plaintiff, who is black, alleged that a DOA selection committee had denied the plaintiff's promotion application on the basis of discriminatory racial considerations in violation of Title VII.<sup>11</sup> The DOA employed the plaintiff as an offset press operator

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Cir. 1983) (discriminatory consideration must have more likely motivated employment decision than reasons employer proffered).

6. See Brodin, *Standards of Causation*, *supra* note 5, at 294. Professor Brodin emphasized that the allocations of burdens of causation and standards of proof will determine the outcome of disparate treatment actions and influence Title VII actions filed in the future. *Id.*

7. See *Miles v. M.N.C. Corp.*, 750 F.2d 867, 875-76 (11th Cir. 1985) (employer can rebut plaintiff's evidence of discrimination by proving by preponderance of evidence that employer would have made same decision absent discriminatory motive); *Smith v. State of Georgia*, 749 F.2d 683, 687 (11th Cir. 1985) (employer may rebut direct evidence of discriminatory intent by proving that employer would have made same decision even absent discriminatory consideration); *Bell v. Birmingham Linen Service*, 751 F.2d 1552, 1557 (11th Cir. 1983) (same).

Other federal courts of appeals have applied the "same decision" test only at the relief stage in a disparate treatment action under Title VII. See, e.g., *Fadhl v. City and County of San Francisco*, 741 F.2d 1163, 1167 (9th Cir. 1984) (employer must prove that even absent discriminatory motive employer would not have hired plaintiff to avoid award of back pay to plaintiff); *King v. Trans World Airlines, Inc.*, 738 F.2d 255, 259 (8th Cir. 1984) (plaintiff is not entitled to award of back pay and offer to hire if employer proves by clear and convincing evidence that employer would not have hired plaintiff in absence of discrimination); *Patterson v. Greenwood School Dist. 50*, 696 F.2d 293, 295 (4th Cir. 1984) (award of back pay and retroactive promotion is not appropriate if employer proves that employer would not have hired plaintiff in absence of discrimination).

8. 749 F.2d 508 (8th Cir. 1984).

9. *Id.* at 510.

10. See *Bibbs v. Block*, 2 Empl. Prac. Dec. (CCH) ¶ 33,779, at 30,744-45 (W.D. Mo. June 14, 1983). In *Bibbs*, the Agricultural Stabilization and Conservation Service, a division of the United States Department of Agriculture (DOA), employed the plaintiff as an offset press operator. *Id.*

11. 32 Empl. Prac. Dec. (CCH) at 30,745. The plaintiff in *Bibbs*, 43 years old at the time of the events in issue, alleged that age discrimination influenced the DOA selection committee's denial of the plaintiff's promotion application. *Id.* The district court, however, dismissed the plaintiff's age discrimination claim. *Id.* at 30,748. The district court stated that the ages of the

in the Print Shop of the Kansas City Data Systems Field Office.<sup>12</sup> In 1976, the plaintiff and six other individuals, all of whom are white, applied for the position of Offset Press Operator Supervisor.<sup>13</sup> The Supervisor of Administrative Specialists reviewed the applications and forwarded all seven applications to a selection committee.<sup>14</sup>

The members of the selection committee consisted of the Head of Administrative Services, the Office Services Manager, and the Offset Press Operator Foreman.<sup>15</sup> The selection committee interviewed each of the seven applicants for the position.<sup>16</sup> Without discussion of the relative merits of each applicant or established criteria for selection, each committee member chose the same top three candidates in the same order.<sup>17</sup> The close involvement of the Office Services Manager with the operations and employees of the Print Shop made the Officer Services Manager the central figure in the promotion selection.<sup>18</sup>

The district court emphasized the influential position of the Office Services Manager in the promotion selection because the plaintiff introduced evidence that the Office Services Manager had characterized the plaintiff as a "black militant," and another Print Shop employee, who is black, as "boy" and "nigger."<sup>19</sup> The district court stated that the members of the selection committee provided extremely guarded testimony at trial regarding

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selection committee's second and third choices, 45 and 39 years old respectively, failed to support the plaintiff's claim of age discrimination. *Id.*

12. *Id.* at 30,745.

13. *Id.*

14. *Id.* In *Bibbs*, Everett Asberry, the Supervisor of Administrative Specialists, reviewed the applications and assigned ratings to each applicant. *Id.* After the initial ratings, Asberry excluded the plaintiff from the list of potential candidates because of a low rating. *Id.* at 30,748 n.2. Asberry subsequently included the plaintiff in the list of potential candidates, however, after considering an award the plaintiff had earned in the military. *Id.*

15. *Id.* at 30,745.

16. *Id.*

17. *Id.* In *Bibbs*, the selection committee chose Dennis Laube, who is white, for the position of Offset Press Operator Supervisor. *Id.*; see *Bibbs v. Block*, 749 F.2d 508, 509 (8th Cir. 1983) (discussion of factual basis of each member's decision). Cox stated that Tresnak's evaluation of each applicant's reputation influenced Cox's considerations. 749 F.2d at 509-10. Blitgen testified that each applicant's technical knowledge and experience determined Blitgen's decision. *Id.* at 510. Tresnak stated that several factors, including previous disciplinary problems, knowledge of supervision, and knowledge of the commodity operations influenced Tresnak's decision. *Id.*

18. *Id.* at 509. The district court in *Bibbs* stated that John Blitgen, the Offset Press Operator Foreman, had worked in the Print Shop less than one month at the time of the selection. *Id.* The district court noted that Maynard Cox, Head of Administrative Services, presided at the selection committee meeting, but stated that the familiarity of Joseph Tresnak, the Office Services Manager, with the employees and operations of the Print Shop made Tresnak the key figure in the selection process. *Id.*

19. 32 Empl. Prac. Dec. (CCH) at 30,746. The district court in *Bibbs* stated that Tresnak referred to the plaintiff as a "black militant" when Tresnak described the racial mix of the Print Shop employees. *Id.* The district court also noted that Tresnak referred to another black

the subjective criteria used in making the promotion decision.<sup>20</sup> The district court further noted that subjective selection criteria may provide a convenient screen for discriminatory employment practices.<sup>21</sup> Although the district court concluded that the Office Services Manager's use of racial slurs tainted the selection process, the district court did not impose liability on the defendant.<sup>22</sup>

The district court stated that the selection committee would have reached the same decision even if the committee had disregarded the plaintiff's race because the plaintiff's previous disciplinary problems motivated and determined the employment decision.<sup>23</sup> The district court reasoned that in a mixed-motive employment decision, the defendant is not liable unless the plaintiff proves that the improper motive determined or motivated the decision.<sup>24</sup> The

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employee, Trotter, as "boy." *Id.* In Trotter's presence, Tresnak also stated that there were "no niggers in Nebraska where I come from." *Id.* The district court stated that Tresnak seemed unaware of the plaintiff's sensitivity to such racial slurs. *Id.*

20. *Id.* In *Bibbs*, the district court stated that the defensive and guarded testimony of each committee member made the district court skeptical that the committee revealed the true considerations involved in the committee's deliberations. *Id.*

21. *Id.* The district court recognized that subjective selection criteria may screen discriminatory employment decisions. *Id.* The district court, however, did not find the selection committee's procedures inherently biased against minority applicants. *Id.*

22. *Id.* at 30,747. Although the district court in *Bibbs* concluded that discriminatory racial considerations influenced the selection process, the court held that the plaintiff did not establish that discriminatory racial considerations prevented the plaintiff's promotion. *Id.* The district court entered judgment for the defendant, stating that to establish liability under Title VII the plaintiff must prove that discriminatory racial considerations determined the promotion decision. *Id.*

23. *Id.* at 30,746-47. The district court in *Bibbs* stated that the plaintiff's interpersonal and disciplinary problems prevented the plaintiff's promotion. *Id.* The district court noted that Tresnak met with the plaintiff on several occasions to discuss the plaintiff's unwillingness to accept direction from the Print Shop Supervisor. *Id.* The district court stated that the nonselection of another applicant, who is white, with similar disciplinary problems supported the court's conclusion that the plaintiff's disciplinary problems prevented the plaintiff's promotion. *Id.* at 30,748 n.3. The district court also noted that the racial integration of the Print Shop indicated that discriminatory racial considerations did not motivate the promotion selection. *Id.* at 30,746.

24. *Id.* at 30,747. In *Bibbs*, the district court noted that the United States Court of Appeals for the Eighth Circuit has applied two different approaches to determine liability in a mixed-motive employment decision. *Id.* One line of cases imposes liability if the improper motive determined the employment decision. *Id.*; *see, e.g.,* *Tribble v. Westinghouse Electric Corp.*, 669 F.2d 1193, 1196 (8th Cir. 1982) (liability attaches if improper motive determined employment decision), *cert. denied*, 460 U.S. 1080 (1983); *Cleverly v. Western Electric Co.*, 594 F.2d 638, 641 (8th Cir. 1979) (plaintiff must show improper motive was determining factor in employment decision); *Cova v. Coca-Cola Bottling Co. of St. Louis*, 574 F.2d 958, 960 (8th Cir. 1978) (liability attaches if determining factor in employment decision was improper motive). The second line of cases imposes liability on the employer if the improper motive merely entered into the employment decision. 32 *Empl. Prac. Dec.* at 30,747; *see, e.g.,* *Satz v. ITT Financial Corp.*, 619 F.2d 738, 746 (8th Cir. 1980) (liability attaches if improper motive was factor in employment decision); *Marshall v. Kirkland*, 602 F.2d 1282, 1289 (8th Cir. 1979) (plaintiff must show that motivating factor in employment decision was improper motive); *Clark v. Mann*, 562 F.2d 1104, 1106 (8th Cir. 1977) (plaintiff need not show that improper motive was sole basis for employment decision but only that improper motive was motivating factor). The district

district court, however, invited correction from the Court of Appeals<sup>25</sup> if in a mixed-motive employment decision, the proper allocation of the burden of proof and the appropriate standard of causation require only a showing that an improper motive played a part in the decision rather than formed the controlling basis for the decision.<sup>26</sup>

In reviewing the *Bibbs* case, the Eighth Circuit affirmed the district court's finding that discriminatory racial considerations influenced the promotion decision.<sup>27</sup> The Eighth Circuit, however, rejected the district court's standard of causation which required the plaintiff to prove not only that discriminatory racial considerations influenced the promotion decision, but also to assume the additional burden of proving that the defendant would not have made the same decision if the defendant had disregarded the plaintiff's race.<sup>28</sup> The Eighth Circuit held that a plaintiff must prove only that a discriminatory consideration more likely than not influenced the employment decision to establish liability in a disparate treatment action under Title VII.<sup>29</sup>

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court in *Bibbs* applied the "determining factor" test and invited correction from the Eighth Circuit. 32 Empl. Prac. Dec. at 30,747.

25. 32 Empl. Prac. Dec. at 30,747.

26. *Id.* at 30,748 n.5. The district court in *Bibbs* noted that a recent argument proposed granting partial relief if the plaintiff shows that an improper motive influenced the employment decision, but that the same decision would have been reached had the improper motive been disregarded. *Id.* The district court refrained from initiating the partial remedy proposal, however, but invited correction from the Eighth Circuit. *Id.*

27. See *Bibbs v. Block*, 749 F.2d 508, 512 (8th Cir. 1984). In *Bibbs*, the Eighth Circuit stated that the record supported a finding that the racial bias of Joseph Tresnak, the most influential member of the selection committee, tainted the promotion decision. *Id.*

28. *Id.* In *Bibbs*, the Eighth Circuit stated that the United States Supreme Court has never adopted the district court's "same decision" rule of causation to determine liability in Title VII actions. *Id.*; see *Mt. Healthy City School Dist. v. Doyle*, 429 U.S. 274, 285 (1977) ("same decision" rule of causation applied to employment decisions involving constitutionally protected rights). In *Mt. Healthy City School Dist. v. Doyle*, the plaintiff, an untenured teacher, alleged that the plaintiff's constitutionally protected first and fourteenth amendment freedoms influenced the defendant's decision to refuse to rehire the plaintiff. 429 U.S. at 276. The Supreme Court, however, stated that to establish a constitutional violation justifying remedial action, the plaintiff may not prove merely that the plaintiff's constitutionally protected conduct influenced the defendant's employment decision. *Id.* at 285. The *Mt. Healthy* Court held that a defendant may avoid liability if the defendant proves that the defendant would have made the same decision without consideration of the plaintiff's constitutionally protected conduct. *Id.* The Supreme Court stated that the "same decision" rule of causation sufficiently vindicates constitutionally protected conduct because a plaintiff is placed in no worse a position than if the plaintiff had not engaged in the protected conduct. *Id.* at 285-86.

The Eighth Circuit in *Bibbs* also stated that the district court's "same decision" rule of causation unreasonably required the plaintiff to dispose of the defendant's allegations of the defendant's subjective intent. *Bibbs*, 749 F.2d at 513. The Eighth Circuit stated that the district court required the plaintiff, not the defendant employer, to prove that the employer would not have made the same decision if the employer had disregarded the plaintiff's race. *Id.* at 512. The *Bibbs* court stated that the "same decision" rule of causation, whether imposed upon the plaintiff or the defendant employer, is inappropriate in the Title VII analysis. *Id.* at 513.

29. 749 F.2d at 511; see *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248,

The *Bibbs* court stated that after a plaintiff proves that a discriminatory consideration influenced the employment decision, it is irrelevant and inconsistent to determine whether the employer would have made the same decision had the employer disregarded the discriminatory consideration.<sup>30</sup> The Eighth Circuit emphasized that Title VII sought to eliminate the consideration of race from employment decisions.<sup>31</sup> The *Bibbs* court stated that the district court's attempt to quantify a proven discriminatory consideration as a minor factor in the promotion decision is inappropriate to the Title VII analysis.<sup>32</sup> The Eighth Circuit held that the district court's finding that discriminatory racial considerations influenced the promotion decision established liability under Title VII.<sup>33</sup> The Eighth Circuit, therefore, vacated the judgment for the defendant and remanded the case to the district court to enter a judgment in favor of the plaintiff.<sup>34</sup>

In *Bibbs*, the Eighth Circuit stated that in an individual disparate treatment action the plaintiff must prove that discriminatory considerations more likely than not motivated the employment decision to establish liability under Title VII.<sup>35</sup> The Eighth Circuit noted that in *McDonnell Douglas Corp. v. Green*<sup>36</sup> the United States Supreme Court established a prima facie case concept for individual disparate treatment actions under Title VII.<sup>37</sup> Recognizing that direct evidence of intentional discrimination is often unavailable, the Supreme Court stated that a disparate treatment plaintiff may establish a prima facie case of discrimination to raise an inference of discriminatory intent.<sup>38</sup> The Supreme Court stated that to establish a prima facie case of discrimination a plaintiff must prove that the plaintiff applied for an available

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256 (1981) (discussion of standard of causation in disparate treatment actions under Title VII). In *Texas Dep't of Community Affairs v. Burdine*, the United States Supreme Court stated that a plaintiff in a disparate treatment action under Title VII must prove intentional discrimination. 450 U.S. at 256. The *Burdine* court stated that a plaintiff establishes intentional discrimination by proving that a discriminatory consideration more likely than not influenced the employment decision. *Id.*

30. See 749 F.2d at 512; see also *supra* notes 28-29 and accompanying text ("same decision" causation test is inappropriate in Title VII cases).

31. See 749 F.2d at 512; see also *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 381 (1977) (Marshall, J., concurring and dissenting) (Title VII is designed to eliminate certain discriminatory considerations from employment decisions).

32. 749 F.2d at 512; see *supra* note 29 and accompanying text (plaintiff must prove discriminatory consideration more likely than not influenced employment decision to establish liability under Title VII).

33. See 749 F.2d at 511.

34. *Id.* at 513.

35. *Id.* at 511; see *supra* note 29 and accompanying text (discussion of "more likely than not" standard of causation for disparate treatment actions under Title VII).

36. 411 U.S. 792 (1973).

37. 411 U.S. at 802-04; see *Bibbs*, 749 F.2d at 510 (discussion of *McDonnell Douglas* prima facie case analysis); see also *supra* note 1 (discussion of prima facie case concept for disparate treatment actions under Title VII).

38. 411 U.S. at 802-04; see *supra* note 1 (absent direct evidence of discriminatory intent, disparate treatment plaintiff may present prima facie case of discrimination).



position, that the plaintiff possessed the required qualifications, and that the defendant rejected the plaintiff under circumstances which create an inference of unlawful discrimination.<sup>39</sup> After the plaintiff establishes an inference of unlawful discrimination, the burden of production shifts to the defendant.<sup>40</sup> To avoid liability, the defendant must articulate legitimate nondiscriminatory reasons for the employment decision.<sup>41</sup> In response, the plaintiff must prove that the defendant's proffered reasons are unworthy of credence or that discriminatory considerations more likely than not motivated the employment decision to establish liability under Title VII.<sup>42</sup>

Substantial disagreement exists, however, among the federal circuit courts of appeals concerning the proper allocation of the burden of proof and the appropriate standard of causation in mixed-motive disparate treatment actions under Title VII.<sup>43</sup> The United States Court of Appeals for the Eleventh Circuit, for example, has stated that the *McDonnell Douglas* prima facie case method of proving employment discrimination pertains only to situations in which direct evidence of discriminatory intent is lacking.<sup>44</sup> The Eleventh Circuit has held that when a disparate treatment plaintiff presents direct evidence of discrimination a burden of persuasion, rather than production, shifts to the defendant.<sup>45</sup> The Eleventh Circuit permits a defendant to avoid liability if the defendant proves by a preponderance of the evidence that the

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39. 411 U.S. at 802; *see supra* note 1 (discussion of elements of prima facie case).

40. *See Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 254-55 (1981) (discussion of burden of proof in disparate treatment actions); *see also supra* note 3 and accompanying text (after plaintiff establishes prima facie case, burden of production not persuasion shifts to employer).

41. *See Burdine*, 450 U.S. 248, 255 (1981) (discussion of employer's burden of production in disparate treatment action); *see also supra* note 3 and accompanying text (employer must articulate legitimate nondiscriminatory reasons for employment decision to rebut plaintiff's prima facie case of employment discrimination).

42. *See* 450 U.S. at 256 (discussion of standard of causation in disparate treatment actions under Title VII); *see also supra* note 29 and accompanying text (disparate treatment plaintiff must prove that discriminatory consideration more likely than not motivated employment decision).

43. *See supra* notes 5-7 and accompanying text (discussion of various standards of causation and allocations of burden of proof applied in federal circuit courts of appeals).

44. *See Bell v. Birmingham Linen Service*, 715 F.2d 1552, 1556 (11th Cir. 1983) (*McDonnell Douglas* prima facie case analysis applies when direct evidence of discriminatory intent is lacking), *cert. denied*, 104 S. Ct. 2385 (1984); *Miles v. M.N.C. Corp.*, 750 F.2d 867, 875 (11th Cir. 1985) (*McDonnell Douglas* method of proving disparate treatment action pertains to situations in which direct evidence of discriminatory intent is absent).

45. *See Bell v. Birmingham Linen Service*, 715 F.2d at 1557. In *Bell v. Birmingham Linen Service*, the United States Court of Appeals for the Eleventh Circuit stated that when a disparate treatment plaintiff presents direct evidence of discriminatory intent a burden of persuasion, rather than production, shifts to the defendant. *Id.* In *Bell*, the plaintiff, who is female, applied for a position in the washroom of the defendant's laundry. *Id.* at 1553. Although the plaintiff had more seniority than the other applicants for the washroom position, the defendant's production manager did not award the position to the plaintiff. *Id.* The plaintiff presented direct evidence that the defendant's production manager denied the plaintiff the washroom

defendant would have made the same employment decision absent the proven discriminatory considerations.<sup>46</sup>

Application of the "same decision" standard of causation to determine liability in a disparate treatment action, however, may distort the purpose of Title VII.<sup>47</sup> Congress enacted Title VII to prohibit discrimination in employment based upon an individual's race, color, religion, national origin, or sex.<sup>48</sup> An employer's consideration of a discriminatory factor in an employment decision violates the purpose of Title VII regardless of whether the employer would have made the "same decision" absent consideration of an unlawful discriminatory factor.<sup>49</sup> The "same decision" standard of causation would enable an employer to acknowledge the consideration of unlawful discriminatory factors, but avoid liability if the employer proves that the employer would have made the same decision absent consideration of discriminatory factors.<sup>50</sup> The "same decision" standard of causation, therefore,

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position to prevent other women employed in the laundry from seeking a position in the washroom. *Id.* The Eleventh Circuit stated that the defendant can not merely articulate nondiscriminatory reasons for the employment decision to rebut the plaintiff's direct evidence of discriminatory intent. *Id.* at 1557. The *Bell* court held that to avoid liability under Title VII, the defendant must prove by a preponderance of the evidence that the defendant would have made the same decision without the presence of the production manager's discriminatory intent. *Id.*

46. See *Miles v. M.N.C. Corp.*, 750 F.2d 867, 875-76 (11th Cir. 1985) (defendant may rebut direct evidence of discriminatory intent if defendant proves that absent presence of discriminatory motive defendant would have made same decision); *Smith v. State of Ga.*, 749 F.2d 683, 687 (11th Cir. 1985) (applying *Mt. Healthy* "same decision" test when disparate treatment plaintiff presents direct evidence of discriminatory intent); *Bell v. Birmingham Linen Service*, 715 F.2d 1552, 1558 (11th Cir. 1983) (applying *Mt. Healthy* "same decision" test in Title VII context when plaintiff presents direct evidence of discriminatory motive); see also *supra* note 28 and accompanying text (discussion of *Mt. Healthy* "same decision" rule of causation).

47. See 42 U.S.C. § 2000e-2(a)(1) (1982). Title VII states that it shall be unlawful for an employer to discriminate against any individual in employment because of the individual's race, color, religion, national origin, or sex. *Id.*; see also Brodin, *Standard of Causation*, *supra* note 5, at 317. Professor Brodin emphasized that the "same decision" rule of causation would frustrate Title VII's objective of eliminating discrimination in employment opportunities because an employer may avoid liability if the employer proves that he would have made the same decision absent a proven discriminatory intent. Brodin, *Standard of Causation*, *supra* note 5, at 317. Professor Brodin stated that Title VII is violated when a disparate treatment plaintiff establishes the operation of an unlawful discriminatory consideration in an employment decision. *Id.* at 320. Brodin stated that after a plaintiff establishes the operation of an unlawful discriminatory consideration, it is irrelevant to the Title VII analysis to consider whether the employer would have made the same decision absent the presence of the proven discriminatory intent. *Id.* at 318.

48. 42 U.S.C. § 2000e-2(a)(1) (1982); see *supra* note 47 (Title VII prohibits unlawful discriminatory considerations in employment).

49. See *supra* note 37 and accompanying text (same decision rule of causation frustrates purpose of Title VII).

50. See *supra* notes 45-46 and accompanying text (same decision rule of causation permits defendant to rebut direct evidence of discriminatory intent if defendant would have made same decision without unlawful discriminatory consideration).

fails to remedy the stigmatization of discrimination and neglects the public interest in eradicating unlawful discriminatory considerations from employment decisions.<sup>51</sup>

In contrast to the views of the Eleventh Circuit, other federal circuit courts of appeals have applied the "same decision" standard of causation in disparate treatment actions to limit some forms of relief, but not to determine liability.<sup>52</sup> The United States Court of Appeals for the Fourth Circuit, for example, has held that after a disparate treatment plaintiff proves intentional discrimination the employer may prove by clear and convincing evidence that the employer would have made the same decision absent discrimination to avoid the imposition of some forms of relief.<sup>53</sup> In *Patterson v. Greenwood School District 50*,<sup>54</sup> the Fourth Circuit held that Title VII provides that retroactive promotion or hiring and back pay are not available forms of relief if the employer proves that the employer would have made the same decision in the absence of discrimination.<sup>55</sup>

In *Patterson*, the defendant, Greenwood School District 50 (School District), appealed from a judgment of the United States District Court for

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51. See Brodin, *Standard of Causation*, *supra* note 5, at 318-19. Professor Brodin stated that a primary objective of Title VII is to eradicate discriminatory considerations in employment decisions. *Id.* at 320. Brodin emphasized that the same decision rule of causation distorts the purpose of Title VII because an employer who violates Title VII may avoid liability if the employer proves that without consideration of unlawful discriminatory factors the employer would have made the same decision. *Id.* at 318. Professor Brodin noted that the application of the same decision rule of causation would fail to remedy the stigmatization of discrimination and would neglect the public interest in prohibiting unlawful discriminatory considerations from employment decisions. *Id.* at 318-19.

52. See Fadhil v. City and County of San Francisco, 741 F.2d 1163, 1166-67 (9th Cir. 1984). In *Fadhil v. City and County of San Francisco*, the United States Court of Appeals for the Ninth Circuit held that an employer may avoid an award of back pay if the employer proves that absent discrimination the employer would not have hired the plaintiff. *Id.* at 1167; see *King v. Trans World Airlines, Inc.*, 738 F.2d 255, 257-58 (8th Cir. 1984) (after plaintiff proves unlawful discrimination, employer may prove that employer would not have hired plaintiff absent discrimination to limit plaintiff's relief); *Patterson v. Greenwood School Dist. 50*, 697 F.2d 293, 295 (4th Cir. 1982) (employer may prove that employer would have made same decision absent discrimination to avoid retroactive promotion and back pay).

53. See *Patterson v. Greenwood School Dist. 50*, 696 F.2d 293, 295 (4th Cir. 1982) (after plaintiff proves unlawful discrimination, employer may prove that employer would have made same decision absent discrimination to avoid retroactive promotion and back pay).

54. *Id.*

55. *Id.*; see 42 U.S.C. § 2000e-5(g) (1982). Section 706(g) of Title VII prohibits the imposition of retroactive promotion or hiring and back pay if an employer refuses an individual employment for any reason other than discrimination in violation of Title VII. 42 U.S.C. § 2000e-5(g) (1982). Congress stated that the remedial focus of section 706(g) is to make the victims of discrimination whole. See 118 Cong. Rec. 7168 (1972). The Fourth Circuit in *Patterson v. Greenwood School Dist. 50*, stated that Title VII requires the imposition of retroactive promotion and back pay only if necessary to make the plaintiff whole. See 696 F.2d 293, 296 (4th Cir. 1982). The Fourth Circuit stated that the defendant would not have selected the plaintiff for the assistant principle position absent discrimination. *Id.* The *Patterson* court, therefore, affirmed the district court's finding of liability, but reversed the district court's award of retroactive promotion and back pay because the plaintiff did not suffer any damage. *Id.*

the District of South Carolina which held that the defendant had discriminated against the plaintiff in violation of Title VII and awarded the plaintiff back pay and promotion.<sup>56</sup> The plaintiff in *Patterson*, who is female, applied for the position of assistant principal at the East End Intermediate School located in the School District.<sup>57</sup> The district court held that the School District's selection process discriminated against the plaintiff on the basis of the plaintiff's sex in violation of Title VII.<sup>58</sup> Although the defendant in *Patterson* did not appeal the district court's finding of liability, the defendant contended that retroactive promotion and back pay were inappropriate forms of relief because the defendant would have made the same decision absent discrimination.<sup>59</sup> In considering the defendant's appeal, the Fourth Circuit noted that Title VII prohibits the imposition of retroactive promotion or hiring and back pay if an employer refuses an individual employment for any reason other than discrimination in violation of Title VII.<sup>60</sup> The Fourth Circuit stated that the defendant proved by clear and convincing evidence that the defendant would not have selected the plaintiff absent discrimination and, therefore, reversed the district court's award of retroactive promotion and back pay.<sup>61</sup> The United States Courts of Appeals for the Eighth and Ninth Circuits also have applied the "same decision" standard of causation at the relief stage of disparate treatment actions to enable an employer to avoid retroactive promotion or hiring and back pay.<sup>62</sup>

In the liability stage of a disparate treatment action, the federal circuit courts of appeals have applied various formulations of the appropriate standard of causation to establish a Title VII violation.<sup>63</sup> For example, the United States Courts of Appeals for the Third and Fifth Circuits have applied a "but for" standard of causation to establish liability under Title VII.<sup>64</sup> In

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56. See 696 F.2d at 294.

57. *Id.* In *Patterson*, the plaintiff and three other individuals applied for the position of assistant principal. *Id.* Five male superintendents of the Greenwood School District 50 (School District) interviewed the applicants and recommended the only male applicant for the assistant principal position. *Id.*

58. *Id.* The district court in *Patterson* stated that the School District's selection process discriminated against the plaintiff on the basis of the plaintiff's sex. *Id.* The district court stated that the superintendents searched for a candidate according to a male stereotype and deviated from standard selection procedures. *Id.*

59. *Id.*

60. *Id.* at 295; see *supra* note 55 and accompanying text (discussion of section 706(g) of Title VII).

61. *Patterson*, 696 F.2d at 295; see *supra* note 55 and accompanying text (award of retroactive promotion and back pay is appropriate only if necessary to make victim of unlawful discrimination whole).

62. See *supra* note 52 and accompanying text (employer may prove that employer would have made same decision absent discrimination to avoid award of retroactive promotion and back pay).

63. See *supra* note 5 and accompanying text (discussion of various formulations of appropriate standard of causation in disparate treatment actions under Title VII).

64. See *McMillan v. Rust College, Inc.*, 710 F.2d 1112, 1116 (5th Cir. 1983). In *McMillan*

*Lewis v. University of Pittsburgh*,<sup>65</sup> the Third Circuit held that to establish liability under Title VII a disparate treatment plaintiff must prove that but for the defendant's consideration of discriminatory factors the defendant would have hired or promoted the plaintiff.<sup>66</sup> The "but for" standard of causation requires a plaintiff to prove not only that an unlawful discriminatory consideration influenced the employment decision, but that the defendant would have hired the plaintiff absent discrimination.<sup>67</sup> The Eighth Circuit in *Bibbs* emphasized that the "but for" standard of causation unreasonably requires a disparate treatment plaintiff to disprove the defendant's allegations of the defendant's subjective intent.<sup>68</sup> The "but for" standard of causation, therefore, may frustrate Title VII's objective of eliminating unlawful discriminatory considerations in employment because liability will attach only if an employer's consideration of an unlawful discriminatory factor is the determinative factor in a challenged employment decision.<sup>69</sup>

In contrast to the "but for" standard of causation, several other federal circuit courts of appeals have stated that to establish liability under Title VII

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*v. Rust College, Inc.*, the United States Court of Appeals for the Fifth Circuit held that to establish liability under Title VII a disparate treatment plaintiff must prove that an employment decision adverse to the plaintiff would not have occurred but for the defendant's unlawful discrimination. *Id.*; see also *Lewis v. Univ. of Pittsburgh*, 725 F.2d 910, 914 (3d Cir. 1983) (plaintiff must prove that but for consideration of discriminatory factor employment decision would have been favorable to plaintiff to establish liability under Title VII).

65. 725 F.2d 910 (3d Cir. 1983).

66. *Id.* at 914. The Third Circuit in *Lewis* stated that Title VII requires a showing of "but for" causation to establish liability in a disparate treatment action. *Id.* The *Lewis* court stated that to establish liability under Title VII a disparate treatment plaintiff must prove that but for the defendant's consideration of unlawful discriminatory factors the defendant would have hired the plaintiff. *Id.* at 917; see *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273, 282 n.10 (1976) (Title VII plaintiff must prove that but for defendant's consideration of plaintiff's race defendant would have hired plaintiff).

67. See *supra* notes 64 & 66 and accompanying text (discussion of "but for" standard of causation).

68. See *Bibbs*, 749 F.2d at 512-13. The Eighth Circuit in *Bibbs* noted that the "but for" standard of causation requires a disparate treatment plaintiff to prove not only that an unlawful discriminatory consideration motivated the employment decision, but to assume the additional burden of proving that the defendant would have hired the plaintiff absent discrimination. *Id.* at 512. The *Bibbs* court stated that the additional burden of proving that the defendant would have hired the plaintiff absent discrimination is irrelevant to the Title VII analysis after the plaintiff has established that an unlawful discriminatory consideration motivated the challenged employment decision. *Id.* The Eighth Circuit also emphasized that the additional burden of proving that the defendant would have hired the plaintiff absent the discrimination unreasonably requires the plaintiff to disprove the defendant's allegations of the defendant's subjective motivation. *Id.* at 513.

69. See *Lewis v. Univ. of Pittsburgh*, 725 F.2d 910, 922 (3d Cir. 1983) (Adams, J., dissenting). In *Lewis*, the dissent argued that the "but for" standard of causation would permit the operation of an unlawful discriminatory consideration in an employment decision if legitimate nondiscriminatory considerations determined the decision. *Id.* The dissent, therefore, emphasized that the "but for" standard of causation would neglect the victims of discriminatory treatment in employment and distort the objectives of Title VII. *Id.*

a disparate treatment plaintiff must prove only that an unlawful discriminatory consideration more likely than not motivated the challenged employment decision.<sup>70</sup> The “more likely than not” standard of causation is consistent with Title VII’s primary objective of eliminating discrimination in employment.<sup>71</sup> The legislative history of Title VII indicates that Congress sought to prohibit distinctions or differences in the treatment of employees because of race, color, religion, national origin, or sex.<sup>72</sup> Moreover, the United States Supreme Court in *Texas Department of Community Affairs v. Burdine* stated that in the final stage of the prima facie case analysis a disparate treatment plaintiff must prove that discriminatory considerations more likely than not motivated the employment decision to establish liability under Title VII.<sup>73</sup> The *McDonnell Douglas* prima facie case analysis presumes that otherwise unexplained actions disadvantaging minorities are more likely than not the product of unlawful discriminatory considerations in violation of Title VII.<sup>74</sup> If a disparate treatment plaintiff must prove that but for the defendant’s consideration of an unlawful discriminatory factor the defendant would have hired the plaintiff, the *McDonnell Douglas* prima facie case analysis becomes an empty ritual.

The Eighth Circuit in *Bibbs* held that to establish liability under Title VII a disparate treatment plaintiff must prove that an unlawful discriminatory consideration more likely than not motivated the challenged employment decision.<sup>75</sup> The Eighth Circuit’s holding supports Title VII’s primary objective

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70. See *Jackson v. RKO Bottlers of Toledo, Inc.*, 743 F.2d 370, 375 (6th Cir. 1984). In *Jackson v. RKO Bottlers of Toledo, Inc.*, the United States Court of Appeals for the Sixth Circuit held that to establish liability under Title VII a disparate treatment plaintiff must prove that an unlawful discriminatory consideration motivated the challenged employment decision. *Id.*; see *Sweeny v. Research Foundation of the State Univ. of New York*, 711 F.2d 1179, 1186-87 (2d Cir. 1983) (plaintiff must prove that discriminatory reason more likely than not motivated defendant to establish Title VII liability); *Cuthbertson v. Biggers Bros., Inc.*, 702 F.2d 454, 458 (4th Cir. 1983) (plaintiff must prove that unlawful discriminatory consideration more likely than not motivated employment decision to establish liability under Title VII).

71. See 110 Cong. Rec. 7218 (1964) (remarks of Senator Clark on Title VII). Senator Clark stated that Title VII prohibits distinctions and differences in the treatment of employees on the basis of race, color, religion, national origin, or sex. *Id.*; see also 110 Cong. Rec. 13,088 (1964). Senator Hubert Humphrey emphasized that Title VII prohibits the use of race, color, religion, national origin, or sex as a factor in denying employment. 110 Cong. Rec. 13,088 (1964). The “more likely than not” standard of causation supports Title VII’s primary objective of eliminating unlawful discriminatory considerations in employment because a disparate treatment plaintiff establishes a violation of Title VII when the plaintiff proves the operation of an unlawful motivating factor in the challenged employment decision. See Brodin, *Standard of Causation*, *supra* note 5, at 320.

72. See *supra* note 71 (Title VII sought to eliminate unlawful discriminatory considerations in employment decisions).

73. See *supra* note 29 and accompanying text (plaintiff in disparate treatment action under Title VII establishes intentional discrimination by proving that discriminatory consideration more likely than not motivated employment decision).

74. See *Furnco Const. Corp. v. Waters*, 438 U.S. 567, 577 (1978) (discussion of *McDonnell Douglas* prima facie case analysis for disparate treatment actions under Title VII).

75. See *supra* notes 29 & 35 and accompanying text (disparate treatment plaintiff must

of eliminating unlawful discriminatory considerations in employment and assuring that legitimate nondiscriminatory considerations determine employment decisions.<sup>76</sup> The “more likely than not” standard of causation establishes a violation of Title VII when a disparate treatment plaintiff proves the operation of an unlawful motivating factor in the challenged employment decision.<sup>77</sup> The more stringent “but for” standard of causation would require a disparate treatment plaintiff to prove not only the operation of an unlawful motivating factor in the challenged employment decision, but to assume the additional burden of proving that the defendant would have hired the plaintiff absent discrimination.<sup>78</sup> Title VII, however, is violated when a disparate treatment plaintiff proves the operation of an unlawful motivating factor in a challenged employment decision.<sup>79</sup> The “but for” standard of causation’s additional burden of proving that the defendant would have hired the plaintiff absent discrimination fails to support Title VII’s primary objective and may discourage the filing of legitimate Title VII actions in the future.

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prove that discriminatory consideration more likely than not motivated challenged employment decision).

76. *See supra* note 71 and accompanying text (“more likely than not” standard of causation supports primary objective of Title VII).

77. *See supra* notes 29, 35 & 71 and accompanying text (discussion of “more likely than not” standard of causation).

78. *See supra* notes 64 & 66 and accompanying text (discussion of “but for” standard of causation).

79. *See supra* note 68 and accompanying text (“but for” standard of causation imposes additional burden which is inconsistent with Title VII analysis).